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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, [redacted] 1960

No. [redacted] 12

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COMMUNIST PARTY OF THE UNITED STATES OF AMERICA, PETITIONER,

—*vs.*—

SUBVERSIVE ACTIVITIES CONTROL BOARD.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR CERTIORARI FILED NOVEMBER 23, 1959
CERTIORARI GRANTED FEBRUARY 5, 1960

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, ~~1959~~ 1960**

**No. ~~537~~ 12**

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COMMUNIST PARTY OF THE UNITED STATES OF AMERICA, PETITIONER,

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IN THE

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

## No. 11,850

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,
*Petitioner,*

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD, *Respondent*

On Review of Order of the Subversive Activities Control Board

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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## EXCERPTS FROM PROCEEDINGS AFTER REMAND*

17151 BEFORE THE

SUBVERSIVE ACTIVITIES CONTROL BOARD

* * * * * * * * * * *

### Request for Opportunity to be Heard, Etc.

The respondent, by its attorneys, makes the following requests:

1. If the Board intends to proceed by expunging the testimony of Crouch, Johnson and Matusow, without a hearing as to their lack of credibility, argument before the Board is requested so that counsel for respondent may have an opportunity to demonstrate that the evidence of record requires the Board to decide this case in favor of respondent and to dismiss the petition.

2. If the Board intends to hold a hearing as to whether the testimony of the three witnesses must be discredited, we request that ample advance notice of the hearing be given, thereby diminishing the possibility of conflict with other commitments of counsel and permitting counsel to obtain and have served the numerous subpoenas which will be required.

JOHN J. ABT,
John J. Abt,
JOSEPH FORER,
Joseph Forer,
*Attorneys for Respondent.*

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17237

### Memorandum Opinion and Order of the Board

This proceeding is presently before the Board pursuant to the decision of the Supreme Court of the United States entered on April 30, 1956, sub nom *Communist Party* v.

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*This Supplemental Joint Appendix is paginated to begin immediately following the last page of the printed record in the Supreme Court on the prior review.

*Subversive Activities Control Board*, (351 U.S. 115), which reversed and remanded this proceeding on the ground that the United States Court of Appeals for the District of Columbia Circuit, which had affirmed the Board's order* upon review on December 23, 1954, (223 F. 2d 531), had erroneously denied a motion for leave to adduce additional evidence concerning the credibility of witnesses Crouch, Johnson, and Matusow, filed by the Party in that Court on August 11, 1954. On May 2, 1956, the Board moved in the Supreme Court that its judgment be certified to the Court of Appeals forthwith, and the Party opposed on the grounds that it was considering filing a motion for rehearing or in the alternative for modification of the terms of remand. The Supreme Court, notwithstanding the Party's opposition, certified the judgment to the Court of Appeals on May 15, 1956, and that Court on May 16, 1956, issued its "Order Pursuant To The Judgment Of The Supreme Court," remanding the case to the Board "for proceedings in conformity with the opinion of the Supreme Court. See Section 14(a) of the Subversive Activities Control Act of 1950 . . ."

17238 On May 21, 1956, the Party filed three motions with the Board seeking by *Motion I* to reopen for additional evidence concerning matters assertedly occurring since the close of the hearing herein and the submission of the proceeding to the Supreme Court which would show that there has not been and is not now a world Communist movement of the character described in section 2 of the Act and that the Party has not been and is not now a Communist-action organization as defined in section 3(3) of the Act; by *Motion II* to strike the testimony of Attorney General's witnesses Gitlow, Budenz, Honig, and Scar-

*The petition herein was filed with the Board on November 22, 1950; the Board hearing commenced on April 23, 1951, and closed on July 1, 1952; the Recommended Decision of the Hearing Panel was issued on October 20, 1952; and the Board's Report and Order directing the Communist Party to register as a Communist-action organization was entered herein on April 20, 1953. The Party's petition to the Court of Appeals for review of this Order was filed on June 17, 1953.

letto as being tainted or in the alternative to reopen to receive additional evidence that Gitlow subsequent to the hearing herein testified falsely concerning Communist Party affiliation of certain individuals, and to reverse prior Board rulings denying the production of documents and reports made to the Federal Bureau of Investigation by Gitlow, Budenz, and Scarletto and to order such reports adduced which assertedly would show that they falsified in their Board testimony; and by *Motion III* to reopen for the introduction of evidence regarding the Attorney General's witness Markward consisting of (a) evidence heretofore proffered by the Party in a motion to reopen filed with the Board and denied prior to the case going up on appeal, (b) a report made by Markward to the Federal Bureau of Investigation, a request for which has been previously denied by the Board, and (c) evidence that assertedly would show that while this case was on appeal Markward testified falsely in a Department of Defense security hearing concerning Party membership of one Annie Lee Moss.

On the same date that the foregoing motions were lodged with the Board the Party moved in the Court of Appeals for an amendment and clarification of that Court's order of May 16th, seeking to have the Board's order directing it to register as a Communist-action organization expressly set aside "... in order to insure that further proceedings before the Board will conform to the judgment of the Supreme Court and that the Board will not erroneously deny petitioner an opportunity to introduce material evidence." The Party in that motion alluded to the three instant motions it had filed with the Board, expressed apprehension to the Court that these motions would be denied by the Board for lack of authority to consider them and representing that it desired clarification of the Court's order so it could protect its rights by filing a timely motion with the Court for leave to adduce additional evidence before the Board. In opposing that motion in the Court the Board contended that its order against the Party should

not be set aside as there was no warrant in the Supreme Court's opinion for doing so and it appended copies of the three motions that the Party had filed with the Board to acquaint the Court with the nature and scope of evidence the Party sought to have considered upon the remand. The Court denied the Party's motion per curiam without opinion on June 13, 1956.

17239 On June 20, 1956, the Attorney General filed with the Board a memorandum in opposition to the Party's instant motions contending that they should be denied *in toto*. These motions were argued before the full Board on July 12, 1956, and are disposed of by this Memorandum Opinion.

It is first desirable for an orderly consideration of these matters to state the procedure the Board intends to follow concerning the specific matter upon which the case was remanded. We are given clear alternatives by the Supreme Court of either reopening the hearing pursuant to section 14(a) of the Act to receive additional evidence concerning the credibility of the Attorney General's witnesses Crouch, Johnson, and Matusow, or of assuming the truth of the allegations made in the Party's affidavit which accompanied its motion for leave to adduce and expunging the testimony of the afore-mentioned witnesses without further hearing.

The Party's allegations concerning these witnesses in that supporting affidavit have never been controverted by the Attorney General. The witness Crouch is now dead and the witness Matusow has been, upon the basis of substantially the same evidence proffered by the Party's motion, totally discredited by the Board in other proceedings subsequent to the decision of the Court of Appeals herein and prior to the Supreme Court's opinion remanding this case.* Thus as to Crouch an effective hearing as to his

*See Board's Reports in *Brownell* v. *Labor Youth League*, Docket No. 102-53, dated February 15, 1955; *Brownell* v. *Veterans of the Abraham Lincoln Brigade*, Docket No. 108-53, dated December 21, 1955; and *Brownell* v. *National Council of American-Soviet Friendship, Inc.*, Docket No. 104-53, dated February 7, 1956.

credibility is thwarted at the outset by his death and as to Matusow it would avail nothing as the Board has previously ruled that his credibility was such that it should disregard his testimony *in toto*. Further, since neither party has indicated any desire to present evidence concerning the credibility of any of these witnesses in preference to having the Board expunge, and taking into account that the public interest favors proceeding to a final resolution of this case, we shall proceed upon remand with respect to the witnesses Crouch, Johnson, and Matusow, by expunging their testimony and reconsidering our determination on the record as expurgated.**

17240 We turn now to a consideration of the pending motions.

*Motion I—To Reopen For Additional Evidence, and Offer of Proof*

The Party in this motion and offer of proof as supplemented on June 29, 1956, contends that the Supreme Court decision sets aside the Board's order against the Communist Party and that the Board is required to make new findings and enter a new order; that section 13(a) of the Act requires this finding to be as of the present time; and that since the hearing herein closed on July 1, 1952, there is no evidence before the Board as to the Party's current character and hence no basis for a finding in the present tense. It was further contended at oral argument that even if the order was not set aside the Board may and should take the additional evidence which the Party alleges has become available to it since the termination of the hearing and submission of the case to the Supreme Court pertaining to Marxism-Leninism, the dissolution of the Communist Information Bureau (Cominform), and the

**The parties will be notified at a later date of Board action on the Communist Party's request, filed May 16, 1956, to argue the sufficiency of the evidence upon deletion of the testimony of Crouch, Johnson, and Matusow.

eight criteria of section 13(e) of the Act, which additional evidence assertedly would establish that the Party has not been and is not now a Communist-action organization.

As summarized in argument, the Party offers to prove by such evidence that "the Board's original determination that there was a world Communist movement of the kind described in section 2 of the Act and that Respondent was a Communist-action organization was wrong at the time it was made" and that "in any event no such world Communist movement exists as of now and the Respondent is not a Communist-action organization as of now." (Tr. 16841.)

In its memorandum in opposition to this motion, petitioner takes the positions: (1) the opinion of the Supreme Court and the ruling of the Court of Appeals denying the Party's motion to set the Board's order aside clearly establish that the order is not set aside and hence no new order need be entered as of the present time; (2) section 13(a) of the Act, construed in context, requires only a finding that a respondent "is" a Communist-action organization as of the time the petition was filed with the Board; (3) that Congress specifically included in section 13(b) a "release" clause whereby an organization may prove it no longer meets the standards of the Act and can be relieved of its duty to register and that such procedure is exclusive; (4) that an administrative process superimposed with judicial review necessarily takes time and that if changes in circumstances or trends during this period warranted reopening, the administrative process would stand little chance of ever being consummated, citing *I.C.C.* v. *Jersey City*, 322 U.S. 503, at page 514; *U.S.* v. *Pierce Auto*, 17241 327 U.S. 515; and *Consolidated Copperstate Lines* v. *U.S.*, 65 Fed. Supp. 950; (5) that the evidence sought to be adduced is sufficiently broad to amount to a trial *de novo* on issues which were fully explored at the hearing and concerning which respondent is now precluded

from offering evidence; (6) that the standards set forth in *Thompson* v. *U.S.*, 188 F. 2d 652, for a new trial are not met, namely, that due diligence must be shown by the Party and that the new evidence must be (a) discovered since the trial, (b) not merely cumulative or impeaching, (c) material to the issues, and (d) such as would probably change the result; and (7) that the motion is addressed to the discretion of the Board and should be denied *in toto*.

We are met at the threshold with the question of our authority at this posture of the case to entertain this motion. The Party in oral argument cited *Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U.S. 134, as authority for the Board proceeding on remand to entertain this motion, and cases decided in conformity therewith* for the proposition that it would constitute an abuse of discretion not to hear the proffered evidence. Petitioner contends that *Pottsville* and other cases cited afford no support for this position as they turned on the peculiarities of the Federal Communications Act and the Commission's regulatory duty thereunder to award permits for the construction and operation of broadcasting facilities on the basis of public convenience, interest or necessity, which considerations are not present in the case at hand.

Underlying the *Pottsville* case are both the Constitutional division and the Congressional distribution of Governmental powers. In view of the nature of Board proceedings and the character of the Board's functions under the Act as set forth below, both being materially different from those of the Federal Communications Commission whose hearing powers are exercised in implementation of a flexible regulatory scheme pursuant to a broad Congressional policy, we do not view the Pottsville decision or those

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*Wayne Broadcasting v. F.C.C., 225 F. 2d 523; The Enterprise Co. v. F.C.C., 231 F. 2d 708; W. S. Butterfield Theatres, Inc. v. F.C.C., decided by U. S. Court of Appeals, District of Columbia Circuit, May 24, 1956.

cases decided in conformity therewith, such as *Easton Publishing Company, et al.* v. *Federal Communications Commission,* 185 F. 2d 987, as affording authority for us to . . entertain the instant motion.

17242 Concerning the nature of Board proceedings and its duties under the Act, it is pertinent that the Act was called into being by the inefficacy of previous Congressional enactments such as the Foreign Agents Registration Act, 22 U.S.A. § 611-21, and the Voorhis Act, 18 U.S.A. § 2386, in the face of increasing danger to the Government resulting from the activities and successes of the world Communist movement, to effectuate the registration and disclosure of Communist agents in the United States. This legislation was deemed necessary to the security of the Nation.

The intent of Congress as manifested by the terms of the Act is that each Communist-action or Communist-front organization in existence in this country on the effective date of the Act or coming into existence thereafter had a duty to register with the Attorney General as such; that the Attorney General has the right and is obligated to proceed before the Board when he has reason to believe an organization which has not registered is required to be registered. Board proceedings thus invoked are inherently adversary and are held to determine if this duty exists. If so, § 13(g) requires that a Board order directing registration issue; if not, § 13(h) requires an order dismissing the petition. Save those incident to the conduct of enlightened adversary hearings, the Board possesses no investigative powers. It has no broad regulatory domain involving wide areas of discretion committed to its administration by Congress and has no powers to enforce its own orders. Much akin to a district court, it loses jurisdiction over its proceedings once the record is filed in the Circuit Court pursuant to the statutory review procedures being invoked and its orders become final and are *res adjudicata* under

section 14(b) without implementing court action if judicial review is not instituted within the prescribed time or if affirmed upon appeal. Initial judicial review of Board proceedings is placed in a specified court, the United States Court of Appeals for the District of Columbia Circuit; and the scope of review is broader than that normally prevailing over administrative agencies.

The Board functions solely as a quasi-judicial agency, empowered upon petitions duly filed to conduct hearings, to arrive at findings of fact and conclusions of law on the basis of the record made in such hearings, and to issue orders requiring or cancelling registration or denying petitions accordingly.

Consequently, the Board's duties under the Act and the character of its proceedings are such that a wholesale transplantation of the *Pottsville* case rationale is not possible; indeed the many factors above discussed establish the contrary. In this connection compare *Evans* v. *Federal Communications Commission,* 113 F. 2d 166, p. 168, where the court indicates that the Pottsville rationale is not 17243 applicable to proceedings such as those of the Board, which are judicial in character. Therefore, in proceeding upon this remand the Board more properly assimilates its position to that of an inferior court rather than to that of an administrative agency vested with broad regulatory powers over a segment of the economy and whose hearing powers are exercised in implemention of such regulatory functions. This is not to say, however, that Board proceedings are not affected with a high degree of public interest or that the Board must not upon the instant remand exercise its powers in effectuation of the terms and purposes of the Act as prescribed by Congress. Quite to the contrary, Congress has entrusted to the Board an administrative process which involves the conduct of an adversary hearing wherein the Government is proceeding in vindication of perhaps the highest prerogative of sov-

ereignty, self-preservation, seeking by way of Board procedures to protect itself against unidentified efforts on behalf of foreign agencies devoted to its disestablishment.

The decision by the Supreme Court in *National Labor Relations Board* v. *Donnelly Garment, et al.*, 330 U.S. 219, is pertinent to the questions posed by the instant motion. In that case upon review of a Labor Board cease and desist order the Court of Appeals at the outset found error in the exclusion of evidence which amounted to a denial of due process in the hearing and it remanded the proceeding without reviewing the merits, directing that such evidence be taken. Upon remand the trial examiner received only the evidence specifically referred to by the court as erroneously excluded, plus that of the company president who had been ill and was unable to testify at the original hearing, otherwise he received no evidence that was available but not offered at the first hearing and excluded all evidence of events subsequent to the original hearing. The examiner and the Board, on the basis of the original record and the additional evidence made substantially the same findings and the Board entered substantially the same order. The case again went to the Court of Appeals which upon this review construed its previous opinion and mandate as calling for a new trial upon the evidence already taken and such competent and material evidence as might be proffered upon a further hearing. It again found a denial of due process resulting in part from the exclusion of evidence and without passing upon the merits again remanded to the Board. The Board took the case to the Supreme Court by certiorari. Insofar as pertinent here the Supreme Court citing the *Pottsville* case emphasized the difference in the relationship which prevails between courts *inter se* and between an appellate court and a law-enforcing agency like the Board whose proceedings are subject to unrestricted judicial review; while positing the

Circuit Court's first opinion remanding the case against the nature of the Board's process, the Court stated:

17244 "In the context of the opinion remanding the Board's original order *and of the nature of the administrative process with which it is entrusted,* the Board was justified in not deeming itself under duty to grant a "new trial" in the sense in which a lower court must start anew when an upper court directs such a new trial. There was no reference to a "new trial," nor was any intimation given that such was the breadth of what the remand required. *From the Court's opinion there appears only a very restricted dissatisfaction with the original proceedings before the Board, calling for a correspondingly restricted correction ...*"* (P. 227.) (Emphasis added.)

Discussing whether the Labor Board was required to reopen the issues in the case, the Court was clear that what had been left unassailed by the first Court Opinion need not be gone into on remand, stating:

> "Since in our view the remand did not call for a proceeding *de novo,* the Board was not required to reopen any issue as to which its ruling was left unassailed by the Circuit Court of Appeals in its first decision. We shall therefore consider the particular defects which the Circuit Court of Appeals found in the second hearing, by treating that hearing not as a new trial but as the sequel of the first hearing under a remand by the Circuit Court of Appeals for the limited purpose of correcting the prior erroneous exclusion of testimony." (P. 228.)

In the light of the foregoing, we turn to the case at hand. The opinion of the Supreme Court and the order of the Court of Appeals issued pursuant thereto remanding this proceeding have left the Board's order against the Party standing and contain not the slightest intimation that any additional evidence be taken other than that specified with

* This is also indicated in the Supreme Court's opinion remanding this proceeding, see fn., p. 9, *infra.*

espect to Crouch, Johnson, and Matusow. It is also clear
that the proceeding is remanded pursuant to section
7245 14(a) of the Act, with an alternative provided which
does not require any further hearings, the purpose
ing to permit the Board to reconsider its determination
a the present record as expurgated and to make its recom-
endation to the Court concerning its present order.

The Party here seeks to adduce evidence which cuts across
he entire gambit of issues in this proceeding embracing all
of the eight criteria of section 13(e) and all the elements of
the definition in section 3(3). In short, the motion in its
broadest aspect seeks a complete new trial on the record as
made and any other evidence relevant and material to any
issue in the case which it may adduce at a further hearing.
The *Donnelly* case is authority for ruling we need not re-
open to grant what in effect amounts to a new trial. Here
the Court of Appeals affirmed the Board's order and the
Supreme Court found a limited defect* resulting from the
exclusion of evidence and it went no further than to specify
a correspondingly limited means of correction, and it re-
manded "for proceedings in conformity with this opinion."
Beyond correction of this defect by expungement and re-
consideration on the record as expurgated we need not go,
especially where, as here, our duty under the Act, as we con-
ceive it, requires nothing more, and in fact militates against
reopening this proceeding on the basis invoked by the Party.

As the nature of the Board's function under this Act af-
fords no basis to act beyond the terms of the remanding
opinion, we are of the view that the reopening of the hear-
ing to take the proffered additional evidence is beyond our
authority in the premises.

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* In this connection, the Court stated: "Petitioner should therefore be given leave to make its allegations before the Board in a proceeding under § 14(a) of the Act. The issue on which the case must be returned to the Board lies within a narrow compass and the Board has ample scope of discretion in passing upon petitioner's motion." 351 U.S. 115, p. 125.

Notwithstanding the foregoing ruling, and taking cognizance that when such a conclusion is reached the merits of the matters presented are rarely discussed, the instant motion presents questions of initial impression under the Act and, in view of the Party's indications that it will pursue the matter in the Circuit Court of Appeals if it does not prevail here, and deeming that it may serve a useful purpose in the future course of this proceeding we will, alternatively, consider this motion on the merits and indicate a ruling thereon. For this purpose we shall assume that we have authority to do so.

17246 Turning now to the merits,* it is sound to say that matters of this type normally are addressed to the discretion of the agency, see *U.S.* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, and cases cited by the Attorney General, see pages 4-5, *supra*. Further, because administrative process superimposed with judicial review inevitably takes time, a motion to reopen a record made at a full and fair hearing after issuance of an order based thereon, because of events occurring after the close of the hearing, must be scrutinized with jealousy lest it open the door to abuse, see *I.C.C.* v. *Jersey City*, 322 U.S. 503; *N.L.R.B.* v. *New York Merchandise Co., Inc.*, 134 F. 2d 949; *Central and Southwest Utilities* v. *S. E. C.*, 136 F. 2d 273.

As stated, the Board's order herein against the Party has not been set aside and, as we interpretet sections 3 and 13 of the Act, there is no requirement that we bring the record up to date by taking evidence concerning events which have transpired since the close of the hearing herein. Consequently, the Board's order properly speaks on the record as made. Cf. *N.L.R.B.* v. *Westinghouse Air Brake Co.*, 120 F. 2d 1004, p. 1007, and *N.L.R.B.* v. *Acme Air Appliance Co.*, 117 F. 2d 417, p. 421. Therefore, con-

* Although not decisive, it should be noted that the Party's offer of proof and supporting affidavit of counsel are very general and conclusory and leave much to conjecture as to what evidence would be presented.

sidering the motion in its broadest aspect, we find that it should be denied.

If another view of the motion is taken, namely, that it in effect seeks not a new trial but to show new circumstances which have resulted in a change of the Party's status under the Act, then we are of the view that such evidence is not properly received at this posture of the case. It is not properly adducible in a section 14(a) proceeding, but rather is exclusively provided for in a separate proceeding under section 13(b) of the Act, as will be demonstrated.

As stated above, the Act, under these circumstances, does not require that the record speak as of the moment. Further, the Congressional objective, expressed in section 7 of the Act, that Communist organizations in the United States in existence on or after its effective date shall register could not be effectuated if Board procedures, which are in implementation of that purpose, can be reopened due to the circumstances occurring while the determination is under judicial review.

17247 This is shown by the interrelation of judicial review to finality of the Board's order. It is true that Board orders become final and enforceable and are *res adjudicata* if judicial review is not invoked in the allotted time under section 14(b); however, it is clear that, once the review procedure is instituted, enforceability of the order is stayed pending completion of review on the merits. In this aspect the matter is not unlike judicial enforcement of a cease and desist order of the National Labor Relations Board in unfair labor practice cases, the violation of which is punishable in a subsequent contempt proceeding. There the courts have recognized that evidence of compliance with such orders is irrelevant as a matter of law in a proceeding in the Appellate Court on review of the order and on a petition of the Board to

enforce its order, and that it cannot be adduced as newly discovered "material" evidence under a clause in the National Labor Relations Act (§ 10(e)) which is similar to the section 14(a) provision of this Act. See *N.L.R.B.* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563.

The primary basis for this ruling is that to permit compliance evidence to be adduced in the judicial review proceeding which is necessary to the enforceability of the Board's order would "make a merry-go-round" of the Act (see *N.L.R.B.* v. *Condenser Corp.*, 128 F. 2d 67, p. 81), and "would serve only to delay the proceeding and would not contribute to the orderly administration of the Act." *N.L.R.B.* v. *Swift & Co.*, 129 F. 2d 222, p. 224.

The same considerations apply to change of status evidence after a Board order of registration has issued against a respondent. As this case shows, and it is generally representative of Board proceedings, it takes a number of years after the close of the hearing for appellate processes to be completed. Consequently, to permit the status of a respondent once litigated in a full hearing to be relitigated because of events transpiring while the case is undergoing the lengthy judicial review procedures would result in endless litigation which never comes to fruition. It would unduly delay the finality of the Board's order and frustrate the Congressional purpose, i.e., to inform the public concerning Communist organizations through registration of such organizations.

This is not mere speculation, but is precisely the situation with which we are confronted by the instant motion and which would result were it granted. For example, the basic nature of the Party's proffered new evidence stems from actions taken by the Communist Party of the Soviet Union and high Soviet officials and the reactions thereto by other Communist Parties throughout
17248 the world including respondent. As the Government noted in its opposition to this motion and as

our experience confirms, it has been characteristic of the Communist Party and government of the Soviet Union and the respondent to announce policies, for one reason or another, including political expediency, which seemingly reverse or materially alter existing major policies and programs. We have in our Report in this case traced a number of similar startling reversals of Soviet policies and the Party's adherence thereto for over a period of 30 years. Consequently, we do not consider the circumstances presented by this motion as comparable to the situation in *Atchison, Topeka & Santa Fe R. Co.* v. *U.S.*, 284 U.S. 248. Moreover, it is our considered opinion that circumstances such as those asserted can only be accurately assayed in the crucible of time.

Congress has specifically provided, in section 13(b) of the Act, for a Board hearing by which an organization may, after it has complied with a final registration order, show a change in status. This is made clear by section 13(i), which provides that if the Board finds that the registered organization is no longer a Communist organization, it must order the Attorney General to cancel the registration and relieve the organization from obligations thereunder. It is reasonable to conclude that these provisions of the Act reflect a Congressional intent that once a registration order has been issued by the Board against an organization, evidence that its determined status has changed should be considered only after registration has been effected and in a separate hearing directed to the effect of such new evidence upon the determined status. In the instant circumstances we deem the § 13(b) procedure exclusive, as any other course would preclude efficacious administration of the Act.

Accordingly, we would, assuming the authority to do so, deny this motion on the merits, for the reasons above stated.

*Motion II—To Strike Testimony Or Reopen Hearing*

We come now to Motion II, to strike the testimony of four witnesses, i.e., Gitlow, Budenz, Scarletto, and Honig, or alternatively (1) to reopen the hearing for production of documents previously denied with respect to Gitlow, Budenz, and Scarletto (for the most part documents in possession of the Federal Bureau of Investigation) and (2) reception of additional evidence on the credibility of witness Gitow.

The Attorney General opposes this motion, as well as Motion III, contending that the opinion of the Supreme Court does not justify or authorize the striking of 17249 the testimony of these witnesses, the reopening of the proceeding for the production of reports, or the hearing of additional evidence. It is asserted that these motions are untimely and attack matters already tested and adjudicated, that they contain matters irrelevant and immaterial to the issues, and are without legal justification.

In support of the motion to strike, the Party asserts that the testimony of the four witnesses herein was shown to be "tainted" within the purport of *Communist Party* v. *SACB*, supra, and that exclusionary rulings on cross-examination denying the production of documents prevented it from fully demonstrating the unreliability of these witnesses. In the motion's total aspect, with the exception of the request to present additional evidence on Gitlow's credibility, the Party is requesting the Board to reverse prior rulings.

While we agree with the Attorney General's contention that the remand herein does not require that we strike any testimony other than that of Crouch, Johnson, and Matusow under the expungement alternative, we believe it to be the spirit of the Supreme Court's opinion that we conduct the reconsideration of the determination with a view toward assuring that no "taint" exists, as

the Court applied that term. Accordingly, in the light of the Court's opinion we have reviewed the testimony of these four witnesses, taking into account the rulings referred to in support of this motion, and we find no reason to strike the testimony of these witnesses. We find, as indicated below, that the Party was given adequate opportunity, of which it fully availed itself, to attack the credibility of these witnesses. While their testimony involves evaluation problems, these are such that when resolved it is apparent that the witnesses are not "discredited," within the purport of the Supreme Court's opinion; and, hence, there is no warrant to strike their testimony. Moreover, the specific instances of asserted conflicts in testimony, which the Party now cites in support of its contention that the testimony of these witnesses should be stricken, were fully briefed by the Party in attacking the credibility of these witnesses both in the Court of Appeals and the Supreme Court; and the remand herein contains no intimation that these instances constituted "taint."

Turning to the first portion of the alternative request, to reopen for production of documents, the Party chose to attack on review in the Court of Appeals only two of the four rulings challenged here once again (see Party's brief in that court, page 197 and page 203 for these two). These two rulings were also raised in the Supreme Court (Party's brief page 204, fn. 130, and page 207, fn. 132).

It is significant that the Court of Appeals affirmed 17250 after an exhaustive review of the record, and, we note in passing, the Supreme Court with these questions before it remanded solely because of the lower court's denial of the motion for leave to adduce additional evidence on Crouch, Johnson, and Matusow. The Court of Appeals stated after reviewing the record: "Full opportunity for cross-examination of these witnesses was afforded at the hearing before the Board, and full opportunity was also afforded for the presentation of rebuttal

testimony." 223 F. 2d 531, 565, reversed on other grounds, 351 U.S. 115. We have, however, reviewed these rulings and, there being no supervening circumstances requiring otherwise, we see no reason to alter them.

We come now to the final question presented by this motion, to reopen to receive additional evidence on Gitlow's credibility. Here again, the Party, in the Court of Appeals (Party's brief, p. 206, fn. 18) and again in the Supreme Court (Party's brief, p. 201, fn. 129), briefed the substance of the assertions now made. An examination of the showing made by the Party in this motion, which is unsupported by an affidavit, reveals it does not approach that made in the motion (and supporting affidavit) which caused the remand in this proceeding. The instant showing is insufficient to warrant reopening and, moreover, to grant requests such as this would result in protracted trials within a trial on the credibility of witnesses. Clearly the law does not intend such a result.

*Motion III—To Reopen For Evidence Re Witness Markward*

We turn now to Motion III, which concerns the witness Markward and seeks to reopen the hearing (1) to permit proof of the allegations made by the Party in a prior motion before the Board to reopen the hearing filed on November 24, 1952, prior to issuance of the Report and Order herein, (2) to reverse a prior Board ruling and require the production of a report made to the Federal Bureau of Investigation by Markward concerning a statement by a Party official, and (3) to permit proof that Markward subsequently testified falsely concerning Party membership of one Annie Lee Moss on other occasions.

As to the first request, once again this is a matter referred to by the Party in its brief in the Court of Appeals (Party's brief, p. 214, fn. 24), although it did not choose to raise

squarely the denial of the motion to reopen. As to its failure to do so, it is significant that it could have
17251 and should have if it thought there was merit to its position. We have, however, reviewed the Board's prior ruling denying this motion in the light of the Supreme Court's opinion and reaffirm it.*

As to the second question, involving production of a document, this ruling was not specifically attacked in the Court of Appeals though accreditation of the testimony involved was challenged (Party's brief, p. 214, fn. 24). We allude once again to the conclusion of the Court of Appeals that the Party was given full opportunity for cross-examination and rebuttal and, upon reconsideration of the ruling, we conclude that it should be reaffirmed.

Coming to the request to adduce additional evidence concerning Markward's testimony on Annie Lee Moss, we have here a situation such as discussed above on the request to submit additional testimony regarding the credibility of Gitlow and, once again, an affidavit in support is lacking. The detailed counter-statements by counsel for the Attorney General are of such a nature as to throw grave doubt on the accuracy of the assertions and we conclude the proffered evidence would not have sufficient materiality to warrant reopening the hearing to receive it. Moreover, this matter was referred to by the Party in its brief in the Supreme Court (Party's brief, p. 201, fn. 129). For these reasons, as well as substantially those given above in relation to the submission of additional evidence on Gitlow, we decline to grant this request.

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*We note in passing that in other subsequent proceedings before it the Board has considered attacks on the credibility of Markward substantially on the basis here asserted and has concluded that these did not materially detract from the weight to be given to her testimony.

It may be worth the stating that in limited remands such as here involved, appellate courts do not intend to create an open sesame for the prevailing party. That is to say, there is no carte blanche to dredge the record for questions the prevailing party should have raised initially on review if they were thought to be meritorious; nor is there any implied right to rehash old rulings unlimitedly, particularly when such rulings have been presented on review and left unassailed. The party has no license to treat as a rehearsal the hearing on the issues. See *N.L.R.B.* v. *Donnelly Garment Co., supra,* at p. 228. If, however, the Board felt that supervening law, or some other valid reason pointed toward Board action in order to correct substantial injustice it would, of course, take appropriate measures. But we see no such situation here.

17252 For the reasons stated, we deem these three motions should be denied.

It is therefore

ORDERED that the motions be, and hereby are, each and severally denied in all respects.

By the Board.

THOMAS J. HERBERT,
Thomas J. Herbert,
*Chairman.*

Washington, D. C.
August 10, 1956

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17256

**Notice Fixing Date for Argument**

The Communist Party having on May 16, 1956, requested, *inter alia,* that, if the Board intends to proceed by expunging the testimony of Crouch, Johnson and Matusow without a hearing, it be given an opportunity to show the evidence of record requires a decision in favor of the Communist Party and dismissal of the petition herein, and

the Board having announced in its Memorandum Opinion and Order issued August 10, 1956, that it intends to proceed in such manner, notice is hereby given that oral argument will be held at 10 A.M., EDT on September 10, 1956, in Room 113, Lafayette Building, 811 Vermont Avenue, Northwest, Washington, D. C., for the purpose of affording the Communist Party the opportunity requested, as set forth above. Two hours will be allotted to each party.

By direction of the Board.

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August 16, 1956
Washington, D. C.

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17271

**Motion for Leave to Introduce Additional Evidence**

The Respondent, by its attorneys, moves that the Board order the holding of a hearing to enable the Respondent to introduce evidence that government witness Mary Markward is a perjurer, whose testimony should be expunged from the record of this case.

In the alternative, the Respondent moves that the Board enter an order (1) requiring the Petitioner to supply for the inspection of Respondent's counsel the transcript of the hearing before the Security Hearing Board, Military District of Washington, in the case of Annie Lee Moss, convened at Fort Lesley J. McNair, Washington, on September 20 through 23, 1954, and the opinions and decisions of that Board and of the Secretary of Defense in the case, and (2) allowing time thereafter for the Respondent to file a motion before this Board with respect to the subject of perjury by Mrs. Markward regarding Annie Lee Moss.

In support of this motion, for the reasons and grounds therefor, and as an offer of what Respondent intends to prove in a hearing, Respondent refers to the attached affidavit of Joseph Forer.

17272 Oral argument hereon is requested.

17273 DISTRICT OF COLUMBIA, *ss:*

JOSEPH FORER, being duly sworn, deposes and says:

1. I am one of the attorneys for the respondent in the case before the Subversive Activities Control Board, No. 15-101, *Brownell* v. *The Communist Party of the United States of America.* This affidavit is made in support of, and as an offer of proof for, Respondent's Motion for Leave to Introduce Additional Evidence, to which this affidavit is annexed.

2. On information and belief derived from accounts in the public press: In or about September 1954, in a Security Board proceeding of the Department of Defense involving Mrs. Annie Lee Moss, a Department employee, Mary Markward gave testimony to the effect that Mrs. Moss had been a member of the Northeast Club of the Communist Party of the District of Columbia. Mrs. Moss contradicted this testimony. The Defense Department reinstated Mrs. Moss as an employee in or about January, 1955.

3. On October 18, 1955, Markward testified as a witness for the Attorney General in the proceeding before the Subversive Activities Control Board of *Brownell* v. *American Committee for Protection of the Foreign Born,* Board Docket No. 109-53. The transcript citations in this paragraph are to the transcript of the hearing in that case. Markward testified in that case that she joined the Communist Party in May 1943 (Tr. 3140) and was assigned to the Northeast Club or Branch of the Communist Party of the District of Columbia (Tr. 3141). The club then had a membership of about 40 persons (*ibid.*). In October 1943, Markward became press director of the club (*ibid.*). In January or February 1944, she became chairman of the club, and apparently remained so until May 1944 when, under the newly formed Communist Political Association, the neighborhood clubs were merged into a city-wide club

(Tr. 3148-9). Markward also testified as follows (Tr. 3171-2):

"Q. When you were a member of the Northeast Club, was Annie Lee Moss a member?

A. She was.

Q. When you referred to testifying in several loyalty board hearings, among other loyalty hearings 17274 you testified in the case of Annie Lee Moss, did you not?

A. I did.

Q. And, as a matter of fact, you were cross-examined in that case by Mr. George E. C. Hayes, who is now Chairman of the Public Utility Commission of the District of Columbia?

A. That is correct.

Q. You were also cross-examined by Mr. Hayes' law partner, Judge Cobb, correct?

A. Judge Cobb was there. I do not recall he asked any questions. He may have.

Q. Now you know, do you not, that Mrs. Annie Lee Moss is presently employed by the Department of Defense?

A. That is what I read in the papers."

4. It is well known that proceedings in government security board cases are considered confidential and that the transcripts of testimony and other documents in such cases are not made available to persons not in the government and not involved in the cases directly or as counsel. Following the order of the Court of Appeals of November 5, 1956, and in an effort to meet the Court's test of a "sufficient and appropriate showing," I telephoned Hon. James A. Cobb, who, with his law partner, had been counsel for Mrs. Moss in the Security Board hearing. I told Judge Cobb that I would like to see the transcript of the proceeding in Mrs. Moss' case if he was free to show it to me. He informed me that the Defense Department had delivered a copy of the transcript to his firm—I gathered for the purpose of Mrs. Moss' counsel checking its accuracy—but that the Department had taken it back, having sent a mes-

senger to Judge Cobb's office for that purpose. Judge Cobb, therefore, had no transcript of the proceeding. It is clear to me, therefore, that the Respondent herein can make no further showing other than that already made as to what transpired at the Security Board proceeding, unless Respondent has the aid of compulsory process. On information and belief, derived from the affidavit of James
17275 T. Devine, executed September 28, 1956, and filed by the Board in the Court of Appeals in support of its opposition to Respondent's motion to the Court for leave to adduce additional evidence, the Department of Justice has a copy of the proceedings in Mrs. Moss' Security Board case.

5. If the hearing requested herein is held, Respondent offers to prove the facts described in paragraphs 2 and 3, and in addition that Markward's testimony regarding Mrs. Moss was false, and that the Defense Department disbelieved Markward's testimony and therefore reinstated Mrs. Moss in her job. For this purpose Respondent will call as witnesses Mrs. Moss, Mrs. Markward, appropriate officials of the Defense Department and of the Security Board which heard Mrs. Moss' case; will also subpoena production of the proceedings in that case; and will call such further witnesses as may appear from such proceedings to be qualified to testify on the subject matter.

6. The aforesaid affidavit of James T. Devine makes certain assertions about the occurrences at Mrs. Moss' Security Board proceeding. In my view these assertions do not meet the situation involved, but on the contrary tend to give a misleading impression. The Devine affidavit asserts that Markward did not purport to identify Mrs. Moss in the Security Board proceeding on personal knowledge, but merely as one whose name she saw in records of the Communist Party and Communist Political Association. The affidavit quotes Markward as testifying, "That is the only recollection I can swear to." But: (1) Mrs. Markward swore to more than that in the American Committee for

Protection of Foreign Born case. (2) There is left unexplained how Markward could take such a position in view of her membership and positions in the Northeast Club. (3) The question still remains as to whether Markward was lying about seeing Mrs. Moss' name in the records. In view of Markward's testimony in the A.C.P.F.B. case, it seems obvious that Markward does not assert that the records of the Communist Party and Communist Political Association were or could be erroneous.

17276 Examination of Markward on the subject would, I believe, be illuminating, and I think it significant that the Devine affidavit is discreetly silent on the question of what testimony, if any, Markward gave about the accuracy of the records, how they were kept, etc. I believe, and the Respondent therefore offers to prove, that it could be established at a hearing that Markward lied when she testified in the Security Board proceeding that she saw Mrs. Moss' name in Communist Party records. (4) If the Devine affidavit is meant to imply that the Defense Department did not disbelieve Mrs. Markward, but assumed instead that the Communist Party records were referring to some other Annie Lee Moss than the one involved in the Security Board case, I believe, and the Respondent therefore offers to prove, that this implication is erroneous and without foundation. I point out in this connection that (a) the Devine affidavit shows that Markward was asked about an Annie Lee Moss "with an address at one times at 72 R Street," and (b) the implication is contradicted by Markward's testimony in the A.C.P.F.B. hearing. (5) The Devine affidavit seems to imply that the Defense Department believed Markward and accepted her testimony as establishing that Mrs. Moss had been a member of the Communist Party, but reinstated Mrs. Moss on the grounds that nevertheless Mrs. Moss was not presently subversive or disloyal. I believe, and the Respondent therefore offers to prove, that any such implication is untrue. Mrs. Moss, as I understand and as the Devine affidavit does not deny, testified under oath that she had

never been a member of the Communist Party. It is inconceivable that the Defense Department believed that Mrs. Moss' testimony in this respect was false and nevertheless reinstated her in employment.

7. After issuance of the Court's order of November 5, 1956, John Abt, my co-counsel, and I consulted as to what might be done to make the "sufficient and aprpopriate showing" referred to in that order. We knew that Markward had recently testified in the Blumberg Smith Act case in Philadelphia, but we did not know what she had testified to. In the hopes that her testimony in that case might be of assistance to us, we obtained a transcript of that testimony. The statements made in following paragraphs about events at the Blumberg trial are based on my examination of that transcript, being proceedings in *United States* v. *Dr. Albert Emanuel Blumberg*, United States District Court for the Eastern District of Pennsylvania, Cr. No. 17963, for the days of February 16, 17, 20-21, 1956. Transcript references are to that transcript. Preliminarily I should say that the charge against Dr. Blumberg was under the "membership" clause of the Smith Act, to the effect that he was a member of the Communist Party knowing that it advocated the overthrow of the United States government by force and violence.

17277

8. On direct examination on February 16, 1956, Markward testified in the Blumberg case that about June 10, 1945, she attended a meeting, at which Dr. Blumberg was present, of a District Committee of the Communist Political Association (Tr. 1116-7). This was the District Committee for the Maryland-District of Columbia area (Tr. 1091, 4), and, according to Markward, Dr. Blumberg was then vice-president of the District (Tr. 1123). Markward testified that Dr. Blumberg spoke at this meeting as follows (Tr. 1125-6, emphasis supplied):

"The Witness: Dr. Blumberg was self-critical also. He stated——

The Court: Was self-critical also? Self? You drop your voice now and then. Self-critical?

The Witness: That is right. He stated also that he was a long-time Communist Party member who happened to have the privilege of being educated in the Marxist-Leninist classics, and that he had had a high office in the District Communist Party organization, and that he shared the responsibility of allowing the Party members to follow the Browder line without taking the initiative and trying to inform them that this line was revision of the Marxist-Leninist line. He said that it was, in so dong that he had helped to disarm the Communist Party members in the district, in the nation, and that he—I am trying to get my phrase together here—*that the Communists had always known that it was inevitable that there be a violent struggle for the proletarian revolution;* that the Communist Party was the only organization which could be the vanguard and lead the people of this country to socialism; and that he took the responsibility, shared the responsibility for allowing the people
17278 to coast along for a couple of years there without bringing this to their constant attention."

9. On cross-examination, on February 20, 1956, Markward was asked to again state what Dr. Blumberg had said at this meeting. Her testimony was along the lines of that already quoted, but even more prejudicial to the defendant Blumberg. It was as follows (Tr. 1362m-1362n, emphasis supplied):

"Q. I am asking you what Dr. Blumberg said when he made certain remarks which you testified about the other day. The remarks started with him saying something about being self-critical.

A. Dr. Blumberg as a District Committee member, officer of the District Committee, made remarks to that District Committee meeting. He stated that he was making his remarks because he did feel critical of himself, he took responsibility as a district leader for having led and encouraged the members of the district to follow the line that Browder had laid down. He blamed himself because he said that he had had the training and experience in Marxism-Leninism and should have

been able to recognize the falsity and the non-validity of the line that the Party had taken in the recent past, and that he had done nothing to steer the membership away from it. He said that, as I recall it, in his lack of correct leadership he had aided in the disarming of the Party so that it was not able to take its vanguard role in leading the proletariat to the proletarian revolution, the dictatorship of the proletariat.

As I recall, he also stated that *it was vain or foolish for the Party leadership to have ever taken the point of view that this revolution could come about peacefully, that it would necessarily have to be brought about by force and violence since the capitalist leaders of the nation would not permit the revolution to come about peacefully.*"

10. Markward had previously been a government witness in Smith Act conspiracy trials in Baltimore (the *Frankfeld* case), involving alleged leaders of the Communist Party in Maryland and the District of Columbia, and in New York (the *Flynn* case), involving alleged national leaders of the Party. Her testimony about Blumberg's talk, quoted above, obviously would have been important in the *Flynn* and *Frankfeld* cases; any prosecutor in his senses would have welcomed such testimony; and unques-

17279 tionably the testimony would have been admitted under the conspiracy rules of evidence, particularly in view of the latitude with which such rules have been applied in Smith Act cases. I am personally familiar with the *Frankfeld* case, having briefed and argued the appeal in that case in the Fourth Circuit, and having prepared the petition for certiorari therein. Under the evidentiary rulings made by the trial judge in the *Frankfeld* case, it is inconceivable that Markward's testimony about Blumberg's talk would have been excluded.

11. In the Blumberg trial, Markward admitted that she had been interviewed by the United States Attorney or one of his assistants before she took the stand in the *Frankfeld* case (Tr. 1362). Nevertheless, it appears clear from the Blumberg transcript, she did not testify to any such talk

by Blumberg and did not even say that he attended the June 10, 1945 meeting. Her explanation was that she was not asked about Blumberg in that case. (Tr. 1362n-p). According to my recollection of Markward's testimony in the *Frankfeld* trial, she gave no testimony even remotely along the line quoted above as to Blumberg's alleged talk. I have been unable to actually check the *Frankfeld* trial record, which I no longer have in my possession, because the Board, in my opinion most arbitrarily, on November 13, 1956, entered an order giving respondent only until November 16, 1956, to file the motion to which this affidavit is attached. While I am quite sure that my recollection is accurate, I do not, of course, pretend to possess the superhuman powers of recollection which seem to be enjoyed by the Department of Justice's professional witnesses, including Markward.

12. Markward also admitted in the Blumberg trial that she had testified in the *Flynn* case about the June 10, 1945 meeting at which Dr. Blumberg allegedly spoke. She admitted that she was not asked in that trial about Dr. Blumberg. (Tr. 1362p). She was also asked and answered on cross-examination (*ibid.*):

17280 "Q. And in the whole Flynn trial, although you testified at length, you didn't mention violence once, did you?
A. I don't recall."

Again because of the Board's arbitrary time limit, I have been unable to check the record in the *Flynn* case to determine whether Markward did mention violence there.

13. In the hearing in this case Markward gave no testimony on the claimed talk by Blumberg. Yet obviously such testimony would have been welcomed by the attorneys for the Attorney General and would unquestionably have been admitted by the Board's hearing panel.

14. Markward testified at both the Blumberg and Flynn trials that she had submitted a report to the FBI on the

June 10, 1945 meeting referred to above (Blumberg trial Tr. 1362e). The court in the Blumberg case directed the government to produce this report, as well as certain others, "for inspection by the trial court to determine whether or not the documents have sufficient evidentiary value in any event to warrant disclosure to the defense" (Tr. 1293-4). Subsequently, the court, after examining the documents turned them over to Blumberg's attorney (R. 1364-7). Markward was shown and identified Exhibit E as her report to the FBI on the District Committee meeting of June 10, 1945, already referred to (R. 1372). She was then interrogated on further cross-examination and replied as follows with respect to Exhibit E (Tr. 1373):

> "Q. Now, kindly tell me, tell his Honor, show the jury, where, anywhere in those pages, double spaced, there appears a statement that either Dr. Blumberg or anyone else whatever said that violent struggle was inevitable in the United States of America, either in those words or in synonyms of any of those words, or any combination of words, or synonyms, for that matter.
>
> Mr. Von Moschzisker [Blumberg's attorney]: I know this takes time, your Honor, but I know of no other way to give her a chance.
>
> The Court: I know none other either. She will have to read it.
>
> 17281 By Mr. Von Moschzisker:
>
> Q. Can you show us where?
>
> A. This report does not contain the remarks in regard to force and violence other than the fact that we must fight and not appease reaction.
>
> Q. Who said that?
>
> A. Mr. Lannon."

15. Markward testified on direct in the Blumberg case that early in 1949 she attended a series of Communist Party classes on the ABC's of Marxism-Leninism, and that the teacher at one of these classes was Charles Payne (Tr. 1165-6). She testified as follows about Payne's teaching (Tr. 1176, emphasis supplied):

"The class which remains in my mind is one taught by Charles Payne. He told us that the Communist Party must necessarily bear the burden of taking the vanguard role in leading the people of America through a revolution. *He told us that this revolution could not be done peacefully; that the capitalist element in the country could not just hand over the reins to the Communists* but that the machinery of government would have to be seized by the dictatorship of the proletariat and then converted to the form of government which such a dictatorship would use.

"He said that after the dictatorship of the proletariat would be organized no other political party could be allowed in the United States, that any other political party would be an enemy of the people and would have to, by force, be suppressed."

16. The court required the government to produce the notes that Markward had taken at the class sessions and her report to the FBI on the Payne class. The court after examining them handed these over to Blumberg's counsel. (Tr. 1293-4, 1364-7). These documents (Exhibits L through O) showed that she had not noted and had not reported to the FBI that Payne had taught that the revolution could not be peacefully accomplished (Tr. 1374-9). After having been shown the exhibits she was asked and answered (Tr. 1387-8):

"Q. As a matter of fact, none of the exhibits I have shown you this afternoon mentioned either force or violence did they? You can look at them all if you want.

A. I believe that is right."

17282 17. Markward testified in the Board proceeding in this case as to the Payne class on the ABC's of Marxism-Leninism. Her testimony before the Board is obviously inconsistent with the testimony she gave in the Blumberg trial, quoted in paragraph 15 above. In this proceeding she described the Payne teaching as follows (printed Joint Appendix in the Court of Appeals p. 747):

"On February 25 [later corrected by her to March 25, J.A. 748], we had a class conducted by Charles Payne. 'The subject matter for that class was on 'Socialism, Utopian and Scientific.' There he stated that with the growth of imperialist nations, specifically speaking of the United States, that the world would be divided into two camps, that it would be the imperialist camp and that of the democracies moving towards socialism and these democracies moving towards socialism would be bound to be triumphant in the future."

18. The Respondent offers to prove the matters asserted in foregoing paragraphs 8 through 16; and that Markward committed perjury in the Blumberg trial in her testimony regarding the District Committee meeting of June 10, 1945 and regarding the Payne class.

19. The matter which Respondent has offered to prove in the foregoing was not available to Respondent prior to the decision of the Court of Appeals which affirmed the Board's registration order against Respondent.

20. The offer to show prejury committed by Mrs. Markward in the Blumberg case is relevant not only as another instance of perjury by her, but also to illuminate the probability of her having committed perjury with reference to Annie Lee Moss and to indicate the need for a hearing on Markward. Markward's testimony in the Blumberg case fits into the pattern of a practiced professional perjurer. The pattern goes like this: The witness gives testimony which neatly fits in with and supports the charge in the particular case. This testimony reveals a super-human memory as to conversations which took place years before. Simultaneously the memory is faulty as to much more recent matters, including the witness' own testimony 17283 in prior cases. On prior occasions in which the witness has testified and such testimony would have been important, the witness has either not testified at all on the subject or has given a different version, tailored to fit the particular previous case. When finally an objective

check is made possible by a court's requiring of contemporaneous reports to the FBI, it turns out that the reports do not contain, and contradict, the witness' testimony.

21. Nor can these matters be taken in isolation. As to Markward, we have already shown that she gave untrue testimony about her compensation from the FBI, and the Board has prevented us from proving in a hearing that she committed perjury on this subject. Moreover, the Department of Justice has used other perjurers in this case. This is true not only as to Matusow, Johnson and Crouch. We submit that the record demonstrates under any objective and intelligent analysis that numerous others of the government's witnesses are highly unreliable and untruthful witnesses. Without charging the Department of Justice with knowledge of subsequent events, it is clear that the Department did not in this case, to put the matter mildly, comply with its responsibility not to utilize witnesses of dubious credibility. To give only a few examples: It put Manning Johnson on the stand even though it knew that he had already admitted committing prejury as a government witness and had expressed a willingness to do so again. It put Honig on the stand even though it knew that he had been found an unreliable witness by Judge Sears in the first Bridges deportation case. It used Matusow even though it knew, as the Assistant Attorney General testified before an Appropriations Subcommittee, that he was a psychoneurotic (see our Supreme Court Brief, p. 200). Under the circumstances, one is entitled to believe that there is something more here than coincidence. How many perjured and unreliable witnesses have to be discovered in a single proceeding before one may fairly conclude that there is something wrong about the whole case?

17284 In the face of all these circumstances, the Board has persistently ignored and even concealed the circumstances revealing the unreliability of the Attorney General's witnesses. It has enthusiastically accepted the pal-

pably false testimony of palpably unreliable witnesses. It has refused to hold hearings on the unreliability of witnesses, and it has in the courts resisted such hearings. It has refused to require the production of witnesses' FBI reports (including production of a report by Markward), and thereby has precluded objective demonstration of false testimony. The Board, in short, has compromised the administration of justice.

JOSEPH FORER.
Joseph Forer.

Subscribed and sworn to before me this 15th day of November, 1956.

E. ELEANOR ROSCOE,
*Notary Public.*

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17306 UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

November 26, 1956

Subversive Activities Control Board
811 Vermont Avenue, N.W.
Washington, D. C.

* * * * * * * * * * *

Dear Sirs:

We are attaching a transcript of the proceedings and a duplicate original of the Hearing Board action in the Annie Lee Moss employee security case in the Department of Defense. These documents are submitted to the Board in separate covers under seal for its *in camera* inspection in the event that the Board should determine that either or both of them is necessary to its deliberations.

As stated in our memorandum of this date in opposition to Respondent's Motion for Leave to Introduce Additional Evidence, it is our opinion that we are under no obligation in this matter to make these documents available at this time. We are submitting these documents in these

particular circumstances to expedite consideration of this important case in the event the Board determines it is necessary to review either or both of them. If the Board inspects *in camera* either or both of these documents, it is requested that such document or documents be retained under seal as part of the record in this case for such review by the appellate courts as may be required.

As the Board knows, the reports, records and files related to employee security proceedings are regarded as confidential. This policy is necessary in the interest of our national security and welfare and also to protect government personnel involved in such procedings. Neither this Department nor the Department of Defense can authorize public disclosure of this material without appropriate approval under the applicable executive orders, regulations and directives. In this connection your attention is called to the Presidential directive of March 13, 1948 and to the Presidential letter to the Secretary of Defense dated May 17, 1954. We are specifically instructed by the Department of Defense to state that the Hearing Board action be made available only to the members of the Board.

Respectfully,

JAMES T. DEVINE,
James T. Devine,
*Attorney,*
*Department of Justice.*

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17313

**Memorandum Opinion and Order**

On November 16, 1956, respondent filed a motion for leave to introduce additional evidence, with an accompanying affidavit,[1] and petitioner on November 26, 1956, filed a memorandum in opposition thereto. Petitioner accompanied the memorandum in opposition with a sealed, certified

[1] Affiant mingles factual assertions and argument, making it difficult, unnecessarily, to weed out the portion properly in the affidavit.

copy of the transcript of proceedings in the Annie Lee Moss Security Hearing in the Defense Department, and the Security Board's findings,[2] for *in camera* inspection by the Board if it deemed such inspection necessary to its deliberation on the motion.

In its motion, respondent seeks to introduce evidence that witness Markward "is a perjurer, whose testimony should be expunged from the record of this case." In the alternative, respondent moves for an order (1) requiring production for inspection the transcript of the hearing in the Annie Lee Moss Security Hearings and the opinions and decisions of the Hearing Board and Secretary of Defense and (2) allowing time after inspection to file a motion "with respect to the subject of perjury by Mrs. Markward regarding Annie Lee Moss." Respondent requests oral argument on the motion but since the subject matter of the motion has previously become familiar to the Board it sees no need for oral argument.

17314 To avoid confusion in setting forth the assertions in the affidavit (see fn. 1), we relate them summarily. Affiant avers that witness Markward testified in the *Moss* hearing that Moss had been a member of the Northeast Club of the Communist Party in Washington, D. C.; that Moss contradicted this testimony; and that the Defense Department reinstated Moss. He avers further that in a proceeding before this Board, *Attorney General* v. *American Committee for Protection of Foreign Born*, Markward testified "to more" regarding Moss than that averred in the affidavit of Mr. Devine, attorney for petitioner, which related to the *Moss* Security Hearing and accompanied the Board's opposition to a similar motion previously filed by respondent on August 17, 1956, in the United States Court of Appeals for the District of Columbia in this proceeding.[3]

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[2] The decision of the Secretary of Defense in the proceeding, i.e., his public letter of January 18, 1955, is quoted in part in petitioner's memorandum.

[3] Respondent, in support, quotes testimony of Mrs. Markward regarding Mrs. Moss in the *Foreign Born* proceeding, *supra*.

Affiant avers, with various arguments in support, that Markward's testimony in the *Moss* hearing was false; and that the Defense Department disbelieved Markward and therefore reinstated Moss. To prove this, says affiant, he will subpoena Mrs. Moss, Mrs. Markward, appropriate Defense Department officials, Security Board members, the transcript of the Moss proceeding and such other witnesses as may be indicated.

In short, respondent apparently seeks to virtually retry before this Board the Moss Security Hearing and probe the actions and mental processes of Defense Department officials and Security Board members to show Markward lied in that proceeding.

It is further asserted that in *United States* v. *Blumberg*, U.S.D.C. E.D. Pa., Cr. No. 17963, a Smith Act trial under the "membership" clause, Markward testified that Blumberg had made certain statements to a Party meeting in 1945; that her report to the FBI on that meeting was produced and did not contain certain of the statements testified to; that in two conspiracy Smith Act trials where she was a witness (*United States* v. *Flynn, et al.* and *United States* v. *Frankfeld, et al.*) and in this proceeding she did not testify to the foregoing Blumberg statements and was not questioned concerning them; that under conspiracy rules of evidence, and under the rationale of the trial judge's rulings in one of the two Smith Act trials,[4] such testimony would, in affiant's opinion, have been admissible against the defendants in those other cases; that Mrs. Markward also testified in the *Blumberg* trial to certain statements by one Charles Payne while teaching a
17315 Communist Party class in Marxism-Leninism; that her notes in that class session and her written report to the FBI on the class were produced in court and did not contain the statement by Payne testified to; and that her testimony in this proceeding on the same class differed from her testimony thereon in the *Blumberg* case.

[4] Blumberg was not a defendant in either of these two Smith Act trials.

Respondent offers to show Markward committed perjury in the *Blumberg* trial in her testimony regarding the 1945 Party meeting and the Payne class. It contends, also, this offer of proof is relevant to its showing on Markward's testimony in the *Moss* hearing.

Petitioner contends there is no adequate showing that (1) Markward testified falsely in the *Moss* hearing (2) that the Defense Department discredited her or (3) that she testified in the *Foreign Born* proceeding inconsistently with her testimony in the *Moss* hearing. In offering the sealed transcript of the *Moss* proceeding for examination by the Board *in camera*, petitioner states that neither the Department of Justice nor the Defense Department can authorize public disclosure of the material without approval under "the Presidential directive of March 13, 1948" and "the Presidential letter to the Secretary of Defense dated May 17, 1954." In respect to the Markward testimony in the *Blumberg* case, petitioner, while not controverting so much of the affidavit as contains factual averments of the testimony there, argues that the showing of respondent alternately consists of speculation, allegations of perjury by omission and rests "* * * upon the fact that the witness' testimony was not a verbatim recital limited to the information contained in her reports to the Federal Bureau of Investigation." As to the latter, petitioner contends in substance that the reports of Markward to the FBI were in the nature of intelligence reports and "* * * their language was not to constitute a verbatim report of all events, statements and information to which [she] was privy, and further * * * they were not predicated upon criteria not yet established"; that Smith Act prosecutions did not commence until 1948 and the instant Act was not passed until 1950 and that it would be a needless function for an expert informant in a report to the FBI to burden it with a detailed statement of what a Party member said "in advocating such mutually understood terms as dictatorship of the proletariat, scientific socialism, proletarian

revolution, and other terms within the lexicon of Communism."

We have reviewed the documents in the *Moss* proceeding submitted by petitioner for inclusion in the record and *in camera* inspection by the Board. The review evidences, in the light of its motion, that respondent seeks to retry the *Moss* Security Hearing and probe the actions and mental processes of the Security Board and the Defense Department, and this is not a function of the Board. But even if this were permissible, our review reveals that respondent's showing that witness Markward testified falsely in the *Moss* proceeding and was disbelieved in that proceeding is not supported. The Board will, therefore,
17316 not permit testimony to be adduced going to the question of whether witness Markward was disbelieved in the *Moss* Security Hearing.

The Board will, however, without entering upon a rehearing of the *Moss* proceeding, reopen this hearing for the purpose of permitting respondent to attempt to show that witness Markward has testified inconsistently in statements made regarding Mrs. Moss' membership in the Communist Party, i. e., it may examine her on her testimony in the *Moss* hearing and the *Foreign Born* proceeding, *supra*, regarding Mrs. Moss to determine whether there have been any inconsistences in such testimony. If as a result of such examination respondent lays an adequate foundation the Board will entertain a request that petitioner be directed to attempt to secure appropriate approval for the production of witness Markward's testimony in the *Moss* Security Hearing for inspection and use by respondent in further examination of Mrs. Markward.

Coming to the showing on the Markward testimony in the *Blumberg* case, as well as the relation of a portion of that testimony to Markward testimony in this proceeding, we note the recitation of the testimony is not controverted by petitioner. In other words, in those instances in the *Blumberg* case where production of Markward's notes and

reports to the FBI were produced it is factually conceded by petitioner that those documents did not contain the statements testified to by Markward at the trial. We will weight that consideration, as well as petitioner's argument in reference thereto, in evaluating Mrs. Markward's testimony in this proceeding. In so doing, however, we will not consider as valid the inferences drawn by respondent in relation to the *Frankfeld* and *Flynn* cases. No witness rationally could be held to have such a burden. Nor do we consider it material or relevant that in this proceeding in testifying about the Payne class she related only so much of Mr. Payne's statements as pertained to the Marxist-Leninist version of the division of the world into two camps. It could well have been that petitioner's attorney did not desire testimony beyond that given by the witness in relation to the Payne class. Moreover, the fundamental issues being different in the two proceedings, we do not regard respondent's showing as sufficient to indicate testimonial inconsistency.

It is, therefore,

ORDERED that to the extent delimited above respondent's motion is hereby granted and the hearing in this proceeding is reopened for the purpose specified; and it is further

ORDERED that the hearing will commence at 10:00 A.M., December 7, 1956, in Room 113, Lafayette Building, 811 Vermont Avenue, Northwest, Washington, D. C.; and it is further

17317 ORDERED that petitioner produce the witness Markward for further examination, as indicated; and it is further

ORDERED that, in view of the foregoing Board action in reopening the hearing and the considerations leading to this, petitioner produce for Board inspection *in camera* on or before December 6, 1956, the report made to the FBI by witness Markward, referred to at pages 5983-5998 of the transcript of this proceeding, relating to the so-called "Frankfeld meeting"; further Board action to await the result of its inspection; and it is further

ORDERED that petitioner submit a certified copy of the January 18, 1955 public letter of the Secretary of Defense relating to the *Moss* proceeding; and it is further

ORDERED that respondent submit a certified copy of the pertinent testimony of witness Markward in the *Blumberg* case, to which it refers; and it is further

ORDERED that the paragraph on page 12 of the affidavit accompanying the instant motion is stricken as scurrilous, and the affiant, Joseph Forer, a member of the Bar of the United States Court of Appeals for the District of Columbia Circuit and a practitioner before this Board, is hereby notified that his conduct in this connection is considered unbecoming a member of the Bar practicing before the Board.[5]

By direction of the Board.

THOMAS J. HERBERT,
Thomas J. Herbert,
*Chairman.*

December 3, 1956
Washington, D. C.

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17324

**Motion to Amend Memorandum Opinion and Order of the Board of December 3, 1956**

The respondent, by its attorneys, moves the Board to amend its Memorandum Opinion and Order of December 3, 1956 in the following respects:

1. By ordering petitioner to make available to respondent for its inspection and use in examining the witness Markward the transcript of the Annie Lee Moss Security Hearing or, in the alternative, so much of that transcript as contains the testimony of Markward.

2. By making available to respondent Markward's report to the F.B.I. concerning the so-called "Frankfeld meeting."

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[5] Mr. Forer will take note that should there be a repetition of such conduct the Board will consider instituting appropriate proceedings.

3. By enlarging the scope of respondent's examination of Markward to permit respondent to examine her with respect to the following matters:

A. The falsity of her identification, in the Security hearing, of Mrs. Moss as a member or former member of the Communist Party.

B. The discrepancies between (1) her testimony in the *Blumberg* case with reference to statements made by Charles Payne in a 1949 Communist Party class, (2) her notes and report to the F.B.I. concerning the same class, and (3) her testimony in this proceeding concerning that class.

C. The discrepancies between her testimony in the *Blumberg* case with reference to the June 10, 1945 Com-
17325 munist Party meeting and her F.B.I. report concerning that meeting.

D. The omission from the testimony given by her in the *Flynn* and *Frankfeld* cases with reference to the June 10, 1945 Communist Party meeting of the statements concerning force and violations which she attributed to Blumberg when she testified in the *Blumberg* case.

E. The contradictions or inconsistencies, if any, between her testimony in this proceeding concerning the so-called "Frankfeld" meeting and her report to the F.B.I. on that meeting.

The grounds for the foregoing motion are as follows:

1. *The transcript of the Annie Lee Moss Security Hearing.* The Board has re-opened the hearing to permit respondent to examine Markward as to inconsistencies between her testimony regarding Mrs. Moss in the Security Hearing and in the *American Committee for the Protection of the Foreign Born* proceeding. Obviously, the best if not the only available evidence of such inconsistencies is contained in the transcripts of Markward's testimony in the two proceedings. Respondent cannot adequately examine Markward as to inconsistencies between her *Foreign Born*

and *Security Board* testimony if it is denied access to the latter testimony. Yet the order of the Board withholds from respondent the transcript of Markward's testimony in the Security Hearing, at least until the respondent succeeds in establishing, solely by the testimony of the witness whose credibility is under attack, that such inconsistencies exist.

The Board states that it has examined the transcript of the Security Hearing *in camera* and has found that it does not support "respondent's showing that witness Markward testified falsely in the Moss proceeding." The Board does not state that its examination of the transcript revealed no inconsistency between Markward's testimony in the Security Hearing and her testimony in the *Foreign Born* proceeding. On the contrary, since the Board
17326 has permitted respondent to examine Markward for the purpose of establishing such an inconsistency, it is fair to assume that the inconsistency exists. Otherwise the Board would presumably have denied a hearing on the issue of inconsistency just as it did on the issue of falsity, and for the same reason. But if Markward's *Security Hearing* testimony is inconsistent with her *Foreign Born* testimony, respondent is plainly entitled to inspect the former, use it in examining Markward, and introduce it in evidence.

The only conceivable reason for withholding the Security Board transcript from respondent is its alleged privileged character. But petitioner waived the right to assert any such privilege when his counsel, James T. Devine, made a partial disclosure of the contents of the transcript in an affidavit annexed to the Board's Memorandum in Opposition to Motion for Leave to Adduce Additional Evidence dated September 28, 1956 and filed with the Court of Appeals. Certainly the Attorney General cannot make public so much of the contents of an alleged privileged document as he believes supports his position and then assert the privilege as a bar to the production of portions

of the same document bearing on the same subject matter which are or may be unfavorable to him.

If nevertheless, petitioner is unable or unwilling to produce for respondent's inspection the *Security Hearing* transcript, then the appropriate course is for the Board to strike from the record in this case all of Markward's testimony because of the deprivation of respondent's right to cross-examine. In the alternative, therefore, we move that all of Markward's testimony be stricken.

2. *Markward's F.B.I. report of the "Frankfeld meeting."* The order of the Board states that further Board action on this report is to await the result of its *in camera* inspection. Plainly, if such inspection reveals that the report contradicts or is inconsistent with the testimony of the witness, it must be made available to respond-
17327 ent with the right to examine Markward on it and to introduce it in evidence.

3. *Enlargement of the scope of respondent's examination of Markward.*

A. The order of the Board forecloses respondent from examining Markward for the purpose of showing that her testimony in the Security Hearing was false. Apparently, this action was based on the Board's conclusion, solely from its *in camera* inspection of the transcript of the hearing, that the testimony was true. Obviously, however, the veracity of a witness cannot be determined simply by reading the suspected testimony. At a bare minimum, such a determination requires examination of the witness with respect to the truth or falsity of the suspected testimony. Yet the order of the Board denies respondent this opportunity.

B. The Board states that in evaluating Markward's testimony in this proceeding it will weigh the fact that her notes and F.B.I. reports which were produced in the *Blumberg* case did not contain the statements testified to by her at the trial of the case, and will also weigh "petitioner's

argument with respect thereto." Petitioner's argument consists of an attempt to account for the discrepancies between the notes and the report, on the one hand, and the testimony, on the other, by a series of unsupported assumptions and hypotheses. The Board proposes, in its evaluation of Markward's credibility, to give consideration to petitioner's speculative explanations of the discrepancies while denying respondent an opportunity to test their validity by eliciting testimony from Markward. For example, petitioner "explains" the omissions from Markward's reports by suggesting that the F.B.I did not ask her to report all statements by Communists in which force or violence was advocated since this criterion for reports may not have been established prior to the first Smith Act prosecution in 1948. This hypothesis appears absurd on its face and in any event can have no application to the Payne class room lecture which occurred in 17328 1949. Furthermore, the existence or non-existence of any possible factual basis for petitioner's speculation can be established by examination of Markward. In evaluating Markward's testimony, therefore, the Board must either disregard petitioner's hypothetical explanation of the discrepancies or allow the facts to be ascertained by permitting an examination of Markward on the subject.

C. The Board advances several hypotheses of its own in an attempt to explain the discrepancies between Markward's account of the Payne lecture in this proceeding and in the *Blumberg* case, as well as the discrepancies between her testimony concerning the June 10, 1945 meeting in the *Blumberg* case and in the *Flynn* and *Frankfeld* cases. These hypotheses supply the only basis for the Board's ruling that the discrepancies in question are not relevant to the issue of Markward's credibility. Thus, the Board states that "it could well have been" that petitioner's attorney was not interested in eliciting from Markward the testimony she later gave in the *Blumberg* case concerning Payne's advocacy of violent revolution. The

issue, however, is whether Markward perjured herself in the latter case. The relevant question, therefore, is not what the motives of petitioner's attorney "could well have been" but whether, in preparing to take the stand, Markward ever informed him that Payne had advocated violence in the course of the class room lecture. Obviously, the failure on her part to do so would support the conclusion that she committed perjury in the *Blumberg* case. The facts can be determined by examination of Markward, and inquiry therein should not be precluded by speculation. Similarly, the relevant issue concerning the *Flynn* and *Frankfeld* cases is whether Markward, in preparing to testify, informed the prosecutors that Blumberg had advocated violence at the June 10, 1945 meeting. Again, the Board forecloses examination of Markward on this issue.

17329 This motion is not intended to waive respondent's other objections to the Board's refusal to grant in full the respondent's motion for leave to introduce additional evidence, such as the denial of the opportunity to establish by witnesses other than Markward that she testified falsely in the *Moss* proceeding and was not believed by the Department of Defense.

Respondent requests oral argument on the foregoing motion.

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17330

**Motion to Require Petitioner to Produce Certain Documents for Use by Respondent or, in the Alternative, for in Camera Inspection of Such Reports by the Board**

The respondent, by its attorneys, moves that the Board order petitioner to produce the following documents for the purpose of permitting respondent to inspect them, to offer them in evidence in this proceeding, and to make such further motions as it may deem necessary on the basis of the inspection.

1. All memoranda dictated by the witness, Gitlow, and in the possession of the F.B.I. purporting to explain or

interpret documents received in evidence in this proceeding through Gitlow.

2. Letter written by the witness Gitlow to his wife from Moscow in or about May, 1929, describing the so-called "Molotov Decision."

3. All reports and memoranda of statements made by the witness Budenz to the F.B.I. concerning conversations or meetings between the witness and Morris Childs and Robert William Weiner during the years 1939 and 1940.

4. All reports and memoranda of statements made by the witness Budenz to the F.B.I. concerning a letter written by Joseph Starobin in the spring of 1945 in San Francisco, addressed to the editorial board of the Daily Worker and allegedly describing a conversation between the writer and "the French Comrades" or between the writer and Dimitri Manuilsky.

5. All reports made by the witness Scarletto to the F.B.I. concerning a meeting held at the home of Gertrude
17331 Stoughton in September or October 1950 at which the question of sabotage was allegedly discussed.

In the alternative, respondent moves: (1) that the Board order petitioner to produce the foregoing documents for *in camera* inspection by it; (2) that the Board make available to respondent for the making of such further motions as it may deem necessary such of the documents as the Board finds contradict or are inconsistent with the testimony in this proceeding of the witness or witnesses involved, and (3) that the Board seal and certify as a part of the record in this proceeding such of the documents, if any, as it does not make available to respondent.

The grounds for the foregoing motions are as follows:

Respondent moved for the production of all of the above described documents at the hearing (Tr. 1092-8, 1208, 1216-7, 1273-6, 12011, 12020-5, 12066-16, 11412-6). Its motions were denied by the panel (*ibid.*), and the rulings of the

panel were affirmed by the Board in its Report. Respondent again moved for the production of these documents in its Motion to Strike Testimony of Certain Witnesses or in the Alternative to Reopen Hearing, filed on May 21, 1956. This motion was denied in a Memorandum Opinion and Order of the Board dated August 10, 1956.

Since issuing its Memorandum Opinion and Order of August 10, 1956, the Board apparently has altered its position, at least with reference to *in camera* inspection by it of the relevant F.B.I. reports of informer witnesses. Thus, although the order of August 10 denied respondent's motion for the production of Markward's F.B.I. report relating to the so-called "Frankfeld meeting," the Board *sua sponte* on December 3, 1956, ordered petitioner to produce the same report for *in camera* inspection by it.

All of the considerations which require *in camera* inspection of the Markward report as a minimum
17332 precaution against reliance on tainted testimony are present in the case of the documents which are the subject of the present motion. The record establishes that each of these documents (1) was either prepared by the witness or (in the case of Budenz) consists of a memorandum based on or transcribed from his verbal statements to the F.B.I., (2) is in the possession of the F.B.I. with the possible exception of Gitlow's letter to his wife, and (3) contains an account by the witness of an incident or matter with respect to which he testified in this proceeding. Furthermore, as appears from the Report of the Board, the witness' testimonial version of the incident or matter was relied upon by the Board. Finally, the contradictions and inconsistencies between the testimony of Gitlow, Budenz and Scarletto in this proceeding and their testimony on the same matters in prior proceedings, as well as the internal inconsistencies in their testimony in this proceeding and the other evidence of record impairing their credibility, establishes, at a minimum, that they are untrustworthy witnesses.

Indeed, the case for the production to the respondent for *in camera* inspection by the Board of the Scarletto F.B.I. report concerning the meeting at Gertrude Stoughton's home and the Budenz statement to the F.B.I. concerning the Starobin letter is even more compelling than that for Board inspection of the Markward report. For the testimony of Scarletto and Budenz establishes that their statements to the F.B.I. contradicted their testimonial versions of the same incidents in this proceeding.

Respondent requests oral argument on the foregoing motion.

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17334 UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

December 6, 1956

Honorable Thomas J. Herbert
Chairman
Subversive Activities Control Board
811 Vermont Avenue, N. W.
Washington, D. C.

* * * * * * * * * *

Dear Mr. Herbert:

In accordance with the Board's Memorandum Opinion and Order in the subject case, dated December 3, 1956, the Petitioner herewith submits the following documents:

1. The original and two Photostat copy of the report made to the F.B.I. by witness Markward, referred to at pages 5983-5998 of the transcript of this proceeding, relating to the so-called "Frankfeld meeting." These documents are submitted under seal for the Board's inspection *in camera*. It is requested that the Board, after examination of the documents submitted retain the Photostat copy in lieu of the original and that the original be returned

to the Petitioner under appropriate security precautions.

2. A certified copy of the January 18, 1955 public letter to the Secretary of Defense relating to the Moss proceeding.

Sincerely,

JAMES T. DEVINE,
James T. Devine,
*Attorney for Petitioner.*

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17344

**Memorandum Opinion and Order**

This Memorandum Opinion and Order is being entered pursuant to the oral ruling made at the reopened hearing on December 11, 1956, and the statement that a written opinion would follow. (Tr. 17068-17069.)

On December 6, 1956, respondent filed a Motion to Amend the Memorandum Opinion and Order of the Board entered December 3, 1956, by:

1. Ordering petitioner to produce for its inspection and use in examining witness Markward the transcript of the Annie Lee Moss Security Hearing, or, alternatively, the transcript of the Markward testimony in that hearing.

2. Making available to respondent Mrs. Markward's report to the FBI on the so-called Frankfeld meeting.

3. Enlarging the scope of respondent's examination of Mrs. Markward with respect to:

A. The falsity of Mrs. Markward's identification of Mrs. Moss as a Party member or former member in the Moss Security Hearing.

B. Discrepancies between (1) her testimony in the *Blumberg* case with reference to statements by one

Charles Payne in a 1949 Party class, (2) her notes and report to the FBI concerning that class, and (3) her testimony in this proceeding concerning the same class.

17345 C. Discrepancies between her testimony in the *Blumberg* case on the June 10, 1945, Party meeting and her FBI report on that meeting.

D. The omission from her testimony in the *Flynn* and *Frankfeld* cases on the June 10, 1945, meeting of the statements concerning force and violence which witness Markward attributed to Blumberg when she testified in the *Blumberg* case.

E. The inconsistencies, if any, between her testimony in this proceeding on the so-called Frankfeld meeting and her report to the FBI on that meeting.

Respondent grounds its request for production and inspection of the Moss Security Hearing transcript on the assertion that since the hearing was reopened to permit examination of Mrs. Markward on inconsistencies between her testimony regarding Mrs. Moss in the Security Hearing and in the *American Committee for Protection of Foreign Born* proceeding respondent cannot adequately examine her without access to the Security Hearing transcript.

The Board's review of the Security Hearing transcript showed, as the affidavit of James T. Devine had stated, that Mrs. Markward's identification of Mrs. Moss was confined to her recollection of that name (and an address) in Party records of certain years, none later than 1946, and that identification was not based upon personal identification. As to the *Foreign Born* proceeding, one construction that could be placed upon Mrs. Markward's testimony on cross-examination there was unqualified identification of Mrs. Moss. In fact, respondent in effect took that position in its affidavit filed November 16, 1956 (p. 3, para. 6). The testimony and questions were terse and of such a nature, and the examination of Mrs. Markward was so constructed, however, that the Board was unable

to conclude with any certainty that her testimony was, or was intended to be, contradictory of her prior testimony in the Moss hearing. Of collateral significance was the colloquy between counsel in the *Foreign Born* proceeding at Tr. 3229 *et seq.*, the counsel for the respondent organization there being the affiant (and counsel) here.

Having reviewed the Moss transcript there remained the question of whether inconsistent testimony had been given by witness Markward in the *Foreign Born* proceeding. Since adequate foundation for production of the Moss transcript does not now exist, in our view, it has not been ordered. If, however, respondent upon examination of the witness lays adequate foundation the question of production will become live. The usual method of laying such foundation is, of course, through examination of the witness concerned.

17346 Coming to the Markward report to the FBI on the "Frankfeld meeting," we have examined this report *in camera* and see no need to produce it for inspection and use in examining Mrs. Markward, though it will remain in the record sealed. Our review of the document revealed that, though the phraseology of the witness' testimony at the hearing was not there contained, it reported statements by Frankfeld when which read in the light of the relevant exhibits, e. g., Pet. Exs. 331 (Foster, Dennis statement), 332 (Frankfeld statement), 333 (Thorez statement), and 334 (Togliatti statement) led us to conclude that production is not warranted. The report also contains other statements substantiating testimony she gave at the hearing on what transpired at the Party meeting, in addition to still other matters not here relevant. In short, from our knowledge of the record we concluded that no substantial credibility question was presented.

Respondent, in seeking enlargement of the scope of the examination of Markward, seems to contend that even though the Board's inspection of the Moss transcript shows respondent's charges with respect thereto are not supported, respondent should, nevertheless, be permitted

to examine Mrs. Markward with respect to "the truth or falsity of the suspected testimony." We know of no authority for such a contention. While Mrs. Markward may be examined under the prior inconsistent testimony doctrine, in respect to her testimony in the Security Hearings and in the *Foreign Born* proceeding, the Board will not permit a rehearing of the *Moss* case. Nor do we see reason to alter our views on respondent's other contentions regarding the *Blumberg, Flynn,* and *Frankfeld* cases,[1] as related to our previous opinion of December 3, 1956. To do so would be to impose a new and unreasonable burden on witnesses.

Concerning respondent's renewal of its motion at the end of the reopened hearing for production of the Markward testimony at the Moss Security Hearing transcript (Tr. 17133) this is also denied. We might say in elucidation that the examination of Mrs. Markward at the hearing disclosed that no adequate foundation in support of the renewed motion exists. The Moss Security Hearing transcript, as previously stated, will remain in the record, sealed. It is, therefore,

ORDERED that respondent's motion and the foregoing renewed motion are hereby denied.

By Direction of the Board.

[SEAL]

CHARLES C. WISE, JR.,
Charles C. Wise, Jr.,
*Executive Secretary.*

December 13, 1956
Washington, D. C.

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[1] As the trial court stated in the *Blumberg* case, *supra*, it is not a test of a witness' recollection or credibility if an attorney in another case "for some reason or for no reason," omitted to ask the witness about a subject testified to (C.P. Ex. 93, p. 1362 p.).

17350

**Memorandum Opinion and Order**

Respondent on December 6, 1956, filed a motion to require production of certain documents, with an alternative request contained therein. This motion was opposed by petitioner in its memorandum filed December 10, 1956.

In its Order issued November 5, 1956, the Court of Appeals granted the Board permission, on appropriate showing, to reopen the hearing only to examine the credibility of the witness Markward. Moreover, we see no reason to change our previous ruling in the Memorandum Opinion and Order dated August 10, 1956, on requests similar to those of this motion.

It is, therefore,

ORDERED that respondent's motion for production of documents, and the alternative request, filed December 6, 1956, are hereby denied.

By direction of the Board.

[SEAL] THOMAS J. HERBERT,
Thomas J. Herbert,
*Chairman.*

December 17, 1956
Washington, D. C.

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16911 **Argument in Behalf of Respondent**

By Joseph Forer

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16912 The third point I would like to make goes to the approach that we think the Board should take. So far as the result is concerned, we think we know what the result will be. So far as the approach is concerned, I want to suggest to the Board that it is the obligation of the Board to decide this anew from the original evidence less the exculpated evidence. In other words, it isn't a question of taking the report of your predecessor members,

going through it with a red pencil and deleting whatever references there are to the testimony of Paul Crouch or Manning Johnsen or Matusow and then leaving
16913 the rest of it stand and all the other findings stand, at least that there is something else in the report which relates to the particular findings.

I think, in other words, you have to write a whole new report on your own. I think there are several reasons for this.

First of all, the decision is now yours and the Board now must take responsibility for it. It is not the responsibility of your predecessors.

Secondly, the Supreme Court returned the case and said that the Board had to reconsider the entire record, and the Supreme Court was careful to point out that it was entirely possible that the old Board took into account the testimony of Crouch, Matusow and Johnson even in making findings which did not specifically refer to their testimony or was not annotated by their testimony. As the Supreme Court in Justice Frankfurter's opinion said, it is entirely possible that the Board was influenced in other findings by the testimony of these three individuals.

So you cannot assume that any finding made by the old Board, even based on testimony other than that of these three characters, was not influenced. You have to make your own finding.

In that connection also it is necessary for this Board to make its own independent evaluation of the credi-
16914 bility of the witness.

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17068 Chairman Herbert: Be seated.

During the noon recess the Board has been considering the two motions that were argued this morning.

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We want to state at this time for the guidance of the parties during the hearing about to commence that the

Board's review of the Moss security hearing transcript showed, as the affidavit of Mr. Devine had stated, that Mrs. Markward's identification of Mrs. Moss was confined to her recollection of that name and an address in party records for certain years, none later than 1946, and that identification was not based on personal identification.

As to the Foreign Born proceeding, one construction that could be placed upon Mrs. Markward's testimony on cross-examination there was unqualified identification of Mrs. Moss. In fact, Mr. Forer takes that position in his affidavit filed November 16. The testimony and questions there were terse and of such a nature, and the
17069 examination of Mrs. Markward was so constructed, however, that the Board was unable to conclude with certainty that her testimony was or was intended to be inconsistent with her prior testimony in the Moss hearing.

Of collateral significance was the colloquy between counsel in the Foreign Born proceeding at transcript pages 3229, et seq., counsel for the Respondent organization there being the affiant and counsel here.

Having reviewed the Moss transcript, therefore, there remained the question of whether inconsistent testimony had been given by the witness Markward in the Foreign Born hearing.

Since adequate foundation for production of the Moss transcript does not now exist in our view, it has not been ordered. If, however, Respondent upon examination of the witness lays adequate foundation the question of production will become live. Of course the usual method of laying such foundation is through examination of the witness concerned.

The Board has heretofore directed counsel to produce Mrs. Markward. Is she here with us now?

* * * * * * * * * * *

Mr. Forer: May the record show, Mr. Chairman, that Mrs. Markward was present in the hearing room when the Chairman read his statement that he has just made.

17070 Chairman Herbert: That is quite correct.

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Mr. Forer: Mr. Chairman, the Board's order directed the Respondent to produce the relevant excerpts from the testimony of Mrs. Markward in the Blumberg case. I should explain that by cooperation between counsel for the Respondent and counsel for the Petitioner we have photostated those pages of Mrs. Markward's testimony in the Blumberg case which either side considered might have relevance, and then we have put them together in one integrated exhibit so that it will be one exhibit and in the order of the page numbers.

As a matter of fact, you can tell which pages were selected by the Attorney General because those pages happen to have a smaller margin than the pages that we photostated.

Also by agreement between counsel it is agreed that these are authentic copies of Mrs. Markward's testimony, subsequent, however, to either side being able to actually check it against the record and if any discrepancies are found, to call it to the attention of the Board.

Also, I should say, and this is with our consent, Mr. Devine reserves the right, to which we are happy to consent, possibly to introduce a few more pages from Mrs. Markward's testimony in the Blumberg case. He

17071 doesn't know yet whether he will want to so introduce them, but if he does we will have no objection.

So at this time I would like to have this, which is the except of Mrs. Markward's relevant testimony as submitted by both sides in the Blumberg trial, received in evidence as an exhibit.

* * * * * * * * * * *

Mr. Forer: It has been offered and admitted, is that correct?

Chairman Herbert: Correct.

(Respondent's CP Exhibit No. 93 was marked for identification and received in evidence.)

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17074 Mr. Forer:

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17075 Now I want to offer in evidence a certified copy of the exhibits in the Blumberg case, which consists of Mrs. Markward's reports to the FBI and Mrs. Markward's notes on the Payne Classes which were admitted in evidence in the Blumberg case.

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17076 Mr. Forer: Also the preceding exhibit will indicate what appears here as Exhibit LL in the Blumberg case is a copy of Mrs. Markward's notes on one of the Payne classes. What appears as Exhibit MM——

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Mr. Forer: What appears as Exhibit MM is a copy of Mrs. Markward's report on the Payne class. What appears as Exhibit NN is a copy of Mrs. Markward's notes on another Payne class. What appears as Exhibit OO is a copy of Mrs. Markward's report to the FBI on the Payne class.

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17077 I therefore offer this in evidence. It is a certified copy from the records of the Federal Court in Philadelphia.

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17079 Chairman Herbert: Mr. Forer, if you will note the second last paragraph of the memorandum opinion and order of December 3. That is where the Board

ordered that Respondent submit a certified copy of the pertinent testimony of the witness Markward in the Blumberg case.

Mr. Forer: Yes.

Chairman Herbert: That was done because you made several references to it in your affidavit and made certain allegations which were uncontroverted by the Petitioner's counsel. That is why the Board of course admitted the exhibit previously, which is in a sense jointly agreed upon between counsel.

That is in order to furnish the Board sufficient substantiation or verification of your allegations according to what this last admitted exhibit shows the Board has considered your proffer, and

The Board does not feel that your proffer is in accord with the situation and it therefore is denied and the objection of the Petitioner is sustained.

Mr. Forer: I ask that that be marked for identification.

Chairman Herbert: It may be marked for identification.

* * * * * * * * * * *

17080 (CP Exhibit No. 94 was marked for identification and was rejected.)

Mr. Forer: We ask that Mrs. Markward be recalled to the stand for the purpose of further cross-examination.

Mr. Devine: I would like to make a statement for the record first relative to a previous reference made by Mr. Forer. I would like the record to show that there were three spectators in the room, one of whom is Mrs. Markward, that Mrs. Markward was in the hearing room prior to the arrival of the Board, that Respondent's counsel Mr. Forer, who has cross-examined Mrs. Markward in the past is presumably acquainted with her and had knowledge of her presence in the hearing room. If he did not have that knowledge I think he should so indicate for the record.

Mr. Forer: I never heard anything so silly in my life.

Chairman Herbert: Call Mrs. Markward.

17081

**Mary Stalcup Markward**

was called as a witness and, having been duly sworn, was examined and testified further as follows:

**Cross-Examination**

**By Mr. Forer:**

. . . . . .

**Q. It is a fact, is it not, Mrs. Markward, that you testified in September 1954 in a Security Board hearing of the Department of Defense involving Mrs. Annie Lee Moss?**
A. To the best of my recollection that is about the date.
Q. Can you tell us what date in September 1954 it was?
A. I don't recall exactly, sir.
Q. All right.

. . . . . .

17082 Q. Mrs. Markward, will you tell us what you said in that Security Board hearing concerning your knowledge of Mrs. Moss as a member or former member of the Communist Party, or the Communist Political Association. A. I can't repeat it like a phonograph record, but I can give you the substance of
17083 what my testimony was in that regard. I testified that I did recall her name on the various Communist Party records, that I did recall several addresses where she had lived, that I did recall certain information which was contained on the Party records as to her age, sex, race, occupation, union affiliation, and so forth, as far as that is concerned. I do not say that is everything I had to say, but I think in general that that summarizes what I had to say.
Q. Is that the best of your recollection all you said on that subject?

. . . . . .

The Witness: I was on the stand almost a whole day. This business was batted around a good bit. I said

the same things in different words several times that day, I am sure. But I think in general that is the general limitation of what I had to say. I don't believe that I identified her any more completely than that or any less completely than that. I don't know of anything else that I had to say.

* * * * * * * * * *

Q. Did you say anything about whether from your knowledge of Mrs. Moss had ever been a member of the Northeast Club of the Communist Party? A. I said so, that is correct.

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Q. You said it? A. Yes, that I did know she had been a member of the Northeast Club of the Communist Party.

Q. Did you say what dates she had been a member of the Northeast Club of the Communist Party? A. I said in general that the dates that I knew she was a member of the Northeast Club of the Communist Party. She could have been a member of the Northeast Club of the Communist Party before I was, but I didn't know that then. I did come to know that after I had been a member for a while.

Q. Do I understand, then, that you testified at the Security Board hearing that she had been a member of the Northeast Club of the Communist Party when you joined the Northeast Club and was still a member when the Northeast Club dissolved? A. Again——

Q. In substance. A. She may have been, but when I joined the club, when you walk into a room of strange people you don't immediately know who every one of them is. I wasn't introduced to all of them, and the party records weren't open to me at that time. It was only after I received an office in the club and became more active and the various records of the club were available to me that I had knowledge of what those records said.

17085

Q. All I am trying to get is whether or not you put any period on the time of membership of Mrs. Moss in the Northeast Club of the Communist Party in your testimony at the Security Board hearing. That is all I am trying to find out now. A. My recollection of what I said there is that she was a member of the Northeast Club at the time that it was dissolved and the Communist Political Association was formed in Washington, D. C.

Chairman Herbert: Could you fix that time?

The Witness; That time was at the end of May or the first of June in 1944. I don't know that I said it in those words but in general that is what is true and if I had been asked the question and it called for that answer, that is what I would have said.

* * * * * * * * * * *

Q. Didn't you also say she had been a member for some time before the dissolution of the Northeast Club, in a sense? A. That is correct.

Q. You also testified, did you not, that you knew she had been a member of the Communist Political Association? A. I did.

Q. Did you testify as to how long to your 17086 knowledge she had been a member of the Communist Political Association? A. As I recall, I testified that she was a member at least until the registration, that is, when members reaffirmed their desire to remain in the organization and received new party books. I recall certain records about that time showing her affiliation. It could have been any time after November of 1944. It could have been as late as January or so of 1945. I do not recall after that period.

Q. Mrs. Markward, it is a fact, is it not, that it was clear to you that the Annie Lee Moss that you were testifying about was the Annie Lee Moss that was the person involved in that Security Board proceeding and not some other person by the same name, is that right?

A. It was certainly my understanding that that was true.

Q. As a matter of fact, you were sure in your own mind that the Annie Lee Moss that you were testifying about is the same Annie Lee Moss that was involved in that proceeding? A. That is right.

Q. As a matter of fact, the Annie Lee Moss you were talking about you were able to identify by reference to addresses of residence, is that correct? A. That is correct.

Q. And it is a fact that those addresses coincided quite accurately with the address of the Annie Lee Moss that was involved in the Security hearing, is that 17087 correct? A. So far as I know, it is correct, yes.

Q. You were able to identify the Annie Lee Moss that you were talking about as a person who had been a worker in the Pentagon cafeteria? A. That is correct.

Q. And as a person who later had gone to work in the Pentagon? A. I did not say that.

Q. No, I am not saying that, but you know that. You know that now, don't you?

Chairman Herbert: Objection if raised will be sustained to that question as framed.

Mr. Devine: I object.

* * * * * * * * * * *

Q. It is a fact, is it not, that the Annie Lee Moss that you were testifying about was identified by you as a person that worked at one time in the Pentagon cafeteria, isn't that correct? A. That is correct.

Q. You know, do you not, that the Annie Lee Moss that was involved in the Security proceeding was identified as a person who had worked in the Pentagon cafeteria, correct? A. I don't know that from personal knowledge. I know from reading it in the newspapers and reading the hearings and so forth, that that was the same person, yes.

17088 Q. You know that by having attended a hearing before the McCarthy Committee in February 1954, don't you? A. That is correct, but not——

Q. It is a fact, is it not, that you were present at a hearing of the McCarthy Committee when the committee identified Mrs. Annie Lee Moss the same Mrs. Annie Lee Moss who later was involved in this security hearing, as a person who lived at 525 and a half Second Street, Northwest, and who had been a cafeteria worker?

* * * * * * * * * * *

The Witness: I was present when that statement was made and I heard it, yes

By Mr. Forer:

Q. As a matter of fact, you also testified before the McCarthy Committee that there was no possible doubt in your mind that the Annie Lee Moss that you
17089 knew as a member of the Communist Party or knew about as a member of the Communist Party was the same Annie Lee Moss who was called before the McCarthy Committee and who later on appeared in the Security Board proceeding, isn't that correct? A. I was asked for my opinion, and I answered. I don't remember having the word "possible" in there but I believed her to be the same individual, yes

Q. Mrs. Markward, you may use this if it will help you refresh your recollection. It is a fact, is it not, that you testified before the Permanent Subcommittee on Investigations of the Committee on Government Operations known as the McCarthy Committee, on February 23, 1954, is that correct? A. That is correct.

Q. Mrs. Markward, inviting your attention to page 316 of the printing office print of this, I want to ask you if Senator McCarthy asked you the following question and you made the following answer at this hearing before the McCarthy Committee:

"Question: Mrs. Markward, you have been cooperating

with our committee and the FBI. You know much more about this woman, obviously, than any of the committee and the staff know. Having been informed of her address and checked her employment, is there any question at all at this time that the Annie Lee Moss that you are discussing is the Annie Lee Moss that is now working in the Code Room at the Pentagon?"

17090 Answer by Mrs. Markward: "No question in my mind, sir."

At that hearing were you asked that question and did you give that answer? A. Yes, sir.

Q. If you were asked that question now, your answer would be the same, would it not? A. That is correct.

Q. Mrs. Markward, the first time you ever testified anywhere was on June 11, 1951, in executive session of the Un-American Activities Committee, is that correct?

Q. That is not correct? A. That is the first time I testified publicly, I believe.

Q. I am talking about this executive session. A. No. In executive session I testified much earlier than that before that committee.

Q. I am not now talking about interviews that you may have had with members of the committee staff. I am talking about an actual hearing at which you testified. A. Well, there was a hearing on that day, yes, sir.

Q. Did you testify at any earlier date? A. Yes, sir.

Q. What is the first date on which you testified? A. I don't recall exactly what date it was. It was subsequent to about the 8th of February 1951, when

17091 the Daily Worker published notices of my expulsion from the party.

Q. How soon was it—How long was it before the hearing of June 11, 1951? A. I don't recall, sir. I had interviews first and then we had testimony. June 11 was the over-all testimony.

Q. Do I understand from you that this June 11 was a sort of recapitulation of your interviews and testimony—

is that the size of it? A. Substantially that is correct.

Q. On June 11, 1951, you did testify before the Un-American Activities Committee in executive session and your testimony was later made public, is that correct? A. That is correct.

Q. Is it fair to say, Mrs. Markward, that perhaps the major portion of your testimony in this hearing of June 11, 1951, consisted of identifying persons who were known to you as having been members of the Communist Party or the Communist Political Association in the District of Columbia?

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The Witness: I am not sure actually percentagewise how many words go to names and how many to 17092 other words. As far as my testimony was concerned, my recollection of what happened is that the House Un-American Activities Committee asked me about the Communist Party in the District of Columbia and how it functioned and who it was that were involved in making it function. Whether percentage-wise there were more words as to naming names than to telling how it worked I don't know. Simply because your question so specifically stressed the major portion is names, I hesitate to give you a categorical question. It may be true, but on the other hand the import of the testimony was the how and what and then finally the who.

* * * * * * * * * * *

Q. Mrs. Markward, it is a fact, is it not, that at this hearing on June 11, 1951, you identified hundreds of persons as having been members of the Communist Party or the Communist Political Association in the District of Columbia area, is that correct? A. I think there are actually over, a little over, a hundred names in that. I am not absolutely certain as to the number, but I think there are not too many more than that.

Q. It is a fact, is it not, that you had already given the committee on Un-American Activities a list of 76 persons who were known to you as members of the Communist Political Association in Washington, D. C.?

* * * * * * * * *

17093 The Witness: If there are 76 on the list—I haven't counted them.

Mr. Forer: This may help you recall (indicating document). Just take a look there and see if it will stimulate your memory.

The Witness: It says there are approximately 76 names of people, and I say I would take Mr. Owens' preliminary statement as to how many people were on that list.

By Mr. Forer:

Q. Will you turn to page 4470 of that print, which may help you answer the next question. It is also a fact, is it not, that at that hearing you were asked and you gave the names of members of the Northeast Club of the Communist Party? A. That is correct.

Q. Suppose you turn to page 4498. That is toward the end of the hearing, is it not? A. Sort of, yes.

Q. It is a fact, is it not, that after you had listed the names of members of the various clubs of the Communist Party and Communist Political Association, when you got toward the end of the hearing the person examining you for the committee asked if you could

17094 think of any more names that you had not mentioned previously?

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The Witness: Yes.

I don't see it right here, but I believe I was asked a question in substance like that.

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Q. Let me call your attention to Mr. Owens' statement there. You recall, do you not, that toward the end of the hearing, after you had gone through the various clubs and given the names of the members of the clubs, Mr. Owens, who was questioning you, asked you to reflect for a moment as to whether there were some individuals that you could remember as members of the party whom you had not placed in any of these clubs in the prior testimony in that hearing. Is that correct? A. That is correct.

17095 Q. Then following that you read one or more other names, is that correct? A. That is correct.

Q. After that Mr. Owens supplied some names and asked you whether you were acquainted with people whose names he supplied, is that correct? A. That is correct.

Q. And that went on for a while? A. That is right.

* * * * * * * * * *

17096 Q. Let me restate it rather than have the reporter read it.

As we have just seen, after you had given the names of people who belonged to various clubs and after Mr. Owens had asked you if you could think of any more names that you had not already mentioned, following that Mr. Owens asked you a series of questions, do you know so and so, do you know so and so, and in each case you answered that you did know them and then you identified them as members of the Communist Party. A. That is correct.

Q. I am asking you, those names that Mr. Owens supplied at the very end, which were names which you had not earlier supplied, were names that you had given Mr. Owens in interview or prior testimony. You know that that is how Mr. Owens knew who to ask you about? A. I can't give you a categorical yes or no on that. Most of it—I won't say "most", that is a bad word. Many of the names that Mr. Owens asked about he already had

information on, and I had sometimes more information and I am sure sometimes less than he did. But I do not deny that there had been any discussion about
17097 these names prior to the time that on the record I testified about the names.

Q. Did Mr. Owens ask you about a single person at that part there near the end that you hadn't already previously identified to the staff of the Un-American Activities Committee as having been a member of the Communist Party? A. I don't actually believe so. I don't say it is impossible, but I don't believe so.

Q. Do you remember having told Mr. Owens or any other member of the staff of the Un-American Activities Committee before this hearing the name of any person who was a member of the Communist Party or the Communist Political Association to your knowledge whose name was not brought out in that hearing of June 11, 1951? A. I would believe yes.

Q. You would believe yes? A. Yes, not many but I think there were several.

Q. You think there were several. Do you have any explanation for the omission of their names from this hearing of June 11, 1951? A. It was a more or less mechanical thing that there would be a name which would come up. We were on one tangent and we would forget to go back and get it on the record. In any of these executive sessions there is a lot off the record and on the record, and there were several names that have come up in testimony since that I am positive I dis-
17098 cussed with the hearing officers but it just didn't get on the record at the time of the actual hearing.

Q. In other words, any such omission would be more or less due to mechanical matters? A. More or less.

Q. Mrs. Markward, in your testimony of June 11, 1951, did you tell the Un-American Activities Committee that Annie Lee Moss had ever been a member of the Communist Party? A. I did not.

Q. In your testimony of June 11, 1951, did you tell the Un-American Activities Committee that Mrs. Annie Lee Moss had ever been a member of the Northeast Club of the Communist Party? A. I did not.

Q. In that testimony did you tell the Un-American Activities Committee that Mrs. Annie Lee Moss had ever been a member of the Communist Political Association? A. I did not.

Q. In these interviews you had before the hearing of June 11, 1951, interviews and any testimony—and I am talking about interviews with the staff of the Un-American Activities Committee—did you tell the staff of the committee or the committee itself that Mrs. Annie Lee Moss had been a member of the Communist Party or the Communist Political Association or the Northeast Club of the Communist Party? A. I have no
17099 recollection of telling them anything about that.

Q. It is a fact, is it not, that in this hearing of June 11, 1951, you named some persons who were to your knowledge members of the Communist Party but with whom you had not been personally acquainted but who you knew to be members from records and similar sources. A. A few, yes.

* * * * * * * * * * * *

17100 Q. We have been talking about your testimony of June 11, 1951, before the Un-American Activities Committee. You testified again before the Un-American Activities Committee a month later, is that correct, on July 11, 1951? A. It was about that date.

Q. Let us see if this will help you. A. That is it within a day or two anyway.

Q. Just to refresh your recollection that you did testify there on July 11? A. Yes, sir.

Q. That testimony related to Communist activities in the Maryland area, is that correct? A. That is correct. It was primarily aimed toward Baltimore, but the surrounding area was included to some extent.

Q. It is a fact, is it not, that the District of Columbia and Maryland were one district of the Communist Party, is that correct? A. That is correct,
17101 but that particular day's testimony was aimed more at the testimony regarding what I had known about Baltimore than it was about what I had known about the District of Columbia.

Q. But there were, naturally enough, some references to individuals who had been members of the Communist Party or the Communist Political Association in the District of Columbia, is that correct? A. Some, yes.

Q. In that hearing of July 11, 1951, did you tell the committee on Un-American Activities that Mrs. Annie Lee Moss had been a member of the Communist Party, the Northeast Club of the Communist Party or the Communist Political Association? A. I did not.

Q. Do you recall testifying before the McCarthy Committee in August 1953 regarding a Mr. and Mrs. Rothschild? A. Yes, sir.

* * * * * * * * * * *

17102 Q. Those were announced by the committee as hearings involving Communism in the Government Printing Office, is that correct? A. As far as I recall, yes, sir.

Q. You also recall that before that hearing you were interviewed by members of the staff of the McCarthy Committee? A. That is correct.

Q. Mr. Roy Cohn, Mr. Carr and several other persons, is that correct? A. At this moment I only recall discussing it with one of the investigators, Mr. Hawkins.

Q. Whoever it was. Let us skip that. A. Yes.

Q. You were interviewed by members of the staff of the committee? A. Member or members, yes, sir.

Mr. Devine: She stated a member, I believe, Mr. Forer.

17103 By Mr. Forer:

Q. Isn't it a fact that this member or members of the staff of the committee in substance informed you or you knew from what he said that the McCarthy committee was very interested in the subject of Communists working in the Government, didn't you know that? A. Yes, sir.

Q. Prior to this hearing on the Government Printing Office in August of 1953, did you tell either the McCarthy Committee or any member of the staff of the McCarthy Committee that Mrs. Annie Lee Moss had been a member of the Communist Party or the Communist Political Association?

* * * * * * * * * * *

The Witness: May I answer that other than just yes or no?

Mr. Forer: If you can give a responsive answer, that is all I want.

The Witness: You have just been very clear to point out that I knew that that committee was interested
17104 in Communists working for the Government.

By Mr. Forer:

Q. You knew that in August of 1953? A. That is correct, but I didn't know that Annie Lee Moss was working for the Government. So therefore I didn't tell them anything about Annie Lee Moss. The answer is no, I had not informed them anything about Annie Lee Moss working for the Government.

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17105 Isn't it a fact that you did not inform the McCarthy Committee or its staff prior to August 17, 1953, or on August 17, 1953, that Mrs. Annie Lee Moss had been a member of the Communist Party or the Communist Political Association? Isn't that a fact?

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The Witness: I did say that, no, I had not informed the committee, after I finished the explanation I made.

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17106 Q. It is a fact that on August 17, 1953, although you didn't know whether or not Mrs. Moss had worked for the government, you did know that Mrs. Moss had worked in a government building, namely, the Pentagon? You knew that, did you not? A. Yes, sir.

Q. You again testified before the McCarthy Committee on February 23, 1954, did you not? A. Yes, sir.

Q. That is the time that you publicly testified for the first time, publicly, that Mrs. Annie Lee Moss had been a member of the Communist Party and a member of the Communist Political Association, is that correct? A. That is correct.

Q. The day before February 23, 1954, you had testified to that effect in a closed sessison of the House Committee on Un-American Activities, is that correct? A. That is correct.

17107 Q. And that testimony has never been released to the public, is that correct? A. As far as I know it has not.

Q. That was in executive session? A. It was, yes, sir.

Q. So the first committee that you told that Annie Lee Moss was a member or had been a member of the Communist Party was the Committee on Un-American Activities? A. No, sir.

Q. You had told some committee before that? A. I had been contacted by the McCarthy Committee before February 22. I hadn't had a hearing there, but they had contacted me in regard to this individual.

Q. So the first committee that you told, then, was the McCarthy Committee or the staff of the McCarthy committee? A. That is correct.

Q. When did you first tell that to the staff of the McCarthy Committee? A. It was late in the week prior to February 22-23.

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Q. Who was the person that you first told this to? A. To the best of my recollection it was Mr. Herbert
17108 Hawkins.

Q. Mr. Herbert Hawkins. A. That is right.

Q. He just came to see you and asked you if you knew whether Mrs. Annie Lee Moss had been a member of the Communist Party or the Communist Political Association? A. He called me on the telephone.

Q. He asked you that over the telephone? A. Yes.

Q. Did he mention the name of Mrs. Annie Lee Moss first? A. That is right.

Q. You answered in the affirmative? A. That is right.

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17109 Q. When you testified before the House Committee on Un-American Activities June 11, 1951 and named persons who had been members of the Communist Party in the District of Columbia, did you only name persons who had been employed by the Government? A. No.

Q. Mrs. Markward, I am correct, am I not, that when you joined the Communist Party in May of 1943, you became a member of the Northeast Club at that time? A. That is correct.

Q. Then you became press director of that club in October of 1943, and then you became chairman of that club in January or February of 1944, is that correct? A. That is correct.

Q. You remained chairman until about June of 1944 when the Communist Party changed over to the Communist Political Association, correct? A. That is correct.

Q. The Communist Political Association stayed
17110 in existence until about the summer of 1945, when the Communist Party was reconstituted, correct? A. Partially correct.

Q. What part is incorrect? A. Nationally the Communist Party was re-formed about the end of July or August of 1945. The District had their convention one immediately before and one immediately after the Na-

tional Convention, but the City of Washington didn't have their convention until the 14th of October 1945, so officially while we were part of the National Communist Party we used the name of Communist Political Association of Washington until October of 1945.

Q. You were treasurer of the Political Association, is that correct? A. That is correct.

Q. It is a fact, is it not, that it was a requirement of the Communist Party that members of th se neighborhood clubs such as the Northeast Club, should attend meetings of the clubs, is that correct? A. That was one of their more flexible rules. It was on the books to be a rule that every one must attend, but in fact there were many members who attended rarely, some hardly at all.

Q. You mean it was a requirement but it wasn't 17111 fully followed? Is that the idea? A. That is correct. It depended on what the person did other than attend the meetings. If they carried out the party policies, it wasn't too important whether they attended the meetings.

Q. It was a requirement, wasn't it, that the member of the club carry out assignments? A. That is correct.

Q. A person couldn't be a member or couldn't remain a member of the Communist Party for any substantial period of time without attending any meetings or carrying out any assignments, could he? A. The nature of the various assignments was such that he could be a member and carry out assignments without necessarily attending the club meetings. The important criteria was the fact that in the community, in mass organizations any place, they didn't do anything that was anti-party policy. Also, when they were asked to push a party policy within a mass organization or union in their neighborhood, circulate a petition or anything like that, they could do that without attending party meetings.

Q. Mrs. Markward, Mrs. Moss was, according to you, a member of the Northeast Club of the Communist Party at a time when you were a member and press director

and chairman of the Northeast Club, is that correct? A. That is correct.

17112 Q. Is it your testimony that during all that time both of you were members and you were at least an officer of the Northeast Club and you never saw Mrs. Moss at a meeting of the Northeast Club? A. My statement is that I don't recall having seen her. I don't recognize her as a person whom I have seen. I never testified that I did see her, and I have never testified absolutely that she was never present.

Q. Isn't it a fact, that while you were in the Northeast Club you often went out on assignments with other members of the Northeast Club? A. That is right.

Q. You don't know whether or not you ever went out on an assignment with Mrs. Moss? A. I do know that I did not go on an assignment with Mrs. Moss, yes.

Q. You know you didn't? A. That is right.

Q. But you didn't know whether or not you ever attended a meeting with her? A. That is correct.

Q. You know, do you not, that at one time Mrs. Moss roomed with a woman named Hattie Griffin? A I know that, yes, sir.

Q. You testified that you have attended meet-
17113 ings of the Communist Party at the home of Hattie Griffin? A. That is correct.

Q. But you say you don't recall ever having seen Mrs. Moss at the home of Hattie Griffin? A. That is correct.

Q. You have testified, have you not, that you knew that Mrs. Moss paid dues to the Communist Party? A. That is correct.

Q. And dues to the Communist Political Association? A. That is correct.

Q. As a matter of fact, during the time of the Communist Political Association the members paid their dues to you directly, isn't that correct? A. Some of them did, yes.

Q. Only some of them? A. Their dues came to me directly, but when members did not attend meetings

other more active members were assigned to call on them and take literature to them and collect their dues, and they brought them to me.

Chairman Herbert: Did you keep track of who specifically paid dues to you?

The Witness: Yes, sir. Well, I kept track of the members whose dues were paid. My records showed that dues were paid for so and so and so and so. Whether they paid them to me personally or whether I
17114 had asked, to pick a name out of the air, Sally Jones to go see Susie Smith to collect her dues and she was to bring them back, I would record that Susie Smith's dues were paid.

By Mr. Forer:

Q. Mrs. Markward, I want to ask you whether you were asked the following questions and gave the following answers in a hearing before the McCarthy Committee of February 23, 1954. The questioning at this point is by Senator Potter. I will read them to you from page 312 of the printed hearings.

"Senator Potter: Did I understand that you were treasurer of the Communist Political Association of Washington, D. C.?

"Mrs. Markward: Yes, sir.

"Senator Potter: As treasurer the members of the Association paid their dues to you?

"Mrs. Markward: During the time of the Communist Political Association the members themselves paid the dues directly to me. After the Communist Party was re-formed in 1945, and the membership was broken down into smaller cells or clubs, I got most of the dues from the secretary or another officer of the club. At that time I had occasion to meet with the officer of the club to find out the names of the members."

Were you asked those questions and did you
17115 give those answers? A. I did.

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Q. You testified in the proceeding before the Subversive Activities Control Board against the American Committee for Protection of Foreign Born on October 18, 1955, did you not? A. Yes, sir.

Q. I want to ask you whether you were asked the following questions and gave the following answers on cross-examination in that case. At page 3171:

"Question: When you were a member of the Northeast Club was Annie Lee Moss a member?

"Answer: She was.

"Question: When you refer to testifying in several loyalty board hearings among other loyalty hearings you testified in the case of Annie Lee Moss, did you not?

"Answer: I did."

Skipping a few questions and going to page 3172:

"Question: Now you know, do you not, that Mrs. Annie Lee Moss is presently employed by the Department of Defense?

17116 "Answer: That is what I read in the papers."

Were you asked those questions and did you give those answers? A. Yes, sir.

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17118 Q. Were you here when the hearing opened this afternoon and the Chairman opened with a statement——

Chairman Herbert: It is already a matter of record that she was.

17119 Mr. Forer: All right. It is a matter of record that she was here.

By Mr. Forer:

Q. I want to ask now, did you hear what the Chairman said? A. I did.

Q. I believe you testified in a number of cases before the Subversive Activities Control Board, is that correct? A. That is correct.

Q. That includes the Civil Rights Congress case? A. That is correct.

Q. The Labor Youth League case. Did you ever testify in that? A. Yes, sir.

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17122 Q. Are you receiving pay from the FBI at regular intervals, on a regular basis? A. No, sir.

Q. But you are getting paid as you render service from time to time, is that correct? A. From time to time, I still receive—I have in the past received money from the FBI. I don't anticipate any further receipt. I don't know.

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17124 Direct Examination

By Mr. Devine:

Q. Mrs. Markward, during your period in the Communist Party was Annie Lee Moss ever a functionary of the party? A. Not to my knowledge, no, sir.

Q. Was she what you might term a very active worker. A. Not to my knowledge.

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Q. When you were a member of the Northeast Club when you first joined up with the club of the party, how many members were in that club? A. My present recollection, sir, is that there must have been around 40. I had no way of having an exact count as to how many they had. I didn't see the records at that time.

17125 But that is my best estimate.

Q. How often did the club hold meetings? A. About every two weeks.

Q. What would you say would be the average attendance at club meetings? A. The average attendance I would believe would be 12 or 14, something like that.

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Q. Did you get an opportunity to know all the members of this club? A. I did not.

Q. Did you have any sort of recruitment drives during your early period in the Northeast Club? A. In the spring of 1944 a nation-wide recruiting drive of the Communist Party was conducted and the Northeast Club participated in that drive.

Q. Do you know how many or approximately how many new members were recruited during that drive? A. My recollection is that there must have been almost 70 members recruited at that time into the party. They didn't all remain members of the party. Technicalities prohibited some of them from remaining members.

17126 I think actually about that number were recruited.

Q. During what period chronologically were these new members added to the original 40? A. From February to the middle of May.

Q. Did you know all of these 70 new members? A. I did not.

Q. When did the Communist Party change its name and become the Communist Political Association in this area? A. In Washington it was around the first part of June.

Q. How many members were in the Communist Political Association around that time? A. Approximately 300 in the open part of the organizatin.

Q. Did you know all of these 300 members of the Communist Political Association? A. I did not.

Q. In the various hearings that you have appeared in have you ever identified physically Annie Lee Moss as a member of the Communist Party? A. I have never recognized her as a person whom I knew as a member of the Communist Party. My testimony has been as to what the records had to say about a person by the name of Annie Lee Moss.

Q. When you were questioned in the committee for Protection of Foreign Born case before this Board

17127 do you recall being asked by Mr. Forer the following question:

"When you were a member of the Northeast Club was Annie Lee Moss a member?" A. Yes.

Q. Do you recall what your answer was? A. Yes.

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Q. Do you recall being asked on cross-examination by Mr. Forer the following question:

"When you were a member of the Northeast Club was Annie Lee Moss a member?" Do you recall that question? A. Yes.

Q. What was your answer to that question? A. "yes."

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Q. Did Mr. Forer ask you what was the basis of your answer, to the best of your recollection? A. I don't recall that he did.

Q. What was the basis for the answer that you
17128 gave to the question at that time? A. According to my recollection of the records maintained in the Northeast Club by myself, Annie Lee Moss had been a member of that club when I was a member of the club.

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Recross Examination

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17131 Q. Mrs. Markward, I believe you have already testified in previous hearings that you made regular reports to the Federal Bureau of Investigation. A. That is correct.

Q. In these reports did you say that Annie Lee
17132 Moss was a member of the Comm nist Party? A. I did.

Q. You reported that to the Federal Bureau of Investigation? A. I did.

Mr. Forer: Mr. Chairman, we ask that the Petitioner be required to produce the report or reports made by Mrs. Markward to the FBI reporting that Annie Lee

Moss was a member of the Communist Party or the Communist Political Association.

Chairman Herbert: Your request is overruled.

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Mr. Duncan: Mrs. Markward, have you ever at any time in any proceeding of this nature made personal identification of Annie Lee Moss or is your testimony based on the records of the Communist Party?

The Witness: My information has been based on the official Communist Party records. I have never recognized her as a person whom I knew as a Communist Party member, personal identification in that way.

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## ADDITIONAL EXCERPTS FROM ORIGINAL HEARING

2226

**Benjamin Gitlow**
**Direct Testimony**

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Q. I would like to hand you this document, Mr. Gitlow, and ask you to state what it is, if you know.

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2227 The Witness: This is a copy of the documents and minutes which I submitted to the F.B.I., together with my interpretation.

By Mr. Paisley:

Q. Does that last paragraph on the last page——

Mr. Abt: Just a moment. This is most irregular, Mr. Chairman. The Attorney for the Government hands this man a document. We do not know what the document is. Now it appears that it is some kind of a memorandum that he wrote, we don't know when. We haven't seen the document. And he says it is his interpretation from documents that he has handed to the F.B.I.

Mr. LaFollette: That is all he has answered so far, isn't it? It hasn't been offered.

Mr. Abt. If this document is given to the witness as I take it it is, Mr. Chairman, for the purpose of refreshing his recollection, first we are entitled to know whether the Witness' recollection has been exhausted, and second, we are entitled to have the foundation laid for the document from which he is refreshing his recollection.

We have had none of that.

Mr. Paisley: If Counsel could just contain himself
2228 for just a moment, he could have the document. The question I asked of the witness was, whether or not the last paragraph refreshed his recollection. If he had said yes, then I was going to tender it to Counsel for his examination, if he wanted it.

2229 Mr. LaFollette: In other words, we are confronted again with a non-responsive answer to your question.

Mr. Paisley: Yes sir. I don't know whether it was non-responsive or not. I asked the witness first what it was, and second, did it refresh his recollection.

Mr. LaFollette: Does it refresh your recollection?

The Witness: Well, if I recall the question, and the answers I gave, he asked me whether this matter was discussed in Moscow when I was there, whether I heard any discussion, and I said "no."

Mr. LaFollette: That is right. Now let me ask you just about this document. Does that refresh your memory, Mr. Gitlow, now that you have looked at it?

The Witness: This doesn't refresh my memory any more to conversations concerning this matter in Moscow. Not at all.

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Mr. LaFollette: And what did you say this was? You say you recognized it?

The Witness: This here is a copy of my interpretation of the minutes and documents which I submitted to
2230 the Federal Bureau of Investigation.

Mr. LaFollette: And when was that made?

The Witness: That was made when I turned the documents over to them, right after I turned the documents over to them.

Mr. Abt: Mr. Chairman.

Mr. LaFollette: Mr. Abt.

Mr. Abt: This entire matter for this purpose is a complete tempest in a teapot because the witness's recollection, I take it, has not been refreshed.

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2753

**Cross-Examination**

Q. Then, while the documents were in the possession of the FBI, did you have occasion to confer about these documents with anybody in the FBI? A. No, I did not confer on these documents with the FBI after I turned them over to the FBI.

The only thing I did was, after the documents were turned over to the FBI, I sat down and went over each document and dictated an interpretation of each document, which I turned over to the FBI.

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2765 Q. Mr. Witness, two questions on the last subject about which I was making inquiry:

First, did you make any other memoranda with respect to the documents which you turned over to the F.B.I., other than the memoranda that you described this morning? A. I did not.

Q. Did you make any oral statements to the F.B.I., or to any representative of the Department of Justice, about which a written memorandum was made by them—that you know of? A. Nothing that I know of.

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Mr. Abt: Our motion is that the Panel, either by its order or by subpoena, direct the Petitioner to produce for the inspection of the respondent the following documents:

2766 First, all of the documents which this witness says he turned over to the Federal Bureau of Investigation.

Second, the memorandum, so-called explanatory memorandum, which this witness testified that he prepared and turned over to the Federal Bureau of Investigation,

Third, any other memorandum, either written by this witness or transcribed by the F.B.I. from an oral statement made by him, in the possession of the F.B.I.

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2771 Mr. Paisley: Do you want to hear from us, Mr. Chairman?

Mr. LaFollette: I would like to hear from you.

Mr. Paisley: In the first place, by way of a preface, I might say that I don't feel there is any substance whatsoever to the comments counsel has made upon the testimony of the witness, so I will pass that.

Now, he has cited no cases. The reason he cited no cases is because he has no law to back him up.

The files of the Department of Justice are confidential. There are many cases, as you know, where production has been sought and where production of the files of the executive departments was sought, and they have not been

2772 produced. He hasn't cited any case, because none would sustain his contention.

Now as to these three classes of documents he wants, there is no question whatsoever that he is not entitled to the first category and the third category.

Now, as to this second category, the so-called explanations which the witness says he dictated over a period of three or four weeks, in the offices of the F.B.I., about these various documents, he did testify that some of those he used when we went over the exhibits in preparation for this hearing.

All the cases that I have read on the subject of requiring the Government to produce documents from its files, from its confidential files, where the courts have held that op-

posing counsel was entitled to the documents, are cases where the witness has used the documents on the stand, for refreshing his memory.

Now, we attempted to refresh the recollection of the witness with two of those so-called explanations. We voluntarily turned them over to counsel because we realized he was entitled to have them. He is not entitled to have the others.

We resist the motion. He has furnished no grounds whatsoever for the granting of the motion and that is about all I have to say. If he wants to get into a legal argument, we can supply a brief to the Board on the subject. But
2773 we ought not to be placed in that defensive position when they have come forward affirmatively with nothing.

. . . . . .

2886 Mr. LaFollette: Please come to order.

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The motion made by the respondent on May 10, that the panel, either by order or subpoena, direct the Petitioner to produce for the inspection of the respondent the documents described in that motion, is denied.

. . . . . .

2893 Q. Mr. Witness, with respect to the exhibits that have been introduced here, through you, did you make a memorandum with respect to these exhibits? A. I made a memorandum at the time they were—right after they were turned over to the F.B.I.

Q. You made a memorandum with respect to the so-called minutes of the various meetings that have been introduced here as evidence? A. I did.

Mr. Marcantonio: Mr. Chairman, I now ask that a subpoena be made available to the respondent.

By Mr. Marcantonio:

Q. One more question: Are those memoranda now in the possession of the Federal Bureau of Investigation, as far as you know? A. As far as I know, they are.

Q. You made the memoranda in the office of the Federal Bureau of Investigation? A. In New York.

Q. In New York, New York. And you left the memoranda with the Bureau? A. I dictated them, and I suppose they typed them there.

2894 Mr. LaFollette: After this further cross examination, so that the record may be clear, do you wish to renew your motion?

Mr. Marcantonio: Not in the same form. I now ask for a subpoena. We want subpoenas at our disposal. I now make a formal request for subpoenas so that the respondent may serve those subpoenas on the Attorney General.

Mr. LaFollette: The ruling of the Panel is that the request is now, at this time, denied.

Mr. Marcantonio: When the Panel said "at this time"—

Mr. LaFollette: Well I mean, now denied. If there is any qualification in that, it is out. It is denied.

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2895 Mr. LaFollette: I understand what you want.

Let me say this: You are entitled to the possession of subpoenas. You are entitled to submit them, either in open hearing, or to any member of the Panel for signature, so that they may be issued.

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2896 Mr. Marcantonio: Now, we would like to have those subpoenas, Mr. Chairman, some time during the recess, so that that may be done today before this witness leaves the stand.

Mr. LaFollette: The Clerk will furnish them to counsel now.

Mr. Marcantonio: During the recess.

Mr. LaFollette: All right, you may have them during the recess, Mr. Marcantonio. There is no disposition, certainly on our part—I know on mine—to deny you the opportunity to make your record as clear as possible on the issues on which you wish to make it.

Mr. Marcantonio: Very well.

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6310

**Nathaniel Honig**

Cross-Examination

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Q. Were you the same Nathan Honig who testified before the Canwell Committee of the State of Washington on January 30, 1948? A. Yes, I don't remember the exact date, but I did so testify.

Q. But you do recall testifying before that committee? A. I do, yes.

Q. Do you recall it was in the year 1948? A. I am pretty sure it was, yes.

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Q. I now refer to page 212 of the Canwell Committee testimony. Do you remember giving this testimony? You were asked this question:

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6311 Q. Do you recall making this answer:

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6312 Q. Did you give that answer, Mr. Witness? A. That is substantially correct. The language is not mine throughout that proceeding, throughout the published proceedings. The language is changed a lot, but I did say those facts.

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6313 A. No. No, I did not, and as I said before, the transcript of that proceeding was very badly botched and I protested to the Canwell Committee about

that and about a lot of other things in there. I did not answer that way.

Q. Did you protest to the Canwell Committee about this answer? A. I protested about the entire thing.

Q. Did you protest about this particular answer that I have just read to you? A. I don't recall whether I specifically mentioned that, but I wrote a letter of protest to the committee on the entire transcript as soon as I received the transcript.

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6315 Mr. Marcantonio: Mr. Chairman, we would like to have a subpoena for the official reporter, duces tecum, to have the official notes.

Mr. Lafollette: You may have it. Understand, I am not going to let you put it on and hold up this cross-examination and put it on at this time, but you may have it subsequently.

Mr. Marcantonio: Yes. I merely asked for the subpoena.

Mr. Lafollette: Yes, you may have the subpoena.

Mr. Marcantonio: I merely want to point out, Mr. Chairman, that the volume of this testimony contains a list of the staff of the committee that made the investigation, including the clerical staff, including three official stenographers who took down the minutes, and we will want to subpoena such of those three stenographers who took those particular notes, with their notes.

Mr. LaFollette: You may have it.

6316 By Mr. Marcantonio:

Q. Do you have a copy of the letter you sent to this committee? A. No, I made no copy.

Q. Did you deliver the letter personally or did you mail it? A. I mailed.

Q. Did you receive an answer? A. I never received an answer.

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6318 A. I don't recall whether I referred specifically to that particular incident. I wrote the letter and I said that the transcript of my testimony was full of inaccuracies, full of grammatical errors to the extent, I believe I said—well, that is about what I said. I don't remember what specific instance. I did mention specific cases, but I don't remember what they were now.

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6370 Q. Mr. Witness, do you recall testifying on this subject in the matter of Bridges' deportation proceedings? A. Yes, I did.

Q. I am now reading from page 2215 of the Bridges versus Wixon case. Were you asked this question:

"Question: Do you remember testifying as a witness in a case entitled Chatham Shoe Company v. the Shoe Workers Industrial Union?"

And did you give this answer:

"Yes, I testified in a—I don't remember the name of the case, but it was a shoe case."

Do you recall being asked that question and making that answer? A. Yes, I do.

Q. Do you recall being asked this question:

"Do you remember that the trial took place before Mr. Justice Edward J. McGoldrick?"

And you said:

6371 "I don't remember the——"

And then the Inspector said, "McGoldrick," and spelled the word M-c-G-o-l-d-r-i-c-k." Do you recall that? A. I recall it. I don't remember the name, but I recall substantially that.

Q. Then were you asked this question and did you make this answer?

"Question: That took place in October 1933, didn't it?

"Answer: I think it did; I am not sure of the date."

Do you recall that question and that answer? A. I believe I do, yes.

Q. Then you were asked this question, were you not?

"Question: Isn't it true that in that case you appeared as a witness and you testified under oath in substance, that beginning with July 1, 1933, or approximately at that time, the Trade Union Unity League had discontinued and severed its affiliation with the Red International of Labor Unions?"

Do you recall being asked that question? A. Yes, except I don't recall the exact date you mentioned, but I am willing to accept that that is what I said.

Q. Then there was discussion between counsel
6372 and the Presiding Inspector, and then the Presiding Inspector said, "He asked whether you did testify as he has suggested."

Do you recall giving this answer?

"No, I did not testify in those words."

Do you recall saying that? A. No, but I would grant that I said it.

Q. Then were you asked this question and did you make these answers:

"Question: Did you testify to that in substance and effect?

"Answer: No; not in that substance and effect."

Do you recall giving that answer to that question? A. Not exactly, but I will grant that I might have said that, yes.

Q. Were you asked this question?

"You are sure of that?"

And your answer:

"Yes. I remember distinctly what I testified when I was sent there to testify."

Do you recall that question and that answer? A. I don't, but I don't deny it.

Q. You don't deny it. A. I have no reason to deny it. I just don't recall the exact wording.

Q. Do you admit making that answer to that
6373 question, Mr. Witness? A. Oh, I think so, yes.

Q. Continuing then on page 2219—in between

there was discussion between counsel and the presiding officer and then on page 2219 were you asked this question:

"Question: I will ask you now in the case that we have been talking about, the Chatham Shoe case in 1933, you did testify on the question of disaffiliation of the Trade Union Unity League from the Red International of Labor Unions?"

Then there was an objection. Then there was more colloquy. Then did you give this answer?

"Answer: I testified as to the relationship of the TUUL with the RILU. Yes, the question of disaffiliation or not disaffiliation would be part of what I testified about."

Do you recall giving that answer? A. I think I do, yes.

Q. Now continuing, page 2220, were you asked this question?

"Question: What in substance was your testimony on the question of disaffiliation?"

Do you recall being asked that question? A. Yes, I do.

Q. Do you recall making this answer?

6374 "Answer: I testified to the effect—I can't give exact words of course—to the effect, in substance, that the current literature of the Trade Union Unity League, literature then in use, did not show affiliation of the TUUL with the Red International Labor Unions. That was the substance, to the best of my recollection."

Do you recall giving that answer? A. I think I do, yes.

Q. After more discussion between counsel and the Presiding Officer, were you asked this question?

"Question: Mr. Honig, in the testimony that you gave on the question of disaffiliation"——

There was an interruption and more discussion, and then the question continued:

"—did you intend to give the impression that disaffiliation had occurred?"

Then there was an objection, a statement by the Presiding Officer, and then did you give this answer to the question:

"Did you intend to give the impression that disaffiliation had occurred?"

Mr. Witness, did you or did you not give the following answer:

"No, I merely intended to show as a factual—as a matter of fact, that the literature, the current
6375 literature of the Trade Union Unity League did not refer to any such affiliation. That is, most of the literature then being used. At the same time I was shown literature that still was in circulation in the Trade Union Unity League relating to the program—this is to the best of my memory, it is quite a long time ago. I was shown literature, I believe, by the court which still did refer to such affiliation with the RILU and I was asked if I could identify that as having been published by the TUUL or the Labor Unions, as the case may be, and I did so identify it. But I pointed out that this was not the literature, the latest literature showing the program, policy and so forth."

Did you give that answer, Mr. Witness? A. I believe I did, but is that all the answer?

Q. Did you give that answer? A. I believe I did, yes.

Q. We will come to some more. A. Sure.

Q. You believe you gave that answer? A. I believe I did. If you read it there, I believe I did.

Q. Now, were you asked this question? Do you remember this question, the same page:

"Is it correct, then, that you drew a distinc-
6376 tion in your testimony between the literature of the Trade Union Unity League prior to a certain period in which there was mention of a connection or affiliation, on the one hand, and literature after that certain period in which there was no mention of any such affiliation?"

Do you recall being asked that question? A. I think so, yes.

Q. Now, Mr. Witness, did you make this answer to that question?

"Answer: No, not that kind of a distinction. The distinction was trying, at least in my way, to draw there, was a distinction of date of publication of literature. I was just simply trying to show that this literature was published later than that literature and that, therefore, this was more current."

Did you make that answer? A. I think so. Probably, yes.

Q. Mr. Witness, I have been reading first on page 2215 and then from there I went to 2216, over to 2220, 2221, and 2222. I will ask you to look at what I have read to you, Mr. Witness, and I will ask you if any of those words that I read are inaccurate, represent any distortion of your testimony, or whether or not that is a correct transcript of the testimony that you gave in the case of Wixon versus Bridges.

* * * * * * * * * *

6377 Q. The question that I believe was pending was, does any of the testimony which I have read, Mr. Witness, and which you have now examined, represent any inaccuracy in the testimony that you gave before that committee? A. Could I explain my answer when I do give it?

Q. I am asking you very simply, does the testimony that you gave there, the printed testimony, the printed words, that I have shown you there, represent any inaccuracy in the transcript of the testimony that you gave?

Mr. Story: Mr Chairman——

6378 Mr. LaFollette: I will let him answer.

Mr. Story: I think, Mr. Marcantonio should go back to his complete answer which starts on page 2213 and carry it all the way through.

Mr. LaFollette: I thought Mr. Marcantonio read the complete question and answer.

Mr. Marcantonio: I read everything that is pertinent, and I am certain that the Panel will agree with me when they examine that testimony. The question I am asking him now is a very simple question, because this witness has challenged the accuracy of one transcript this morning.

Mr. Story: With that part of his answer taken out of context, Mr. Chairman, the witness can not answer. Let us get his entire answer to that question starting on page 2213 and carrying it through or as far as Mr. Marcantonio would like to carry it, and then we have no objection.

* * * * * * * * * *

Q. Do you challenge the accuracy of that transcript? A. I don't challenge the accuracy of the transcript, no, but I challenge—I simply state that you asked me about a partial answer I gave. You took it out of the context of my testimony here, and it simply is meaningless without the entire thing.

* * * * * * * * * *

6379 Mr. Story: Mr. Chairman, that is still not fair. We have so much colloquy in this testimony here where there is no continuity in his answer unless you get his complete testimony on this particular point, and we object for that reason.

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6380 Mr. Marcantonio: So there will be no argument about it. You want us to read on page 2213, Mr. Story, is that correct?

Mr. Story: Yes.

By Mr. Marcantonio:

Q. "Question: All right. During that period of time did disaffiliation occur between the Trade Union Unity League and the Red International of Labor Unions?"

* * * * * * * * * *

6381 Were you asked that question, Mr. Witness? A. Yes.

Q. Then there is a statement by the Presiding Inspector who said: "I didn't get the word."

Mr. Gladstein, the attorney, said: "Disaffiliation." And then did you give the following answer, Mr. Witness?

"No formal disaffiliation occurred. It was decided, I believe, perhaps six months or eight months before I sailed for the Soviet Union, that we would drop from, for instance, the masthead of Labor Unity, it might have been before that, but some time much later after I became editor of Labor Unity anyway, we would drop the line in the masthead of Labor Unity 'affiliated with the Red International of Labor Unions' and that in any future pamphlets or publications gotten out by the Trade Union Unity League or sponsored by the Labor Unity, that any mention of that affiliation would be dropped; not denying it, but simply dropping any reference to it."

Did you give that answer? A. Yes.

Q. Then you were asked this question:

"Then is that the only thing that happened that would indicate disaffiliation or an effort at it?"

Then there was a statement by Government Counsel. I will read it:

6382 "Mr. Del Guercio: That isn't what the witness said would indicate disaffiliation."

Then defendant's lawyer, Mr. Gladstein, said:

"I am asking him whether there is anything else that took place to indicate disaffiliation."

Then the Presiding Inspector said:

"His interpretation isn't of course material. I think the witness understands what is asked."

Then did you give this answer?

"Answer: There wasn't anything that actually occurred to indicate disaffiliation, because I remember the

meeting of the —or, it was taken up at several meetings of the national executive board of the TUUL, where it was distinctly stressed they were still to be affiliated with the Red International of Trade Unions and would continue to send representatives to the Red International of Trade Unions, but we were to simply drop reference to that in connection in any publications."

Did you give that answer? A. Yes.

Q. Then were you asked:

"Well, then, your testimony would be that there was no disaffiliation."

And you gave this answer, did you not?

"My testimony is that there was no disaffiliation
6383 while I was editor of Labor Unity."

Wasn't that your answer? A. Say that again.

Q. "Answer: My testimony is that there was no disaffiliation while I was editor of Labor Unity."

A. Yes. Go on.

Q. Did you make that answer? A. I believe I did.

* * * * * * * * * * * *

6385 Q. Now, what question do you want me to ask you again that I read to you?

* * * * * * * * * * *

The Witness: The question was, "did you intend to give the impression that disaffiliation had occurred?" and my answer here was "no, I merely intended to show as
6386 a factual—as a matter of fact that the literature, the current literature of the Trade Union League did not refer to any such affiliation."

But my answer was contingent on the whole thing and what I meant to say—the accentuation of that word "no" as Mr. Marcantonio gave it would mean on my part a complete denial. What I was trying to show there was what I was trying to show today in connection with what I have

already said: Not merely was I trying to give the impression that disaffiliation had occurred but also that I was using this literature at the hearing in an attempt to show that to the court.

* * * * * * * * * * *

6388 Q. Now, Mr. Witness, when you testified here that your testimony in the Shoe Workers case was a lie—Do you still say you were lying then? A. I was lying, you mean, in the Shoe Workers case?

Q. Yes. A. Yes, I was lying when I testified in that Shoe Workers case.

* * * * * * * * * * *

6446 Q. At page 212, Canwell: Do you recall being asked this question, reading from page 212 of the Canwell testimony:

> "Question: Now, before you went to Russia did you know that the Communist Party from time—the Communist International—from time to time sent money into this country to finance activities in this country?"

Do you recall now being asked that question? A. I think I do, yes.

Q. Do you recall the answer that you gave there? A. No, I don't.

Q. Do you recall whether or not in the letter that you sent, that you say you sent to the Canwell committee as to whether you pointed out any inaccuracies as to the answer to that question? A. I don't recall whether I did on that particular score.

Q. Do you recall making this answer?

> "Answer: I knew that because when I was editor of Labor Unity I met regularly with the National Executive Committee of the Trade Union Unity League, and I knew also that very often what
> 6447 little pay I got as editor depended on whether

that money had arrived, but I was pretty close to Jack Stachel, Bill Foster, William Z. Foster, who was head of the Trade Union Unity League, and they were members of the Political Bureau of the Party and they kept me in their confidence and they would tell me they were expecting some money through Allen or through Wagner and so forth. I didn't have to have a diagram drawn for me."

Do you recall giving that answer? A. Now that you read it, I do.

Q. You recall it now, don't you? A. Yes.

Q. Did you give any other answer in connection with subsidies as to how you knew? A. To Houston? To the Canwell Committee?

Q. Yes. A. I don't remember whether I did.

Q. That answer was the whole answer you gave with respect to subsidy, isn't that right? A. I don't remember whether I gave any additional answer. I don't remember my testimony exactly.

Q. That is the only answer you gave to that question, isn't that right? I will show it to you (placing book before the witness). It is at the bottom of page 212. A. I believe that probably was the only answer. I see
6448 no other.

Q. Is Weiner's name in that answer? A. I didn't hear you.

Q. Did you mention Weiner's name in that answer that you gave, William Weiner, the name of William Weiner? A. I apparently didn't.

Q. Did you mention a conversation that you said you had with Kutnik? A. No, I didn't, apparently.

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6488 Redirect Examination

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Q. Mr. Honig, you have testified on cross-examination that you wrote a letter to the Canwell Committee of Washington State, the Un-American Activities Committee in Washington State, protesting the errors and the incorrect reporting of your testimony in that proceeding, is that correct? A. Yes.

6489 Q. Do you recall approximately how long after you testified you wrote this letter? A. On receipt of a copy of the testimony from the Canwell Committee, which I am pretty sure was within six months after I testified.

Mr. Marcantonio: Six months after he testified?

The Witness: Within six months after I testified.

May I elaborate briefly on that. What I mean to say is that I didn't receive a copy of my testimony, a copy of this book which contained my testimony, until about six months, within six months, some time within six months after I testified, and within a day or two after I had received it I wrote the letter.

By Mr. Story:

Q. Is that the same book that Mr. Marcantonio has shown you from time to time? A. Yes. That is the first volume of the proceedings of the Canwell Committee.

7816

**Mary Stalcup Markward**

* * * * * * * * *

Cross-Examination

* * * * * * * * *

Q. You testified in this proceeding, and I am now reading your testimony, and ask you if you were

7817 asked this question and did you make this answer, at page 5890:

"Question: Will you tell us what transpired at that meeting?

"Answer: The chief topic of discussion at that meeting was the question of the statement which had been made to Thorez, one of the French Party leaders, that the Communist Party members of France would not bear arms against the Soviet Union. This was the essence of what the statement was. The Communist Party leaders around the world had made similar statements. Eugene Dennis, I believe, in the name of the Communist Party of the United States had issued a similar statement. I believe William Foster joined with him in this statement, if I am not mistaken. Phil Frankfeld had made a statement to the Baltimore Sun along the same line, stating that the members of the Communist Party would not bear arms in any conflict between the United States and the Soviet Union."

Do you recall giving that testimony here? A. Yes.

Q. You say that you read the exhibit which I now show you, Exhibit 331, "United States Communists will oppose Wall Street War, says Foster and Dennis"? A. Yes.

Q. You also stated that you read the article 7818 that appears in Exhibit 332, being the Daily Worker, Sunday, March 13, 1949, bearing the title "Frankfeld Answers Sun Paper." A. Yes.

Q. Just keep these before you while I ask you the following questions.

Having read that, referring now to Exhibit 331, will you tell us where Mr. Foster or Mr. Dennis states that they would not bear arms against the Soviet Union in any war between the United States and the Soviet Union? A. I answered the question about what the discussion was in the meeting, not what the statements say. The same speaks for itself.

Q. I know, but you said this statement was read at the meeting, and it was the subject of the discussion.

I now ask you where in this statement you find that either Mr. Foster or Mr. Dennis said that they would not bear arms in any war between the Soviet Union and our own country. A. I do not see that in this statement.

Q. I beg your pardon? A. Those words in that form are not in this statement.

Q. Coming back to your testimony, page 5890, in the light of your statement to the question previous to the last one that I asked you, you made this statement, did you not? "The Communist Party leaders around the world have made similar statements." Do you
7819 recall giving that testimony here? A. I do.

Q. You also said in that testimony at page 5890, "Eugene Dennis, I believe, in the name of the Communist Party of the United States, had issued a similar statement." Do you recall saying that here? A. Yes, sir.

Q. Coming to Exhibit 332, I come back to your testimony in connection with that exhibit, page 5890, you said, did you not, "Phil Frankfeld had made a statement to the Baltimore Sun along the same line, stating that the members of the Communist Party would not bear arms in any conflict between the United States and the Soviet Union." Wasn't that your testimony? A. Yes, sir. I think the statement in these things where they say they will oppose such a war, called it an unjust war, and they also said they would not take part in such a war.

Q. We are talking about bearing arms. You said here in your testimony, and I am asking you again the question I asked you before, did you or did you not testify as follows, reading from page 5890 of the transcript of this proceeding which contains your testimony:

"Phil Frankfeld had made a statement to the Baltimore Sun along the same line, stating that the members of the Communist Party would not bear arms in any conflict between the United States and the
7820 Soviet Union." That was your testimony here, was it not? A. That is right.

Q. Now I direct your attention to Exhibit 332, "Frankfeld Answers Sunpaper." Will you show us where Mr. Frankfeld states there that the members of the Communist Party will not bear arms in any conflict between the United States and the Soviet Union? A. It does not state that in this paper. He stated that at the meeting which we held on this date.

Q. You stated here on page 5890 that Phil Frankfeld had made a statement to the Press, to the Baltimore Sun, specifically, along the same line, that the members of the Communist Party would not bear arms in any conflict between the United States and the Soviet Union. Now you say he did not make that statement or that he did make the statement to the Baltimore Sun; which is it? A. He made the statement in the meeting in which we were discussing the statement he had made to the Baltimore Sun, and my recollection very evidently has confused the actual statement he made to the Sun and the discussion of the statement he made to the Sun.

Q. So your recollection was confused on the subject, was it not? A. It was confused on the actual wording of what he said to the Sun.

* * * * * * * * * * *

7821 Q. As a matter of fact, calling your attention to Exhibit 332, I call your attention to the following language:

> "Striking out against the misrepresentations of what form opposition to war would take, he declared"—

This is Mr. Frankfeld's statement.

> "—if you mean strikes and sabotage and all that marlarke, the answer is definitely no, we would mobilize the American people ideologically and politically against the war."

Isn't that the statement before you? A. Yes.

Q. Did you make a report in writing to the FBI with respect to what Mr. Frankfeld had declared on this issue of possible conflict between the Soviet Union and the United States? A. I made a report at that time of exactly what transpired at that meeting.

Q. And the report was in writing? A. That is correct.

Q. Did your report conflict with the report that appears in the news story and the statement of Frankfeld
7822 in Exhibit 332? A. The FBI had a copy of the Sunpaper, what the Sunpaper had to say. I assume they also had a copy of this Daily Worker. I reported the discussion which took place at this meeting, which did contain the essence of what I had to say about not participating in a war with the Soviet Union.

Q. Do you have a copy of that report with you ? A. I do not.

Q. Do you have it at home? A. I do not.

Q. Do you have a copy of it anywhere? A. I do not.

Mr. Abt: If the Panel please, on the basis of this witness' testimony, we now move that the Government be ordered to produce a copy of the report to the FBI which this witness says that she made, in as much as there is a clear conflict between her testimony on direct examination and what she alleges the content of that report is, as well as the exhibits themselves.

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7836 Mr. LaFollette: No. We may proceed. The motion is denied, and the exception is granted.

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13967

**Louis Francis Budenz**

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Cross-Examination

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Q. Yes. How soon after October 10, 1945, which was the date you say you left the Communist Party, did

you obtain a position teaching at the Notre Dame University? A. How long after I left the Party did I obtain the position?

13968 Q. That is right. You say you left the Party on October 10, 1945. Is that right? A. Yes, sir.

Q. How long after that did you obtain the position teaching? A. I was there on the 12th.

Q. You were there on the 12th? A. 12th of October.

Q. Two days afterward. A. That is correct.

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13988 Q. After you left the Communist Party you had a period of silence for a period of a year, did you not? A. That is right, I did, yes, sir.

Q. That is, a year in which you made no public appearance? A. That was an agreement with the Univer-
13989 sity of Notre Dame.

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13990 Q. During this period of silence, however, you did have discussions with the FBI, did you not, during that year? A. One discussion, which lasted for three days. I did not wish to see them, by the way, but I finally agreed to do so.

Q. Yes. In this discussion you gave the FBI infor-
13991 mation about the Communist Party, did you not? A. Yes, sir, some information.

Q. How soon after you left the Communist Party did you start giving information to the FBI? A. I should say approximately three, about six months is my recollection. It may have been a little earlier, four to six months.

Q. The first three days that you were at Notre Dame did you give any information to the FBI at that time? A. No, sir. I didn't see any FBI representative until after several months at Notre Dame.

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14001 Q. So as to clarify the record, you said this
14002 morning that you spent three days with the FBI, and

that was four to six months after coming to Notre Dame. A. That was my remembrance, yes, sir. That was the first meeting.

Q. Yes. How soon after that did you have another meeting? A. I had, I think, one more meeting very shortly thereafter.

Q. You say shortly thereafter. Would you say a week thereafter or two? A. I would say several weeks probably.

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Q. Prior to November 22, 1946, how much time did you spend with the FBI? A. I can't say that exactly, but I should say there were visits in New York in 1946. I should say 100 hours or more.

Q. One hundred hours or more. These 100 hours were broken up into quite a number of interviews and 14003 visits? A. It may have been even more than that.

Q. Can you give us approximately how many interviews and visits this constituted? A. There were a number of days on these first two visits that ran over several days, and then there were intermittent connections with the FBI. Then in the fall I had a number of visits from the FBI.

Q. During these visits, all of these numerous visits that took place prior to November 22, 1946, which was the date of your first public appearance, did you give any written reports to the FBI? A. No, sir.

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14076 Mr. Abt:

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14078 On that state of the record we submit, if the Panel please, that we are entitled to all reports made to the FBI by this witness dealing with any and all conversations between himself, Weiner and Childs with reference to the financing of the Midwest Daily Record.

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For the reasons that I have stated therefore we move for the production of those reports.

14081 Mr. Brown: The motion is denied.

SECOND SUPPLEMENTAL JOINT APPENDIX

IN THE

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## No. 11,850

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COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,
*Petitioner,*

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD, *Respondent*

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**On Review of Order of Subversive Activities Control Board**

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IN THE

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 11,850

---

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,
*Petitioner,*

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD, *Respondent*

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**On Review of Order of Subversive Activities Control Board**

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## SECOND SUPPLEMENTAL JOINT APPENDIX

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## EXCERPTS FROM PROCEEDINGS BEFORE SUBVERSIVE ACTIVITIES CONTROL BOARD AFTER SECOND REMAND

### Excerpts From Hearing Before Examiner, Board Member Cherry. July 22. 1958

17716 **Mrs. Mary Markward**

was recalled as a witness and testified further as follows:

* * * * * * * * *

Cross Examination

By Mr. Forer:

Q. Mrs. Markward, before 1940 you lived in
17717 Chesterbrook, Virginia, is that correct? A. That is correct.

Q. And in 1940 you moved to the District of Columbia, right? A. Correct.

Q. And then in April of 1947 you moved back to Chesterbrook, Virginia; is that right? A. That is right.

Q. But between 1940, when you moved to Washington from Chesterbrook, in April of 1947, you lived continually in Washington, D. C.; right? A. That is correct.

Q. Then in 1953 you moved from Chesterbrook to your present address at Silver Spring, Maryland, right? A. That is correct.

Q. Now, there was a period of time when you were paid, I believe it was $20 a week, by the Communist Party for working in the office, is that correct? A. That is right.

Q. And that $20 salary started in October of 1945, is that right? A. To the best of my recollection, sir, that is about the time.

Q. And how long did it go on; when did it stop? A. Sometime in the following or during the following
17718 summer. If I may go on and explain a little more, so we don't get in a hassle, I was not continually paid for doing work in the office.

In about February they hired another part-time office worker, but continued my $20 a week as part-time, for

payment as a part-time functionary, and part-time payment as a functionary, excuse me, I was being paid for my work as secretary-treasurer of the Party.

Q. When did the $20 a week salary from the Communist Party stop? A. During the summer of 1946.

* * * * * * * * * *

17725 Q. Now, what were your other expenses for your work for the F.B.I. in the Communist Party? A. Well, one major expense was baby sitter after my child was born in 1947.

Q. Now, just a minute. When was your child born? A. In July of 1947.

Q. And when did you start having a baby sitter for the child? A. The first of September.

Q. And how long did you employ the baby sitter? A. I had baby sitters as long as I was active in the
17726 Party, not necessarily the same one.

Q. Well, now, will you answer my question? Until when did you employ a baby sitter? A. Until October of 1949.

Q. And on what basis did you employ the baby sitter? I mean did the baby sitter live at your home or come when called, or how did your work it? A. For a while I had a baby sitter that lived in my home and stayed with the baby 24 hours a day because I was on call to go out 24 hours a day.

Q. How long a while was that? A. For one year.

Q. When? A. From the first of September, 1947 until the first of September, 1948, approximately.

Q. And then you tapered off on your baby sitter after that? A. No, it increased after that. The young lady continued to live at my home and went back to school, so I paid her to stay with the child at night and hired another sitter to be with the child in the daytime, so my sitter fees increased.

Q. That was also—you had sitters then for 24 hours a day after September 1948? A. That is right.

Q. How long did that continue? A. Until
17727 October of 1949.

Q. I see. Now, what other expenses did you have? A. The most major expense I had was transportation.

Q. From where to where? A. Mostly around town to get from meeting to meeting, from being with a Party member to another Party member and the various things that I had to do in my capacity as an officer of the Communist Party.

Q. This was streetcar fares and that sort of thing? A. It was mostly taxi fares. I got to cover more people by taking cab fares. I wouldn't say I never took a streetcar, but I did use an awful lot of cabs, and also in order to get to where my husband could pick me up to go home I would have to take a cab.

Q. Could you estimate how much money you spent on transportation in connection with your work for the F.B.I.? A. No, sir.

Q. Let's go back a moment to the baby sitters. How much did you pay these baby sitters? A. I was paying the girl $15 a week that first year and I paid about $25 a week when I had two of them.

Q. What other expenses did you have? A. Train fare from Washington to Baltimore.

Q. How often—well, how often did you take the train from Washington to Baltimore? A. It depended
17728 on the type of activity I was involved in.

Q. Well, was there a period when you regularly traveled at more or less regular intervals from Washington to Baltimore? A. There was a period when I went once a week; there was a period when I went three times a week.

Q. When did you go three times a week, during what period? A. The early part of—well, all of 1946 and into 1947 too, some of 1947.

Q. I am afraid I didn't quite get that. 1946 and how much of '47? A. Some of 1947, I said.

Q. How much of 1947 is "some?" A. Well, about the first two months, and then—it was the first two months and the last two months, that would be four months, and—

Q. That is when you were going to Baltimore three times a week? A. Approximately.

Q. And when were you going to Baltimore once a week? A. In 1946.

Q. Well, in 1946 you were going to Baltimore three times a week, you just told us. A. You have got me lost.

17729 At the end of 1945, before I started three times a week when I got on the District Board in January of 1946.

Q. All right, when were you going to Baltimore regularly once a week? A. At the end of 1945.

Q. For how long in 1945? A. Two months.

Q. Now, aside from that—by the way, you went by train regularly? A. Usually.

Q. If you didn't go by train, someone drove you, is that it? A. That is right.

Q. When they drove you, you didn't pay for the ride? A. That is right.

Q. Now, aside from these periods you have told us about, when you were going to Baltimore at these regular intervals, how often did you go to Baltimore by train or by bus? A. Once a month almost all the time I was in the Party. When I wasn't going more often I went at least once a month, except when I was in the hospital being sick or having a baby or something like that.

Q. And those times you went by train? A. Almost always.

17730 Q. But sometimes you went by car? A. Occasionally.

. . . . . .

17732 Q. Now, Mrs. Markward, eventually you reported to the Bureau of Internal Revenue the money you had received from the F.B.I., is that correct? A. That is correct.

Q. And in your return did you deduct your expenditures? A. I figured my expenditures to the best of my recollection.

Q. But you did estimate them for the purposes of your income tax return? A. I did, sir.

Q. When did you file this return?

. . . . . .

A. It was filed in February of 1954.

. . . . . .

17736 Q. Well, can you tell us how much money you owed the Bureau of Internal Revenue on those F.B.I. payments which you reported in 1954? A. My recollection is I paid them something over $1500.

. . . . . .

Q. And that was after you had deducted expenses for these various years? A. That is right.

Mr. Cherry: And that covered what years, now?

By Mr. Forer:

Q. Well, what years did that cover? A. I filed the reports for 1943 through 1950 and I assume I was billed for everything I filed the reports for; that is what I was billed for.

. . . . . .

17737 Q. Now, you became sick in October of 1949? A. That is correct. No, sir, I became—

Q. Well, let me put it this way. You became sick enough so that you were unable to do this work in October of 1949? A. That is correct.

Q. And, as a matter of fact, you were paralyzed for several years and unable to do any work? A. I was paralyzed for a few months, completely paralyzed, but I wasn't able to go back into this activity. I was able to take care of my home.

Q. For a few months you were completely paralyzed then after that you were able to stay home, but you weren't

able to be active in doing this work that you had been doing before? A. That is correct.

Q. So that from October, 1949, you never went back into this life which gave rise to these expenses that you have been telling us about. Is that correct? A. That is correct.

17738 Q. Well, did you render any service to the F.B.I. after October 1949? A. In consultations, and that type of activity I did.

Q. You mean they would come to see you and confer with you and they would pay you for the information you gave in those conferences, is that about it? A. I never understood they were paying me for the information. They did still give me funds from time to time.

Q. But you weren't doing anything else for them besides talking to them in conferences? A. That is right.

Q. And you did not—these funds you also reported? A. What is that?

Q. These funds? A. Yes, sir.

Q. You didn't report them as gifts? A. I reported the funds on my income—

Q. As income? A. That is right.

Q. All right. So that after, from October, 1949 on, you didn't have expenses for dues in the Communist Party, did you? A. I paid dues through January of 1950.

Q. At what rate? A. Thirty-five cents, my recollection is.

17739 Q. Thirty-five cents a month? A. I think so.

Q. Did you pay any contributions during that period? A. No, sir.

Q. Did you buy any Communist literature during that period? A. I wasn't out of the house during that period? A. I didn't do anything.

Q. So your answer is no? A. That is right.

Q. And, of course, you didn't pay for travel to Baltimore or whatever expenses you paid for baby sitters was at-

tributable to your illness, not for working in the Communist Party, correct? A. That is correct.

* * * * * * * * * * * *

17741 Q. Well, Mrs. Markward, I believe you told us from October, 1949 on, you had no more of these expenses with the exception of thirty-five cents a month for dues. Your income, nevertheless continued from the Federal Bureau of Investigation, according to my information.

For example, on November 8, 1949, you received $150. On December 13, 1949 you received $100. During
17742 1950 you received $450. In 1951, prior to September 27th, you received about $200.

Now, when you testified in September 1951, were you not aware that you had been receiving, since you became inactive in the Party, money from the F.B.I. which was more than you had been spending for these expenses? Weren't you aware of that? A. Well, this is going to get a little involved here again, Mr. Forer. I had expenses there no one had anticipated before, namely, medical and doctor bills. Now, the doctors don't know what caused my illness, but the Veterans Administration recognizes this illness as a service-connected disability. I believe that my activity in the Communist Party caused my illness, and I also believe—I don't know what was in the F.B.I.'s mind—I can't read it, that they were in some way trying to make me at least not unable to keep my head above water until I got my hospital and doctor bills covered to take care of my medical expenses, which are still continuing.

Q. Then when— A. When I went into expenses, I didn't list that as a necessary expense of the thing, but I say I can't help feeling that it is connected.

* * * * * * * * * * * *

17743 Q. Yes, when you made out your income tax return, did you deduct your medical bills? I mean deduct it from these F.B.I. payments? A. I know what

you are saying, and I am thinking. I know it was discussed. I do not recall exactly whether or not the Internal Revenue allowed it or not.

• • • • • • • • • • • •

Q. Mrs. Markward, on September 27, 1941, Mr. Taylor asked you to explain what sort of things these expenses were, and he even said, "make exactly clear just what sort of arrangements you had," and your answer was as follows:

"Answer: In this type of activity I was doing it was very necessary to pay dues, to make contributions, to buy literature, that type of thing, and other incidental things.

"Question: Transportation to Washington?

"Answer: Yes, that was part of it."

17744 Now, which one of these things you have mentioned, dues, contributions, literature, that type of thing, other incidental things, and transportation to Washington—which of those things in your mind included the expenses of your illness? A. I would have to answer that, as I understood his question and understood it as you read it right now, they were talking about expenses I had during the time I was active.

Your last question you asked me was the expenses I had after I ceased being active. I say I don't know that is why the F.B.I. paid me. I know that that is what most of it was used for. If they hadn't paid it to me, I would have found the money in some way in order to pay that.

Q. But, Mrs. Markward, even after October—after you became ill and inactive, you were still supplying the Federal Bureau of Investigation with information, were you not? A. To the best of my ability.

Q. Now, I want to invite your attention, in lieu of your latter explanation that you understood that Mr. Taylor's question related to the time you were active in the Party, was that your explanation? Wasn't that your explanation as to why you didn't mention your medical illness at the time? A. That is part of the explanation.

Q. Is there some other part? What is the other part? A. There are a lot of expenses that I had that haven't been mentioned yet, and I can't recall them right now,
17745 but there are other expenses that I have had and will keep cropping up—

Q. I am afraid we don't understand each other. I was asking you to explain why it was that when you listed your expenses, or type of expenses for Mr. Taylor, you listed paying dues of thirty-five cents a month, or up to a dollar a month, which is what you told us about, and buying literature of a few dollars, and you never listed anything as big as the expenses of your illness, and you replied that you construed Mr. Taylor's question to relate to the period when you were actually active in the Party, before October of '49. Isn't that what happened?

. . . . . .

Q. Do you understand the question, Mrs. Markward? A. You are asking me if I understood Mr. Taylor's question to indicate before 1949?

Q. Isn't that what you told me just a few minutes ago? Isn't that what you told me? A. As I say, I don't think we are clear. My answer to that is that Mr. Taylor asked me what type of expenses I had while I was active in the Party and I answered him.

17746 Q. And why did you leave out your medical expenses? A. Because they didn't occur while I was active in the Party.

Q. That is why you left them—so you thought Mr. Taylor was only asking you about expenses while you were active in the Party? A. That is my—

Q. That is your explanation? A. Well, I say that is part of my explanation. During my previous answer some 20 minutes back, I said it is still not clearly exactly whether or not my illness is particularly due to my work in the Party. Some people recognize it is, some say it is not. I am not certain, and at that time I did not have a doctor or a legal opinion on whether it was an accept-

able expense, so I did not give my illness as an expense of my activity in the Party.

Q. But the first part of your explanation is that you understood that Mr. Taylor was asking you about the time you were active in the Party. Now, I want to invite your attention to the preceding page, the page preceding what I just read to you.

Now, you see here where Mr. Taylor was still questioning you and he began this line of questioning as follows:

"Question: While you were supplying the Federal Bureau of Investigation with information, Mrs. Mark-
17747 ward, were you paid any salary by them? What sort of financial arrangements did you have with them?

"Answer: I was not paid a salary by the Federal Bureau of Investigation. Nothing I did for my government was contingent upon receipt of any money from the F.B.I. or any other government agency."

Then there was a colloquy, and the next question was the question I read before, namely:

"By Mr. Taylor:

"Question: Did you receive any money from them at all?

"Answer: I did receive contributions for the expense of the work I was doing from time to time."

And so forth.

Now, having read the question by Mr. Taylor which introduced this line of questioning, do you still abide by your explanation that at least one reason why you omitted medical expenses when you gave your answer in September of 1951 was because you thought that Mr. Taylor was only referring to the period you were active in the Party, that is the period before October, 1949? Do you still abide by that?

. . . . . .

A. Yes, sir.

. . . . . .

17751 Q. Mrs. Markward, I now show you what has been admitted in evidence as Respondent's exhibit—we don't know the number at the moment—and which is a compilation of the payments made to you by the Federal Bureau of Investigation.

Let me ask you first, have you ever seen this compilation —not necessarily this copy, but any copy of this 17752 compilation before? A. Yes, sir.

Q. You have seen it? When did you last see it? A. First and last, I saw it about a week ago.

Q. You don't challenge the accuracy of it, do you? A. No, sir.

Q. Now, I notice here— A. I don't challenge the accuracy of the amounts that were paid to me, sir. Let me put it that way.

. . . . . .

17753 Q. Now, Mrs. Markward, do you recall testifying in the trial of Marie Richardson? A. Yes, sir.

Q. That was in the U. S. District Court for the District of Columbia? It was a criminal trial, was it not? A. That is right.

Q. Do you remember when you testified there? A. It would have been in about February or March of 1952, I believe.

Q. Now, I just want to show you your testimony that you gave in the Richardson case. This is from the ap- 17754 pendix on appeal and at page 55 I invite your attention to the fact that that is where your testimony begins—do you see that? A. Yes.

. . . . . .

Q. I want to ask you whether you were asked the following questions and whether you gave the following answers:

"Question: Now, you have just answered Mr. Hicks by saying that you were paid for your services and for your expenses, is that correct?

"Answer: Yes."

Were you asked that question and did you give that answer on cross examination? A. To the best of my recollection, yes.

Q. Now, it would be better perhaps if I went back and started earlier with what Mr. Hicks asked you. Were you asked the following questions and did you give the following answers on direct examination by Mr. Hicks:

"Question: Mrs. Markward, did you receive any expense money or any other funds from the Federal Bureau of Investigation during this period from 1943 to 1949 or 1950, whenever it was?

"Answer: Yes, I did.

17755 "Question: How were you paid, on what basis?

"Answer: I guess I received money for services and expenses during the time that I did this activity. I was not salaried, as far as that. I mean any particular amount per week for salary or anything like that.

"Question: Was it agreed in advance with the F.B.I. what you would be given for expenses?

"Answer: No, it was not."

Were you asked those questions and did you give those answers on direct examination in the Richardson trial? A. To the best of my recollection, I did.

Q. All right, now, let's go to the cross-examination.

"Question: Now, you have just answered Mr. Hicks by saying that you were paid for your services and for your expenses, is that correct?

"Answer: Yes.

"Question: What was your plan with respect to that matter?

"Answer: I volunteered to do this service without compensation. Subsequently, after I had found out that it

would be possible for me to join the Party, the F.B.I. agent told me they would be able to furnish me from time to time with certain funds to better help me carry out this activity because he did not feel it was necessarily proper for a citizen to be put to all this expense out of their own pocket.

17756 "Question: Now, when you say all this expense, Madam, will you tell us as well as you can how much you were paid in the nature of expenses and how much in the way of salary, compensation, or whatever you may choose to refer to it as?

"Answer: I can't give you a differentiation. At irregular times I received irregular amounts of money which included expenses, and if I had any left over I suppose that is what went to service.

"Question: Would you say if you had anything left over you would submit to the F.B.I. an expense account?"

I will re-read that.

"Question: When you say if you had anything left over, would you submit to the F.B.I. an expense account?

"Answer: I did not.

"Question: So when you speak of expenses, you were given an amount without regard to what your expenses actually were, is that correct?

"Answer: There was some regardless of what the expenses actually were because I didn't have—I didn't get rich while I was doing this by no means. I put everything I had in the way of anything into what I was doing over these years.

"Question: I am not making a suggestion that you got rich, Madam. I am trying to confine it, if I can, to what amounts you were paid and if there were any allocations with respect to expenses, and with respect to which

17757 you were being paid for services I would like for you to tell us.

"Answer: There was no allocation.

"Question: How often did you receive these amounts?

"Answer: It varied with the frequency of my contacts with the Federal Bureau of Investigation which varied from a few at a time to periods when several months elapsed.

"Question: And so sometimes over a period when you received numerous contacts you were again paid—

"Answer: No, I did not say that. I said that there were times when several months elapsed that I didn't have any contact with the F.B.I.

"Question: Can you give us any idea what these respective amounts were?

"Answer: I can't recall. I believe the first time I received any fund it was something like $4, but after that I don't recall what funds I received. It was sufficient to take care of; for instance, getting a baby sitter after my child was born when I had to have a baby sitter 24 hours a day.

"Question: You were connected, Madam, between 1943 and 1949?

"Answer: That is right.

"Question: And you received money on various occasions, I presume, during that time?

"Answer: That is right.

"Question: How often would you say within a year?

17758 "Answer: Maybe 20. I would say it would be a pure guess. I mean I didn't look towards getting funds for what I was doing. If I had funds I spent them. That is all. It was kind of beside the point to me which is why I don't have a good recollection of the thing.

"Question: Well, I asked you as to whether you could give me any idea as to what within a year you received.

"Answer: My best guess would be within 15 or 20 times, but I say that is a pure guess. I have nothing to really base it on.

"Question: During the period of these years, your guess is that about 15 or 20 times each year you received money from the F.B.I.?

"Answer: That is right.

"Question: Can you give me some idea of what an average amount was that you received?

"Answer: I don't have a good guess as to the average because there were some variations. At times I was, for instance, going to Baltimore once or more a week and, as I say, I had expenses such as going to have a baby sitter 24 hours a day and so-forth. We didn't discuss this with them, but they knew it and the amount did vary to accommodate such expenses as that.

"Question: Can't you help us at all as to what amount you got on any of these occasions you speak of?

"Answer: I think perhaps I received $40"—let
17759 me re-read that—"I think perhaps I received $40 on one occasion and perhaps I received $100 on one occasion, but I can't say. It is not fair to me or anything else to say I received $100 15 or 20 times a year, which isn't true."

Now, were you asked those questions and did you give those answers? A. It is my recollection that I did.

Q. Well now, Mrs. Markward, just take a look at this exhibit showing the payments to you. Let's take a look at 1947, glance down at those figures for '47 and glance down at the figures for '48. When did you say—and for '49. When did you testify in the Richardson case? A. In '52.

Q. Now, after looking at those figures for '47, '48 and '49, would you say that it is not fair to you to say that you received $100 from the F.B.I. 15 or 20 times a year, and that that isn't true?

Mr. Broome: That is argumentative, Your Honor. I object to the question.

Mr. Cherry: Overruled.

The Witness: Well, what I said, sir, was that I received irregular amounts at irregular times, and I could not give a correct estimate as to how much I had received, and I was right because if I had been asked to estimate at that time

what I had received, it would have been much
17760 lower than the figures show here, because I didn't know—

. . . . . .

By Mr. Forer:

Q. Mrs. Markward, please try to answer the questions. You ought to be used to the kind of questions I ask. I have questioned you occasionally in the past. A.
17761 Yes. Seeing the figures before me, it would be fair to say that I got as much as $100 a month, 15 or 20 times in a year.

Q. That would be fair to say that? A. It would be fair to say that since I have seen the figures before me. It did not—you said, I believe, that I had time to explain this answer.

Q. You mean you now want to explain your answer that it would be fair to say that?

Mr. Cherry: You may answer.

The Witness: The enlargement that I wanted to make to that answer was that I did not at the time I made that answer in 1952, I believe it is, have these figures before me. I had asked for these figures, and they had not been provided to me. I had no idea in this world how much money I had received from the F.B.I., and if I had named a flat estimate of the money, it would have been much lower because I knew that when I got all through there was nothing left over, and I think it is always better—I am delighted to have the figures so that we have an accurate statement instead of an estimate that you have spent this morning getting out of me on expenses like that. I wish I had kept an account of the expenses that I had, or had been able to keep one.

. . . . . .

17783 Redirect Examination

. . . . . .

17791 Q. On the question of your payments from the FBI and the receipts that you gave them for your payments, were the payments received by you with great regularity; in other words, every week, every two weeks, or every three weeks? A. It was not that regular, sir.

Q. The payments were at irregular times? A. That is correct.

Q. Now, as far as the mechanics of accounting for your payments, would you sign a receipt for one payment
17792 each time you received a payment? A. Normally I did, but sometimes I would sign a receipt for two or three payments, because time had elapsed, and things like that.

Q. In other words. there came times when you didn't have contact with the Bureau for two or three weeks at a time and you might be asked to sign three or four receipts at a time? A. Sometimes it might be as much as a couple of months that I didn't have contact with the FBI.

Q. And at that time you would sign receipts for payments that you had received over that period of time? A. That is correct. Sometimes they would put money in my bank account, and I would have to sign receipts for that money—I mean that would be a time when it was not good to be seen in contact with the FBI agent, and sometimes there would be an extended period and they would put money in my bank account, and sometimes I didn't get a chance to open the bank statement because I had to burn it up before I got it as far as my apartment, or stick it in the incinerator before I got to the apartment, but when they would come, they would give me the receipts and I would sign them.

I hadn't any reasonable doubt that I had gotten as much money as they told me I had got at the time, or that I had received in the past.

Q. Would you say it was because of what you
17793 have said it might account for the regular payments reflected by the exhibit that you were shown

a short while ago? A. That is the only way I could account for it.



**Memorandum Opinion and Order on Motions to Strike**

On January 9, 1958, the Court of Appeals remanded this proceeding to the Board for production of documents in Government files in relation to witness Markward. In responding to a petition for rehearing and motion for leave to adduce additional evidence filed by the Communist Party the Government related a newly discovered circumstance to the Court, i.e., the existence of disc-recordings of an FBI interview with Budenz, and as result the Court, with the Government acceding, then also remended for production of certain "statements" made by witness Budenz to the Federal Bureau of Investigation. Subsequently, the Board requested clarification from the Court on the Budenz question and in its order of June 16, 1958, the Court stated it intended by its order of April 11, 1958, to require production of only statements by Budenz which the Party had demanded at the original hearing, these being "statements" (as defined by Public Law 85-269) by Budenz relating to his testimony at the hearing concerning the so-called Starobin letter and the Childs-Weiner conversation.

Respondent subsequently obtained for inspection the documents ordered to be produced and, at its request, witnesses Markward and Budenz were ordered recalled for

further cross-examination. Witness Markward was examined by both parties on July 22, 1958. As to witness Budenz, however, it developed that he was physically unable to testify; as will be related in discussing the motion to strike his testimony.

Respondent, on August 7, 1958, then made motions to strike in relation to witnesses Budenz and Markward.

18130 *Witness Budenz*

We turn first to the pending motions relating to witness Budenz. In view of Budenz' unavailability for further cross-examination, respondent moved that all of his testimony in this proceeding be stricken. (Tr. 17834.) In the alternative, in the event the foregoing is denied, respondent moved: (1) to strike all of Budenz' testimony insofar as it relates to the Starobin letter and the Childs-Weiner conversation (Tr. 17835); (2) for an order directing the Attorney General to produce for respondent's examination the agents of the FBI who participated in the interviews with Budenz which took place during the period from the 6th through the 12th of December, 1945, and directing that such agents bring with them their complete notes taken during the interviews and any statements or writings furnished the FBI by Budenz either prior to or during such interviews (Tr. 17835, 17860); and (3) that all other portions of the recorded interviews with Budenz, i.e., Board Exhibit 2, which are relevant to any matter to which Budenz testified in this proceeding be made available to it. (Tr. 17835.)

Petitioner opposed all respondent's motions as lacking in merit.

It is necessary first to review the record as far as pertinent for background purposes. Witness Budenz testified on direct examination at the original hearing for slightly less than 2 days. He was cross-examined for approximately 5 days. He was on redirect for 23 pages of the transcript

and on recross for 1 page. Further, there were 8 pages of direct examination on the Starobin letter and 30 pages of cross-examination on it. There were 2 pages of direct examination on the Childs-Weiner conversation and 10 pages of cross-examination on it.

It is clear from the record that Budenz was extensively cross-examined on his direct testimony and collateral matters going to credibility. It is apparent, also, that substantial cross-examination took place on the Starobin letter and the Childs-Weiner conversation. During the course of cross-examination on the Starobin letter, Budenz was questioned, *inter alia*, concerning two prior statements he made on the subject, viz., in a book he authored and testimony before a congressional committee. Likewise, in relation to the Childs-Weiner conversation, Budenz was cross-examined, *inter alia*, on a prior statement he made in relation to foreign financial aid to respondent before a congressional committee.

Upon objection of petitioner, production of reports by Budenz to the FBI on those two topics, however, was denied to respondent at the original hearing. Those denials were specifically asserted as error by respondent on the second review by the Court of Appeals, i.e., after the Supreme Court's remand. The Court of Appeals ruled there was no error in the denials since the record
18131 showed the requested reports were written accounts made by a third party (an FBI agent) purporting to show what the witness had said or done. The Court concluded, therefore, that the denial of production of the reports, being hearsay documents, should be affirmed.

As was indicated above, however, in preparing to respond to the Party's petition for rehearing and motion for leave to adduce additional evidence, both of which were concerned in part with this Budenz question, the Government discovered the existence of a "statement" by Budenz to the FBI in December 1945 in the form of disc-recordings

made without the knowledge of Budenz. The Government thereupon made this discovery known to the Court and acceded to a remand of the Budenz question insofar as it went to production of so much of the disc-recordings as related to the Starobin letter and the Childs-Weiner conversation, these being the testimonial topics wherein the denials of production took place at the original hearing. After this accession by the Government in the form of answers to the Party's petition for rehearing and motion for leave to adduce additional evidence the Party then filed another motion for leave to adduce wherein it sought to expand the extent of the remand as acceded to by the Government. In its order of April 11, 1958, and its subsequent order of June 16, 1958 (which ruled on a Board motion to clarify) the Court remanded the Budenz question for production of documents but, in so doing, restricted its direction of production to those demanded by the Party at the original hearing, i.e., "statements" by Budenz to the FBI in relation to the Starobin letter and the Childs-Weiner conversation.

Accordingly, the Board ordered that petitioner produce to the Hearing Member all "statements," as defined in Public Law 85-269, made by witness Budenz to the FBI concerning the Starobin letter and the Childs-Weiner conversation. In response to this direction petitioner submitted all the disc-recordings of the December 1945 interview of Budenz by the FBI. The Presiding Member excerpted the material relating to those two subjects and furnished it to respondent.[1] The disc-recordings were sealed and are in the record as Board Exhibit 2. Respondent acquiesced in the procedure in relation to the disc-recordings. Respondent's request for recall of witness Budenz for further cross-examination was granted. Petitioner then submitted a letter from Budenz' personal

[1] Prior to the determination of Budenz' unavailability and at the instance of an agreement by both parties (Tr. 17824-17830), these exhibits were received in evidence as Communist Party Exhibits 97-101, inclusive.

physician to the effect that, in the physician's opinion, Budenz was physically unable to testify due to a heart condition. This opinion was confirmed by a heart specialist appointed by the Presiding Member to conduct an
18132 independent physical examination of Budenz. He was of the opinion that if Budenz were to testify under any of the conditions outlined[2] it might seriously affect his health or cause his death due to an extreme heart condition. In view of the medical opinions, all parties are in agreement that witness Budenz is unavailable to testify in this proceeding and it was so ruled.

Turning now to its motion to strike, respondent contends that under the applicable rule as stated by *Wigmore on Evidence*, § 1390, petitioner is responsible for the deprivation to respondent of cross-examination of the witness Budenz and that therefore all Budenz' testimony should be stricken. Further, that this notwithstanding, all Budenz' testimony should be stricken because under the rule as stated by *Wigmore*, the respondent incurs a material loss by reason of Budenz' unavailability for further cross-examination. (Tr. 17838-57.)

Petitioner contends that under the proper application of the law as set out by *Wigmore*, none of Budenz' testimony should be stricken as there already has been adequate cross-examination of Budenz on all phases of his testimony including that concerning the Starobin letter and the Childs-Weiner conversation; and that since the Budenz statements already produced to respondent are consistent with his testimony, no material loss is incurred by it as a result of the witness' unavailability. (R. 17864-81.)

The Presiding Member is of the view that no responsibility, as that term should be construed here, is attributable

[2] These conditions were testimony by Budenz either in "open court," by deposition or by cross-interrogatories. The procedure with respect to the latter was explained to the physician in the Presiding Member's letter to him requesting the physicial examination.

to petitioner for Budenz' unavailability and, conversely, neither is respondent responsible for this circumstance. Respondent has suffered no deprivation of cross-examination with respect to those portions of Budenz' direct testimony not involved in the Court's remand.[3] The record shows that respondent clearly had adequate opportunity, which it utilized, to conduct cross-examination on that testimony, and that in presenting its evidence respondent was given every opportunity to rebut Budenz. Accordingly, the motion to strike Budenz' entire testimony is denied.

18133 On the other hand, Budenz' direct testimony concerning the Starobin letter and the Childs-Weiner conversation and the cross-examination heretofore conducted thereon presents, in the light of the statements produced to respondent, an incomplete picture and one where, resolving all doubts in respondent's favor, the purposes of cross-examination have not been sufficiently accomplished. Accordingly, respondent's motion to strike this testimony is granted and it is ruled that Budenz' testimony concerning the Starobin letter at R. 13837, line 1, through R. 13840, line 22; R. 13841, lines 3 through 10; R. 13841, line 24, through R. 13844, line 10; R. 14096, line 9, through R. 14125, line 19; and that concerning the Childs-Weiner conversation at R. 13818, line 10, through R. 13819, line 21, and R. 14061, line 15, through R. 14070, line 13, is stricken, as well as Communist Party Exhibit 67, which was introduced during cross-examination on the Starobin letter.

Turning to respondent's other alternative motion to order produced for its examination the agents of the FBI

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[3] In this connection, *Wigmore* states: "But the true solution would be to avoid any inflexible rule, and to leave it to the trial judge to admit the direct examination so far as the 'loss of cross-examination can be shown to him to be not in that instance a material loss.' Courts differ in their treatment of this difficult situation;' except that, by general concession, a cross-examination begun but unfinished suffices if its purposes have been substantially accomplished." (§ 1390, 3rd Ed.) (Footnotes deleted.)

who participated in the Budenz interviews, the other portions of the recorded Budenz interviews contained in Board Exhibit 2 and the other documents enumerated, it is ruled that these matters fall outside of the scope of the Court's orders governing the remand, and that no justification is shown for granting these requests. Respondent clearly had adequate opportunity at the hearing to cross-examine Budenz on all matters to which he testified except the Starobin letter and the Childs-Weiner conversation. Furthermore, it is now established that Budenz is unavailable and there is no possibility of adhering to the normal requirement of confronting the witness with any prior statements. This motion is therefore denied.

*Witness Markward*

Respondent moves to strike the entire Markward testimony "because she has been proven to be a perjurer" (Tr. 17885).

In remanding the Markward question, the Court directed production of (1) Markward's written report to the FBI concerning Annie Lee Moss (2) her testimony in the Defense Department Security Hearing concerning Moss (3) her written report to the FBI concerning the so-called Frankfeld meeting and (4) the records of Markward's compensation from the FBI. At Board direction, these documents were furnished respondent.[4]

At respondent's request, witness Markward was recalled for further cross-examination. Respondent cross-examined at length on the records of Markward's compensation from the FBI and other facets relating to such compen-
18134 sation. In relation to the Frankfeld question, respondent merely examined briefly on the procedure she followed in making reports to the FBI and a few

[4] In relation to the reports to the FBI concerning Moss, however, it was necessary for the Presiding Member to excise so much of the reports as did not relate to Moss.

other preliminary questions, but did not examine her on the contents of her report. On the Moss matter, respondent declined to cross-examine Mrs. Markward, taking the position that since it was unable to procure the findings of the Security Hearing Board there was no purpose in doing so (Tr. 17785), this notwithstanding it had access to the Markward testimony in the Moss hearing wherein it alleged she committed perjury. Since respondent sought to leave Markward under attack on the Moss question, her testimony in the Moss Security Hearing and her reports to the FBI on Moss were admitted into evidence as Attorney General Exhibits 498A, 499-511, inclusive.

Respondent grounds its motion to strike on contentions amounting to attacks on her credibility. These contentions are more properly viewed as presenting testimonial and credibility evaluation questions and, in the view of the Presiding Member, respondent has given no sufficient reason to strike her testimony.

Accordingly, it is

ORDERED that all respondent's motions are denied except the alternative motion to strike the Budenz testimony on the Starobin letter and the Childs-Weiner conversation, which is granted, and it is further

ORDERED that counsel for the parties consult and then advise the Presiding Member by August 28, 1958, in regard to whether argument is desired on the sufficiency of the evidence question. If either party requests such argument it will be heard at 10:00 A.M. (EDT), on Wednesday, September 3, 1958, in Room 111 Lafayette Building, 811 Vermont Avenue, N. W., Washington, D. C.

FRANCIS A. CHERRY
Francis A. Cherry
*Board Member—Examiner*

August 25, 1958
Washington, D. C.

**Recommended Decision of Board Member Francis A. Cherry on Second Remand Proceeding Issued September 19, 1958**

18141 STATEMENT OF THE CASE

Upon review of the Board's Modified Report of December 18, 1956,[1] the United States Court of Appeals for the District of Columbia Circuit by its opinion issued January 9, 1958,[2] remanded this proceeding to the Board under section 14(a) of the Act.

The opinion of January 9, 1958, required the production of documents in the possession of the Federal Government in relation to the testimony of the Attorney General's witness Mary Stalcup Markward. On the remaining questions of law the court affirmed the Board except that due to the nature of the remand it reserved judgment on an over-all credibility charge by the Communist Party against witness Markward and on the sufficiency of the evidence question (see 254 F. 2d 314, and the memorandum of the court issued April 11, 1958). The court also ordered references to Attorney General Exhibit 484, appearing on pages 94 and 120 of the Modified Report, stricken. These references, of course, are to be stricken (see Appendix for findings recommended to be stricken). Upon reappraisal

[1] The Board's original Report and Order were issued on April 20, 1953, and were affirmed upon review by the United States Court of Appeals for the District of Columbia Circuit (223 F. 2d 531) and thereafter the proceeding was remanded to the Board by decision of the Supreme Court (351 U.S. 115). The Board's Modified Report now under consideration was issued following that remand.

[2] The court's opinion was followed by three orders, the latest being issued June 16, 1958, as will be related.

of the evidence, absent these references, no alteration in the Board's findings is indicated.[3]

18142 Subsequently, on January 24, 1958, the Communist Party (respondent before the Board and petitioner before the Court of Appeals) filed with the court a petition for rehearing and modification and, concurrently, a motion for leave to adduce additional evidence. In the course of preparing a response to the petition and motion, Government counsel discovered that in the files of the Federal Bureau of Investigation were disc recordings of an interview witness Louis Francis Budenz had with the FBI in December 1945 which had been recorded unbeknownst to Budenz. This circumstance was related to the

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[3] Additionally, review of the record reveals that a reference to Attorney General Exhibit 481, quoted at page 145 of the Modified Report, should likewise be stricken (see Appendix). As this exhibit was cumulative in effect, its deletion does not affect the remainder of the Board's findings. There is an inadvertent reference to Markward in the first full paragraph on page 37 of the Modified Report, which should read "Meyer" and, on page 130, a citation to Attorney General Exhibit 406, which should read "Pet. Ex. 405."

It should also be noted that the Board at page 196 of the Modified Report officially noticed that a number of respondent's leaders had been convicted under the Smith Act and on page 197, footnote 1, the names of these leaders are listed. The Board Member-Examiner takes official notice that as a result of subsequent court action, the convictions of 8 of the 32 leaders have been nullified. (See *Yates* v. *United States*, 354 U.S. 298, and orders of dismissal of indictments issued December 2, 1957, by the United States District Court, S. D. Calif., and *United States* v. *Jackson*, No. 24445, C.C.A. 2d, decided August 4, 1958.) In order to conform the Modified Report to the matters officially noticed it is recommended that the following names and the case citations in which they were originally convicted be stricken from the footnote on page 197, namely: Alexander Trachtenberg, George B. Charney, Sidney Steinberg (Stein), James Jackson, William Schneiderman, Dorothy R. Healey, Rose C. Kusnitz, and Frank Carlson. A modification is also required in the third full paragraph at page 199 of the report by changing in the first sentence thereof the clause "and three of the alternates" to read "and two of the alternates" and by changing the opening word of the second sentence of that paragraph from "Four" to "Three" and striking the name "Schneiderman" from the sentence. A reconsideration of the evidence of record shows that these amendments have no cognizable effect upon the preponderance of evidence in support of the Board's findings.

court and, concurrently, the Government acceded to so much of the respondent's petition for rehearing and motion as pertained to two requests the Party had made at the original hearing for the production of statements which Budenz made to the FBI and which had been denied. (See the two memoranda for the Board filed in the Court of Appeals on February 7, 1958.)

The Communist Party then filed a supplemental motion for leave to adduce additional evidence which related to the Budenz matter and, in substance, sought to broaden the scope of the remand acceded to by the Board. On April 11, 1958, the court entered an order, accompanied by a memorandum, remanding the Budenz matter to the Board for the production of certain "statements" by Budenz to the Federal Bureau of Investigation. Subsequently, on May 23, 1958, the Board asked for clarification by the court of this order and memorandum, and on June 16, 1958, the court entered an order containing the clarification requested. In effect, the court stated that its order of April 11, 1958, should be construed as restricting production to Budenz' "statements" relating to the Starobin letter and Weiner conversation only. The court did not, as the Party requested, order production of all Budenz' "statements" relating to the subject matter of his entire testimony in this proceeding.

18143 Pursuant to Board order, petitioner presented at the reopened hearing all "statements" and "records" ordered by the Court of Appeals to be produced. These were turned over by the Board Member-Examiner to counsel for respondent. In some instances it was necessary to excise irrelevant matter before transmitting the material to respondent.

The Party's request for the recall of the two witnesses involved, Markward and Budenz, was granted. The witness Markward was cross-examined by respondent on July 22, 1958, and, on redirect, by counsel for petitioner.

With respect to witness Budenz, however, a question arose as to his availability due to his physical condition. Petitioner submitted a letter from Budenz' personal physician stating that in his opinion it would imperil Budenz' health due to a heart condition to appear as a witness in this proceeding. The Board Member-Examiner deemed it advisable to have an independent physical examination conducted by a heart specialist in New York City. By affidavit dated August 4, 1958, the specialist reported the results of his physical examination of Budenz and his conclusion that due to an "extremely serious cardiovascular disease" any examination of Budenz "were it to be carried out before the Board or by deposition or by cross-interrogatories in his home, might seriously affect his health or cause his death." He was of the opinion that "even the slightest amount of emotion could very well precipitate a serious outcome in [the] patient's life." (See Board Exhibit 3-C.)

Upon receipt of the doctor's affidavit, the hearing was reconvened on August 7, 1958, and the parties agreed Budenz was unavailable for recall. Thereupon, respondent moved to strike all of Budenz' testimony, and in the alternative moved (1) to strike Budenz' testimony in so far as it relates to the Starobin letter and the Weiner conversation, (2) for an order directing the Attorney General to produce for respondent's examination the agents of the FBI who participated in the December 1945 interviews with Budenz, and directing that such agents bring with them their complete notes taken during the interviews and any statements or writings furnished the FBI by Budenz either prior to or during such interviews, and (3) that all other portions of the recorded interviews with Budenz, *i.e.*, Board Exhibit 2, which are relevant to any matter to which Budenz testified in this proceeding, be made available to it. Respondent also moved to strike all of witness Markward's testimony.

By memorandum opinion and order of August 25, 1958, the Board Member-Examiner denied these motions[4] except in so far as they sought the striking of the
18144 testimony concerning the Starobin letter and the Weiner conversation.[5] (See memorandum opinion and order of the undersigned dated August 25, 1958.)

Both parties waived oral argument before the Board Member-Examiner on the sufficiency of the evidence.

Turning now to a consideration of the evidence adduced on this remand and its effect upon the credibility of witnesses Markward and Budenz and upon the findings in the Modified Report, there will first be considered the matters pertaining to the witness Markward.

*Witness Markward*

Pertinent background concerning Markward has been stated by the Court of Appeals in its opinion of January 9, 1958 (254 F. 2d 314, 326-330), and except where necessary to bring the matter up to date, this history will not be repeated here. The court in this opinion directed that the Board order the Attorney General to produce (1) Markward's reports to the FBI and her testimony in a Defense Department security hearing concerning Annie Lee Moss; (2) Markward's report to the FBI concerning the Frankfeld matter; and (3) records of Markward's com-

[4] In so far as the motions went to the production of notes, statements, or writings in relation to the Starobin and Weiner matters it was, of course, presumed that petitioner had already produced all documents or recordings in its possession which constituted "statements," under Public Law 85-269, on those matters in complying with the Board's orders of April 29, 1958, May 20, 1958, and June 18, 1958.

[5] The testimony stricken from the record is as follows: concerning the Starobin letter at R. 13837, line 1, through R. 13840, line 22; R. 13841, lines 3 through 10; R. 13841, line 24, through R. 13844, line 10; R. 14096, line 9, through R. 14125, line 19; concerning the Weiner conversation at R. 13818, line 10 through R. 13819, line 21, and R. 14061, line 15, through R. 14070, line 13, as well as Communist Party Exhibit 67, which was introduced during cross-examination on the Starobin letter.

pensation from the FBI. Each of these matters will be discussed in the order enumerated.

At the reopened hearing, in conformity with the orders of the Court of Appeals, Markward's FBI reports concerning Moss, being 12 in number, were produced to respondent as was Markward's testimony concerning Moss in the Moss security hearing. Markward was recalled for further cross-examination and, although cross-examined by respondent's counsel on other matters, no cross-examination was conducted concerning Markward's identification of an Annie Lee Moss as a onetime Party member.

Thereafter, upon motion of petitioner, Markward's FBI reports concerning Moss, the majority being copies of actual Communist Party records such as club and branch attendance, membership and dues rosters, were received in evidence as Attorney General Exhibits 499 through 511, inclusive. Similarly, a copy of the Markward testimony in the Moss security hearing was received in evidence as Attorney General Exhibit 498-A.

Exhibits 499-511, inclusive, corroborate Markward's testimony in the Moss security hearing (A.G. Ex. 498-A, pp. 60-66) and all the foregoing exhibits corroborate
18145 the testimony she gave relating to this matter during the previous remand proceeding before the Board. (R. 17082-17132; S.J.A. 2231-2252.) During that remand proceeding the Board, after inspecting the security hearing transcript *in camera*, ruled that "our review reveals that respondent's showing that witness Markward testified falsely in the Moss proceeding and was disbelieved in that proceeding is not supported." (R. 17315.)

The instant remand proceeding, in view of the respondent's failure to pursue cross-examination, has added to the record for the Board's consideration only the 12 FBI documents which corroborate Markward; and in consider-

ing the entire record it is the Board Member-Examiner's opinion that Markward's credibility has not been in any way impaired by this matter but rather, the Party's contention on the Moss matter has been shown to be groundless.[6]

Turning now to Markward's testimony concerning a statement by Party leader Frankfeld to the effect that Party members would not bear arms against the Soviet Union, the Court of Appeals in its opinion of January 9, 1958, ordered produced to counsel for the Communist Party, the report made by witness Markward concerning the Party meeting in Baltimore, Maryland, where, according to her testimony, the statement had been made. The court noted that the Board had inspected this report *in camera* during the earlier proceeding on remand (254 F. 2d at p. 327), but ruled that failure to produce the document to Party counsel offended the principle of the Supreme Court's opinion in the *Jencks* case (353 U.S. 657). At the reopened hearing counsel for the Party was given the complete report made by Markward to the FBI concerning the Party meeting in question. The Party's cross-examination consisted only of (1) identification of the FBI report, which was then offered and received in evidence as Communist Party Exhibit 96, and (2) a few questions relating to her manner and method of making reports to the FBI. Markward was not cross-examined about the contents of this report.

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[6] The situation that has resulted on the Moss question is that the Party's own records, copies of which are now in evidence, and the authenticity of which it does not dispute (A.G. Exs. 499-511, inc.), show an Annie Lee Moss, 72 R Street, S. W., Washington, D. C., was a Party member in the mid 1940's. Yet, respondent on several occasions charged before the Court of Appeals and the Board that witness Markward committed perjury in testifying before the Defense Department to what the Party's own records showed. As has been stated, the Party declined to cross-examine witness Markward on the Moss question after copies of the Party's own records were produced to it.

18146 The further proceedings on remand have added nothing of substance for consideration[7] that was not already before the Board when it inspected *in camera* the Markward FBI report concerning this incident and ruled "that no substantial credibility question was presented." (R. 17346; memorandum opinion and order of December 13, 1956.) The Board had not credited Markward's testimony concerning the Frankfeld statement in its Modified Report because of the conclusory nature of this testimony and the imprecision therein exposed by cross-examination and no findings in the Modified Report were in any way based upon this testimony.[8]

Upon independent consideration of Markward's entire testimony concerning the Frankfeld matter (R. 7721-7732; 7809-7811; 7816-7822; J.A. 742-745; S.J.A. 2271-2277) and Attorney General Exhibits 331, 332, 333, and 334, received in connection therewith (R. 7724, 7729, 7751) and the report about this meeting to the FBI (C.P. Ex. 96), the Board Member-Examiner concludes that the Party has not established a material impairment of Markward's overall credibility.[9]

The Board Member-Examiner is of the opinion, however, that the Board's action in not crediting Markward's testimony concerning the Frankfeld statement, particularly in view of its interpretative quality, was proper and recommends that the Board adhere to this conclusion. Since no findings in the Modified Report are based in any way upon such testimony no change in that Report is recommended.

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[7] The Markward FBI report, however, previously sealed as Board Exhibit 1 is now in evidence unsealed as Communist Party Exhibit 96.

[8] See Board's brief (following remand) in the Court of Appeals for a detailed discussion of this question (pp. 31-37), with which the undersigned agrees.

[9] See, *infra*, however, for a discussion of the Board's prior conclusion to view all her testimony with caution and the recommendation to the Board that it continue to apply the same standard.

Considering next the matter of Markward's compensation from the FBI, at the original hearing Markward testified on direct examination that she was not paid a salary by the FBI; that she received contributions to the expense of the work she was doing; and that such expenses included paying dues; making contributions, buying literature, "that type of thing, and other incidental things," including transportation expenses. (R. 7676.)

Under cross-examination at the original hearing she testified that no formal financial arrangements were made with the FBI concerning money; that she volunteered to perform her services without remuneration of any
18147 kind; that she at no time submitted a statement of expenses to the FBI, but due to frequent contact with agents the FBI had an idea of what she was doing; that she signed receipts for money received, but could not recall any specific amounts for the entire period of her activities or for individual years; and that she received money in "irregular amounts at irregular times," which amounted to reimbursement to her. (J.A. 750.)

After the hearing panel had issued its Recommended Decision, but prior to the issuance of the Board's Report, the Party moved to reopen the hearing to adduce additional evidence, charging, in so far as Markward was concerned, that she had lied in testifying she had received no compensation for her services to the FBI. This motion was accompanied by a stipulation to which the Government was a party, entered into in the trial of *United States* v. *Flynn, et al.* (U.S.D.C., S.D.N.Y., C-136-7), which showed that Markward had received $24,026.45 in payments from the FBI over a period of 10 years, of which $147 was designated as paid for expenses and the remainder as paid for services.

By memorandum opinion and order of February 24, 1953, the Board reviewed Markward's testimony giving consideration to respondent's contentions and the stipula-

tion mentioned, and concluded the showing was insufficient to reopen the hearing.

Without reviewing the course this Markward compensation question has taken subsequently, both upon judicial review and before the Board, it is sufficient to state that the Court of Appeals included the question in remanding the proceeding to the Board (254 F. 2d 314, 329-330). In so doing, the court ordered production of the "records of Markward's compensation from the FBI." These records were made available to respondent and Markward was then subjected to extensive cross-examination on the basis of such records and other facets, the records being received in evidence. (C.P. Ex. 95.)

It is fair to say that Communist Party Exhibit 95 shows that the FBI accounted for payments to Markward for the years 1943 through 1949 on a weekly and semi-monthly basis, and that since that time payments have been docketed generally on a monthly or bi-monthly basis, with occasional lapses in regularity. It is also fair to say that during the years 1943 and 1944 the amount of the single payments for services varied from $3 to $70 with the majority being of $25, $30, and $35 denominations. For the remaining years, from 1944 through 1958, the amounts of individual payments varied from $20 to $400 with the majority of payments docketed during 1945 being $40 or $45; the majority in 1946 being $90 and $180; the majority in 1947 being $180 and $270; the majority in 1948 being $180; the majority in 1949 being $180 and $200; all in 1950
18148 being either $50 or $100; all in 1951 being $50; and all in 1952 being either $50 or $100. Those credited to the years 1954, 1955, 1956, 1957, and 1958 varied in amounts ranging from $20 to $120.

Under cross-examination upon the further hearing just concluded, Markward disputed that she actually received money from the FBI on a weekly or semi-monthly basis or that she received money at a given rate such as $40 or $90

a week over a given period of time. Markward explains the increase in payments in the latter part of 1945 from about $45 per week to $90 per week by stating that it was during this period that she resigned her job as hairdresser and devoted her entire time to Communist Party activity. She did not dispute that she received the total amounts of money indicated and explained that she assumes from the exhibit the FBI was making payments to her according to some rate but that she had no knowledge of this and had no arrangements for payment; and that she never discussed with the FBI whether she should receive more or less money. She testified she either received cash or the money was deposited to her checking account but she was unable to recall receiving any specific payments at any specific time, such as a payment in August of 1947 totaling $400.

Upon further cross-examination at the instant hearing, Markward explained what she considered as items of expenses, and by any reasonable calculations, these could run into substantial amounts in excess of a thousand dollars each year. It is patent that the use of the term "expenses" in the FBI records does not coincide with the witness' concept of that term. To illustrate, there are several years in which the compensation records show no entries whatsoever for expenses, yet, obviously, using Markward's definition of the term, she had substantial expenses during each of these years, and it is reasonable to assume that under the ordinary business connotation of the term "expenses," Markward would have had some expenses during those years in performing her function as an informant. On the other hand, it is apparent that, taking the most liberal estimate of what Markward regarded as expenses, she received substantial payments for services in excess of what her expenses would be. Considering Markward's testimony under cross-examination in the light of the FBI compensation records, it is significant, in the Board Member-Examiner's view, that the

witness fails to recall specific large payments and disputes the regularity of the payments, many being over $100 in amount spaced two or three weeks apart over a period of years. It is also significant that, using her characterization of expenses, there was no testimony adduced reconciling the large amounts of money she received with the connotation conveyed by her testimony on direct examination at the original hearing that she received "contributions to the expense of the work I was doing from time to time." (J.A. 734.)

It is concluded, therefore, that Markward's testimony at the original hearing concerning her receipt of compensation from the FBI should not be credited. That
18149 her testimony concerning this subject was in large measure colored by an antipathy on her part against being characterized as one who profited in performing what she considered a patriotic service is borne out by the record and by her demeanor under cross-examination which showed a resentment against questions having any such imputation.

The record is clear, however, that the Board has long been aware of the amount of money received by Markward from the FBI and the record shows there has been no misapprehension about the matter.[10] This testimony concerning compensation is relevant solely to the interest or bias of the witness and while it in itself is not worthy of credit, an assessment of the record and observation of the witness does not warrant disregarding *in toto* her testimony relating to the issues in this proceeding.[11]

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[10] As indicated, *supra*, the Board was aware of this factor before it issued the original Report and Order inasmuch as the Party submitted a copy of the stipulation entered into by the Government and the defendants in *United States* v. *Flynn, et al., supra* (J.A. 200-202; 212-215), and it has scrutinized Markward's testimony as that of a paid informant (Mod. Rept., p. 6).

[11] The outcome of the Moss question illustrates that it would be a mistake to view Markward as a witness whose entire testimony should be disregarded.

In this connection, the Modified Report of the Board shows that, although the witness testified at length on direct examination, the Board relied on her testimony for only approximately 15 subsidiary findings, and there was other credited evidence to the same effect in respect to 13 of the findings. As to the remaining 2 subsidiary findings, one is to the effect that an individual, who otherwise plays no part in the proceeding, went to Moscow for training during the period when the Party admittedly was a section of the Communist International (Mod. Rept., p. 165), and the other is to the effect that in one instance Party records were altered to date a member's resignation to conform with a prior denial of Party membership by the individual in a court proceeding (Mod. Rept., p. 189). The significance of these findings is minimal. In fact, the effect of her entire testimony is a minor factor in the proceeding, as is apparent from the Modified Report (Mod. Rept., p. 4, fn. 2).

The Board has already viewed the testimony of the witness with caution (Mod. Rept., p. 4). It is felt that, upon reassessment, this standard should be continued. In so doing, it is concluded that the testimony of Markward now relied upon by the Board in its Modified Report, which in almost every instance is corroborated, is unaffected and, therefore, no modification of findings is warranted.

18150 *Witness Budenz*

Louis Francis Budenz, a functionary of the Communist Party from 1935 to 1945 and witness for petitioner, testified, among other things, in the original hearing concerning a letter sent in 1945 to the *Daily Worker* by its correspondent, Joseph Starobin, then in San Francisco. The content of the letter, hereinafter referred to as the "Starobin letter," related to the 1945 reorganization of the Party. Budenz also testified to a conversation in 1939 with the then Party treasurer, Charles Weiner, herein referred to as the "Weiner conversation," which related

to the issue of financial aid. The Court of Appeals affirmed the Board's refusal of the Party's request for production of "alleged reports" on the Starobin letter and Weiner conversation. *Communist Party* v. *Subversive Activities Control Board*, 254 F. 2d 314, 326. As stated, however, before the court's judgment was entered, the discovery of the Budenz recorded "statements" was made with the consequent developments outlined previously. As indicated, *supra*, the present remand in so far as it involves Budenz was to produce any "statements" given by Budenz to the FBI concerning the Starobin letter and the Weiner conversation. (See court orders and memorandum of April 11, 1958, and June 16, 1958.)

During the hearing on this remand, there were delivered by petitioner to the Board Member-Examiner 30 discs containing mechanical recordings on both sides (except for 2 discs cut on 1 side only) covering a period in December of 1945 when Budenz was interviewed by agents of the FBI. The Board Member-Examiner extracted therefrom and delivered in typed form to counsel the portions found to be producible to respondent under the April 11, 1958, and June 16, 1958, orders of the Court of Appeals.[12] Thereupon, the excerpts were offered by respondent and, without objection, received in evidence as Communist Party Exhibits 97, 98, 99-A, 99-B, 100, and 101.[13]

On the basis of the excerpts, counsel for the Party requested the recall of Budenz for further cross-examination, and this was granted but, as stated, it developed that

[12] It was agreed at the hearing that the Board Member-Examiner would excerpt and deliver to counsel for respondent in typed form those portions of the disc recordings to which the Board Member-Examiner found respondent entitled.

[13] The discs are numbered from 1 to 58 by figures scratched into the discs near the spindle hole. The exhibits are, respectively, one excerpt from disc side numbered 6, one from side 8, two from side 10, one from side 16, and one from side 42. The entire group of 30 discs (containing 58 cut sides) is sealed and identified for record purposes as Board Exhibit 2.

Budenz was unavailable. Thereupon, the Party made the motions referred to, *supra*, and the Board Member-
18151 Examiner, by reason of the failure of opportunity for further cross-examination on the two subjects, issued his written ruling striking Budenz' testimony on them, *viz.*, the Starobin letter and Weiner conversation. (See memorandum opinion and order dated August 25, 1958.) There are now considered (a) recommended changes in the Board's Modified Report arising from striking such testimony, and (b) Party contentions as to Budenz' general testimonial credibility.

*Changes in Modified Report arising from the striking of certain Budenz testimony*

The striking of Budenz' testimony concerning the Starobin letter requires that there be deleted from page 98 of the Modified Report the findings of fact based upon such testimony.[14]

At page 100 of the Modified Report there is the conclusion that:

> ... in 1945 respondent reverted to "its basic Communist principles" (*supra*) and reemphasized Marxism-Leninism upon the issuance of a statement to the effect that it should do so by a leading foreign spokesman of the world Communist movement.

As appears from the Modified Report, the conclusion is that the 1945 reorganization of the Party was motivated by a statement issued by Jacques Duclos, a leader in the world Communist movement. Deletion of the Budenz testimony on the Starobin letter does not give rise to any modification in the conclusion since it is clearly established by documentary evidence and the credible testimony of several witnesses other than Budenz.

[14] See Appendix for this material.

To illustrate, such evidence shows: that in April of 1945, there was issued through *Cahiers du Communisme*, official organ of the French Communist Party, an article "On the Dissolution of the Communist Party of the United States" written by Jacques Duclos (A.G. Ex. 208), a leading member and spokesman of the French Party and a former member of the Executive Committee of the Communist International, who is recognized as a leading Marxist-Leninist; that Duclos condemned the dissolution in 1944 of the Communist Party and the change to the Communist Political Association, condemned the policies followed by the latter under Browder's leadership as contrary to victorious Marxist-Lenninist doctrine, and declared that the objectives of the American Communists presuppose the existence of a powerful Communist Party; that during
18152 the three months following the issuance of the Duclos article, Party-wide meetings were held to indoctrinate the members on the merits of the Duclos attack; that in July 1945, only three months after the Duclos criticisms, respondent reverted back to the Communist Party and reestablished the militant Marxist-Leninist substance to its program, policies and activities as Duclos advocated; and, that the reconstituted Party paralleled the type of organization advocated in the Duclos article. Browder, whose policies were attacked by Duclos, was deposed as leader and subsequently expelled from the Party. (See, *e.g.*, A.G. Exs. 208, 209, and 210; Mosely, J.A. 561-563; Meyer, J.A. 704-707; Blanc, R. 8275-8291; Baldwin, R. 12185-12189; Lautner, J.A. 948, 957, R. 11618, 11971-11978; Mod. Rept. pp. 99 and 100,)

In addition to Budenz' testimony on the Starobin letter, the Modified Report shows that the Board considered Budenz' testimony about meetings of the *Daily Worker* staff on the Duclos article. (Mod. Rept., p. 98, 1st full par.) There is no connection between such testimony and

the incident of the Starobin letter.[15] Moreover, testimony given by other witnesses corroborates or substantiates Budenz. His testimony that he, as managing editor of the *Daily Worker*, was instructed to print the Duclos article is corroborated by the fact that it was printed therein. (See Lautner, R. 11618; Baldwin, R. 12185-12189.) His testimony on the importance of the Duclos article and that the *Daily Worker* staff meetings were called to discuss the Duclos article is substantiated by the testimony of other witnesses showing the importance given to the article at other Party meetings called to discuss it. (See Meyer, J.A. 705; Blanc, R. 8275, 8282; Cummings, R. 8619-8620; Baldwin, R. 12185-12189; Lautner, R. 11618 ) Budenz is corroborated by Meyer concerning the reaction of Party functionaries to the Duclos article. (Mod. Rept., p. 98.) Furthermore, it is indisputable that the *Daily Worker* was the official organ of the Party and this, of course, involves close Party control of positions appearing therein.

For the foregoing reasons, except for striking from the Modified Report the findings as to the Starobin letter, no modifications or changes are recommended in the other findings and conclusions on the 1945 reorganization of the Party.

Coming now to Budenz' testimony on the Weiner conversation, the striking thereof requires deletion from the Modified Report of the findings at page 159 based thereon.[16]

The Board's conclusion on the issue of "financial
18153 aid," set forth at page 163 of the Modified Report, shows that little if any materiality was given to the now stricken testimony. The Board found that there

[15] Budenz did not indicate any connection, such as discussion of the Starobin letter at these *Daily Worker* staff meetings, and there is no evidence that the Starobin letter was mentioned or discussed at any of the many other meetings throughout the Party on the Duclos article.

[16] See Appendix for material that is recommended to be stricken from the Board's Modified Report.

was no evidence of any substantial foreign financial aid to the Party subsequent to 1940 [the date when the Party announced its disaffiliation from the Communist International] and no evidence of any such aid after 1944. The only significance given by the Board to the *entire* evidence relied upon concerning financial aid was that such aid was furnished by the Soviet Union "during the formative period of respondent in the United States," which obviously was prior to 1940. The Board drew no inference as to continued aid. In fact, the Board recognized from the record that the foreign financial aid disappeared when the Party "became a going organization." (Mod. Rept., p. 163.) Accordingly, since financial assistance in the formative period is clearly established by evidence other than Budenz' testimony, the deletion of this testimony does not require any change or modification in the Board's conclusion on "financial aid." (Mod. Rept., p. 163.)

One other item of Budenz' original testimony also concerned the issue of financial aid, *i.e.*, his testimony as to the furnishing free to the American Communist Party, through the Moscow news agency "Runag," of political news dispatches. This testimony is not related to nor connected with the instance of the Weiner conversation. The nature of the Board's conclusion on "financial aid" demonstrates that the fact of contributions by Runag in the years involved is of very slight materiality. The contention of the Party that Budenz' testimony on Runag was impeached by cross-examination in the original hearing is rejected in the Modified Report, page 159, footnote 1, and no change is recommended.[17]

A review has been made of all of the findings and conclusions made in the Modified Report in the light of the striking from the record of the Budenz testimony on the Starobin letter and the Weiner conversation. It is found

[17] The general testimonial credibility of Budenz in the light of the proceeding on remand is discussed *infra*.

that none of the remaining findings or conclusions on the various issues of the case were colored by or depend for their support upon the stricken testimony.

*General Credibility*

There remains for consideration the contentions of the Party as to the general testimonial credibility of Budenz in the light of the proceeding on remand. Counsel for the Party, in arguing his motions to strike, contended that:

18154 . . . quite apart from the question of our deprivation of the right of cross examination, Budenz' testimony must be stricken because the excerpts which have been produced, even without cross examination, demonstrate that the man was a perjuror, that he lied consciously and deliberately and I submit that neither the Board nor any other fact-finding body can rely on testimony which is demonstrably shot through with perjury. (R. 17858-17859.)

Counsel for the Attorney General challenged the foregoing, arguing:

> . . . it is our position that these excerpts not only fail to show that Budenz committed perjury but they support what he did say on his direct examination . . . (R. 17879.)

In striking the Budenz testimony on the Starobin letter and the Weiner conversation because the cross-examination thereon was not completed, the Party has obtained all it could possibly have obtained on those items. In striking that testimony, the benefit of any doubt was given to the cross-examiner. This action does not mean, however, that it is appropriate to speculate that additional cross-examination in the light of the produced statements would have shown that Budenz deliberately lied about these two things. Neither may it be speculated, as counsel for the Attorney General suggests, that the only result from further cross-examination would be the explanation by the witness that

it did not occur to him to tell about the two instances during the interviews with the FBI here involved, and that he was not asked the questions. The only reasonable conclusion is that there is no way of knowing what the witness would have said on further cross-examination. The incomplete picture has, as stated, led to the finding that under the circumstances the cross-examination on the two items was not adequate and that the testimony involved should, therefore, be stricken.

Involved here from the produced statements are prior ommissions where in such earlier recitations the witness had an opportunity to relate the matters. But a review of the direct testimony, the original cross-examination (which was extensive) and the now produced earlier statements, viewed in the light of the unavailability of the witness, leads to the conclusion that the record does not support the Party charge of perjury on the part of the witness.

18155 Even if there were a conclusion that a witness consciously lied about a material matter, there is no requirement that the trier disbelieve or strike the whole of his testimony. (*Communist Party* v. *Subversive Activities Control Board,* 254 F. 2d 314, 330-331.) Nothing is more common in all kinds of judicial decisions than to believe some and not all of a witness' testimony. (*NLRB* v. *Universal Camera Corp.*, 179 F. 2d 749, 754.)

There are telling considerations extrinsic to Budenz' testimony which demonstrate that his unst en testimony should be credited, *viz.*, (a) there was other credited, parallel testimony in several instances, (b) in others he was corroborated, and (c) in the remaining relatively few others, where he stood alone, there was a failure to rebut though he had been specific on time, place, and people present.

The experiences of Budenz in the Communist Party were from 1935 to 1945. Testimony parallel to that given by Budenz on a number of items was also given by other

witnesses for petitioner, notably by John Lauter whose experiences in the Party were from 1929 to 1950, and by Frank Straus Meyer whose experiences were from 1934 to 1945. An example is the testimony of witnesses other than Budenz with regards to the Duclos article, as summarized, *supra*, and which evidenced world Communist movement motivation in the reconstitution of the Party.

Another example, relating to the Party's recognition and acceptance of the leadership role of the Soviet Union, is the parallel testimony given by Budenz and Lautner on the policy of the *Daily Worker* never to disagree with the Soviet Union and to support positions taken by the Soviet Union.[18] This in turn was corroborated by the mass of evidence on nondeviation. Still another example is the parallel testimony given by Budenz and Lautner on the true meaning of the references to Marxism-Leninism in the Party constitution. In this connection, a reading of the Modified Report shows clearly the quantity of evidence in addition to that given by Budenz showing the Party's implementation of Marxism-Leninism.

As to the corroborative evidence, it appears not only in general areas but as to details as well, such as the corroboration of Budenz' testimony regarding Gerhardt Eisler furnished by the witnesses Kornfeder, Meyer, Nowell, and Lautner.

18156 It is against this background of parallel testimony in many instances, and of substantial corroboration in others, that the relatively few instances are to be considered where Budenz' testimony stands alone. In such instances, Budenz was specific as to time, place, and people present yet neither the individuals named by Budenz nor any other Party officials were called in denial. An

[18] This position of the *Daily Worker*, the official Party organ, is further evidenced in the record by documentary material. The Party witness Gates, in effect, acknowledged that the *Daily Worker* never supported the United States when its policies were opposed to those of the Soviet Union.

example is the Budenz testimony that at a meeting of Party functionaries, held *during the period of the Hitler-Stalin Pact,* an official in the Party, Eugene Dennis, declared that the Party should be prepared if the United States joined Great Britain in the war against Hitler to turn the "imperialist" war into a civil war, as Lenin advocated. In evaluating this testimony, the Board noted two things at footnote 1, page 184, of the Modified Report: that the testimony was credible in view of documentary evidence showing such a course to be in fact part of Communist doctrine if conditions are favorable; and, that Dennis, to whom Budenz attributed the statement, was not called in rebuttal. Under the conditions of that period, there is no reason to view that testimony other than as a demonstration of a Party leader mouthing Party doctrine.

The Budenz testimony does not depend for its acceptance upon the stricken testimony concerning the Starobin letter and the Weiner conversation. Additionally, the considerations set forth above demonstrate that Budenz should not be disbelieved. The Party's general testimonial credibility charge against the witness has been reviewed before by the Board and the Court of Appeals and the proceeding on this remand does not justify a change in the earlier conclusions.

### Recommendation

In the light of the foregoing, it is recommended that the Modified Report be amended accordingly and that the Board affirm its prior determination and order.

Francis A. Cherry
Francis A. Cherry
*Board Member-Examiner*

September 19, 1958
Washington, D. C.

Findings recommended to be stricken from the Modified Report at the pages indicated are as follows:

| Mod. Rept. Page No. | Finding |
|---|---|
| 94 | "We note in this connection that in August 1951 respondent quoted with approval in *Political Affairs* a statement by the leader of the Communist Party of China that the *History of the Communist Party of the Soviet Union* 'is the highest synthesis, the highest generalization of the world Communist movement.' (Pet. Ex. 484, p. 35.)" |
| 98 | "Budenz testified that while at the *Daily Worker* office he read part of a letter from Starobin, the *Daily Worker* correspondent attending the United Nations Conference on Organization in San Francisco, which was to the effect that Manuilsky [a leading Soviet Union Communist and Ukranian (*sic*) representative to the United Nations Conference] had expressed indignation that the American Communist Party had not criticized the American Government leaders more severely, and stated the American Party should observe more carefully the guidance and counsel of the French Communists.[1]" |
| 98, fn. 1 | "1 Respondent contends that cross-examination showed that Budenz made inconsistent statements regarding this matter in a book he had previously written and in prior testimony before the House Un-American Activities Committee. We do not read those prior statements as substantially inconsistent and the essence of his testimony on this is credited." |

120 "Speaking through *Political Affairs* for August 1951, respondent took the position that 'The scales are weighed in favor of the people's peace forces, headed by the Soviet Union' and there is quoted with obvious approval the statement of Comrade Mao Tse-Tung, 'the tested leader of the Communist Party of China' that the *History of the Communist Party of the Soviet Union* 'is the highest sythesis, the highest generalization of *the world Communist movement.*' (Pet. Ex. 484, pp. 11, 35, emphasis added.)"

18158

Mod. Rept.
Page No. Finding

145 "This same official in an article published in *Political Affairs* in May 1951 similarly stated:

> 'Within the boundaries of our country, an oppressed nation, the Negro people in the Black Belt of the South, is fighting for full freedom . . . not only the Negro workers, but the Negro people as a whole . . . are a most important and staunch ally of the American working class, and . . . the future fate of the American working class is closely bound up with the future of the Negro nation.' (Pet. Ex. 481, p. 32.)"

159 "In 1939 the treasurer of the CPUSA stated that it was impossible to put additional CPUSA funds into the *Midwest Daily Record,* a CPUSA-controlled paper, because at that time communications to their sources of funds abroad, i.e., the Soviet Union, had been disrupted."

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**Memorandum and Order**

This proceeding is before us on remand from the United States Court of Appeals for the District of Columbia Circuit for the production, *inter alia*, of all "statements" by the witness Budenz to the FBI in petitioner's possession relating to the so-called Starobin letter and the Weiner conversation. The Court adopted the definition of statements in Public Law 65-269. 18 U.S.C.A., § 3500. (See opinion of the Court issued January 9, 1958 (254 F. 2d 314) and subsequent orders of the Court issued April 11, 1958, and June 16, 1958.)

An order of the Board directing that such "statements" be produced at a hearing before Board Member Cherry resulted in the production of disc recordings of oral statements made by Budenz to agents of the Federal Bureau of Investigation while being interviewed over a number of days in December 1945. These disc recordings were reviewed by the Board Member-Examiner and relevant parts excerpted and given to counsel for respondent. Later, by agreement of counsel for both parties, the excerpts were received in evidence as Communist Party Exhibits 97, 98, 99a, 99b, 100, and 101.

Upon recall of the witness Budenz for further cross-examination, it became established that he was unavailable due to a grave heart condition. In view of his unavailability, respondent moved to strike all of Budenz' testimony or, in the alternative, to strike his testimony concerning Starobin and Weiner and for production of additional material and the calling of FBI agents as witnesses. The Member-Examiner struck Budenz' testimony concerning the Starobin letter and the Weiner conversation due to the witness' unavailability for further cross-examination on these matters and denied the motions in
18234 all other particulars. Thereafter, on September

19, 1958, the Member-Examiner issued his Recommended Decision in which he stated it was presumed that petitioner had complied with the order to produce all pertinent "statements" of Budenz. In its exceptions respondent challenged this presumption and at oral argument on exceptions held October 22, 1958, contended that the record did not support such a presumption and that petitioner had not represented that all such statements had been produced. (Respondent Exception No. 3, p. 3; Tr. 17923-17926.) Petitioner did not reply in argument to this specific assertion and the proceeding was submitted for the issuance of the Board's final Report.

On November 13, 1958, however, petitioner moved for leave to file a supplemental affidavit addressed to the above contention by respondent.[1] The effect of this motion was to request the Board to stay issuance of its final Report until petitioner had an opportunity to submit the affidavit, and this stay was granted.

On November 21, 1958, petitioner then submitted the "Supplemental Affidavit" of attorney Worthington to the effect that there are no substantially verbatim statements other than the disc recordings already produced, of information given by Budenz to the FBI on the two subjects.[2] There were submitted with the affidavit for our *in camera* inspection, however, all of the notes of the interviewing agents made at the December 1945 interview. The affidavit states that "there are no other handwritten notes

[1] The affidavit sought to be supplemented was made by attorney Worthington on August 6, 1958, pursuant to an inquiry of the Member-Examiner as to whether a disc recording existed of an FBI interview with Budenz on December 6, 1945. This affidavit was received as Board Exhibit 4, and related that the interview of December 6th, an agent's notes on which were submitted with the November 21, 1958, affidavit of Mr. Worthington, had not been "recorded."

[2] The Worthington affidavit is hereby accepted for filing as a representation of counsel supplementing prior representations of petitioner's counsel relating to this matter.

by Agents of any subsequent interview concerning the Starobin incident and the Weiner-Childs matter." The affidavit is silent as to the existence of possible memoranda or reports made by the FBI agents of their interviews with Budenz. There is no assertion that the handwritten notes are the only remaining documents purporting to record communications, oral or written, by Budenz to the FBI relating to the two pertinent topics.[3] The last Worthington affidavit gives rise to an impression that petitioner's counsel may be of the belief that counsel should make the determination as to whether any documents (or other recordings) in petitioner's possession constitute "statements" under the pertinent statute. This impression is given substance by the belated presentation of the handwritten notes and petitioner's assertion that they do not constitute a "statement," as defined in 18 U.S.C.A., § 3500.

18235

Respondent, on November 26, 1958, filed an opposition to the supplemental affidavit and also moved to reopen the hearing based, in substantial part, on the assertions of the affidavit itself.

The Board is of the view that only it can properly determine whether a pertinent document (or other recording) constitutes a "statement" under the guides of 18 U.S.C.A., § 3500 (cf. *United States* v. *Waldman*, 159 F. Supp. 747; *United States* v. *Papworth*, 156 F. Supp. 842). We do not read the Court's opinions and orders remanding this proceeding as indicating otherwise.

In view of the assertions of the last Worthington affidavit, when considered in the light of the record on the Budenz question, the Board is unable to conclude with certainty that all pertinent Budenz "statements" have

[3] We are aware of petitioner's earlier representation that, except for the December 1945 interview, no other interviews of Budenz were recorded mechanically and, of course, we accept that representation.

been produced and that the Court's remand, insofar as possible (due to Budenz' unavailability), has been complied with.

Accordingly, in view of the foregoing, it is

ORDERED that on or before December 8, 1958, petitioner shall produce for the Board's *in camera* inspection all notes, memoranda, reports, or other documents or recordings, purporting to record any oral or written communications by Budenz to the FBI, as well as any document written, signed or approved by Budenz himself, if any, which petitioner may have in his possession relating to the Starobin letter and the Weiner conversation; and it is further

ORDERED that compliance therewith shall be without prejudice to respondent's pending motion filed November 26, 1958, and petitioner's right to reply thereto; and it is further

ORDERED that if any such documents or other material are presented to the Board in compliance with the 18236 above order, petitioner may accompany such presentation with a memorandum setting forth any position in respect thereto deemed appropriate in the matter of subsequent Board action.

By the Board (Member Donegan not participating).

(Signed) DOROTHY MCCULLOUGH LEE
Dorothy McCullough Lee
*Chairman*

(SEAL)

December 3, 1958
Washington, D. C.

**Memorandum and Order**

Pursuant to order of the Board issued December 3, 1958, petitioner on December 12, 1958, submitted for the Board's *in camera* inspection three Federal Bureau of Investigation "To and From" memoranda and one FBI intra-Bureau letter. By accompanying memorandum, petitioner asserts that "on inspection of these documents by the Board, it will be manifest that they are not subject to production to the Respondent and, in the event the Board disagrees with this assertion, requests to be heard."[1]

The four documents contain additional material relating to the Starobin letter and/or the Weiner conversation not heretofore produced. However, we find that inspection of them on their face is insufficient to reach a determination as to whether they are "statements" as defined by 18 U.S.C. 3500, which definition was adopted by the Court of Appeals in this proceeding. Further inquiry is necessary to determine whether the pertinent portions of the documents are "statements." Therefore, it is the Board's view that the individuals who authored the pertinent portions of the memoranda dated June 7, 1946, and August 2, 1950, the summaries of information covered by memorandum dated February 7, 1947, and the letter dated March 4, 1947 (not the signatories thereto if they are not the authors) be produced to give testimony to aid the Board in reaching a determination. In other words, the Board desires the assistance of those individuals who are competent to testify on the appropriate factors

18254 set forth in the statute to be considered in determining whether the pertinent portions of these

[1] Regarding the agents' notes of the interviews which took place on December 7, 10, and 12, 1945, submitted by petitioner with a memorandum of November 21, 1958, these are not involved in this order for reasons to be stated in a forthcoming Board memorandum.

documents are "statements." Counsel for both parties are, of course, entitled to be present. Accordingly, it is

ORDERED that petitioner produce the authors of the relevant portions of the above-described documents (not the signatories thereto if they are not the authors) at a hearing to be held on December 22, 1958, at 10:00 A. M. in the Board's hearing room (Room 113), 811 Vermont Ave., N. W., Washington, D. C., to give testimony on the foregoing, and it is further

ORDERED that at the hearing both parties will be given an opportunity to be heard on whether the pertinent portions of the documents are "statements" as defined by 18 U.S.C. 3500, and present any other pertinent matters.

By the Board (Members Donegan and Cherry not participating, the latter due to absence).

(SEAL) (Signed) DOROTHY MCCULLOUGH LEE
Dorothy McCullough Lee
*Chairman*

December 17, 1958
Washington, D. C.

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18259 SUBVERSIVE ACTIVITIES CONTROL BOARD

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**Notice and Order**

Pursuant to order of the Board issued December 3, 1958, petitioner on December 12, 1958, submitted certain documents for the Board's *in camera* inspection and in so doing requested to be heard on whether the documents are subject to production to respondent. The Board fixed December 22, 1958, as the date for a hearing thereon and ordered that petitioner produce at the hearing the authors of the documents to give testimony to aid the Board in determining whether the relevant portions should be turned over to counsel for respondent for inspection.

Prior to the hearing, petitioner, on the morning of December 19, 1958, served and filed a memorandum and indicated a position on what portions of the documents are relevant by proffering photostatic reproductions of excerpts from the documents. In the memorandum, the petitioner

> . . . withdraws all objections and requests the Board to make available to the Respondent the record of prior statements to the Federal Bureau of Investigation by Budenz touching upon the subject matter of his testimony concerning the Starobin letter and the Weiner-Childs conversation including everything which is conceivably demandable under 18 U.S.C. 3500 subject to appropriate excisions by the Board.

The documents submitted December 12, 1958, by petitioner are, respectively, (a) A Federal Bureau of Investigation inter-office memorandum dated June 7, 1946, (b) a Federal Bureau of Investigation inter-office memorandum dated February 7, 1947, and, attached thereto, 18260 a "series of summaries of information," (c) a Federal Bureau of Investigation inter-office letter dated March 4, 1947, and (d) a Federal Bureau of Investigation inter-office memorandum dated August 2, 1950. The Board has inspected and reviewed each of these documents.

It is clear that petitioner's memorandum of this date makes unnecessary a hearing to determine whether relevant portions of the documents should be turned over to respondent and moots our order of December 17, 1958, requiring the calling of the authors of the documents for this purpose. Those portions of the documents which the Board finds to relate to the Starobin letter and the Weiner conversation will be turned over to respondent. In order to do so, a hearing will be convened as set forth below, at which time counsel will be heard on any matters felt pertinent. Accordingly, it is

ORDERED that the Board's order issued December 17, 1958, should be and the same is hereby vacated; and it is further

ORDERED that a hearing will be held on Monday, December 22, 1958, commencing at 10:00 A. M. in Board Hearing Room 113, Lafayette Building, Washington, D. C., for the purpose of turning pertinent excerpts over to respondent and hearing counsel.

By the Board (Members Donegan and Cherry not participating, the latter due to absence).

(SEAL) (Signed) DOROTHY MCCULLOUGH LEE
Dorothy McCullough Lee
*Chairman*

December 19, 1958
Washington, D. C.

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18267 Filed Dec. 29, 1958

IN THE SUBVERSIVE ACTIVITIES CONTROL BOARD

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**Respondent's Supplemental Motion to Reopen Hearing and Motion for the Production of Documents**

In view of the contents of the FBI office memoranda and intra-Bureau letter produced to respondent on December 22, 1958, respondent withdraws its motion of November 26, 1958 to reopen the hearing for the purpose of adducing evidence that Budenz did not at any time or in any form relate to the FBI the alleged incidents concerning the Starobin letter and the Childs-Weiner conversation to which he testified in this proceeding.

However, it appears from these documents that Budenz gave the FBI several versions of the Starobin letter and the Childs-Weiner conversation which (a) are self-contradictory, (b) contradict the statements made by him in the

December, 1945 recorded interview, and (c) contradict his testimony in this proceeding. Respondent therefore moves to reopen the hearing for the purpose of calling as witnesses the FBI agents who were the authors of the office memoranda and intra-Bureau letter and examining them with reference to the following:

1. The whereabouts of the contemporaneous handwritten notes or typewritten transcriptions thereof, if any, made by the FBI agents who interviewed Budenz, recording the statements attributed to him in the FBI office memoranda and intra-Bureau letter.

18268 2. The date of the interview with Budenz referred to in the office memorandum of June 7, 1946.

3. Which of the statements by Budenz reported in the office memorandum of February 7, 1947 were made by him in December, 1945 and which of such statements were made by him in April 1946.

4. Whether the FBI agents who conducted the interviews referred to in the office memoranda and intra-Bureau letter questioned Budenz concerning the contradictions and inconsistencies between the statements contained in the recorded interview of December 1945 and the several and mutually contradictory versions of the Starobin letter and the Childs-Weiner conversation reported in the office memoranda and intra-Bureau letter.

5. Whether agents of the FBI who had knowledge of Budenz' prior statements relating to the Starobin letter and the Childs-Weiner conversation knew of Budenz' testimony concerning the two alleged incidents at or about the time it was given in this proceeding.

Testimony by agents of the FBI on the foregoing matters is relevant and material to the following issues: (a) Whether Budenz' testimony in this proceeding with reference to the alleged Starobin letter and Childs-Weiner conversation was false; (b) whether, if false, it was known

by the FBI to be false; and (c) whether all of Budenz' testimony in this proceeding should be stricken as tainted.

Respondent also moves to reopen the hearing for the following additional purposes:

1. To introduce in evidence the excerpts produced to it on December 22, 1958, and to make the unexcerpted documents part of the formal record.

2. To examine all FBI agents having knowledge of the facts to ascertain whether or not petitioner has now produced all memoranda, letters, reports and other documents containing, reporting or purporting to summarize
18269 oral or written statements by Budenz relating to the alleged incidents of the Starobin letter and the Childs-Weiner conversation.

Respondent further moves for the production to it of the unexcised recording of the Budenz interview with the FBI of December, 1945, the unexcised office memoranda dated June 7, 1946, February 7, 1947 and August 2, 1950 and the unexcised intra-Bureau letter dated March 4, 1947. The grounds for this motion are that the provisions of 18 U.S.C. 3500 for the excision of documents are inapplicable or, if applicable, are unconstitutional.

Respondent also moves that the Board require the production of all statements in the possession of the petitioner made by all of petitioner's witnesses on any matters to which their testimony in this proceeding relates. The grounds for this motion are that the hearing panel denied respondent's requests for production of certain witnesses' statements on the erroneous basis that respondent was not entitled to statements made by petitioner's witnesses, at least unless it first showed a contradiction beween the testimony and the statements. (See, e. g., Tr. 1092-3, 1208, 12069-76.) Respondent's counsel were not obliged to continue to make fruitless motions for statements when the panel had established a principle of denying production.

In this connection see the questions presented in *Rubin* v. *U. S.*, Supreme Court, No. 437, Oct. Term 1958, cert. granted December 8, 1958.

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18290 SUBVERSIVE ACTIVITIES CONTROL BOARD

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**Memorandum Opinion and Order**

We have for consideration at this time respondent's supplemental motion to reopen the hearing in this remand proceeding and motion for the production of additional documents, both contained in the same document filed December 29, 1958. The Recommended Decision of the hearing member was issued on September 19, 1958, and arguments on exceptions thereto heard on October 22, 1958. Petitioner thereafter on November 13, 1958, moved for leave to file a supplemental affidavit with the Board because of the contentions made by respondent in argument on exceptions to the effect that petitioner had not, as previously ordered by the Court of Appeals and by the Board, produced all statements of the witness Budenz relating to the Starobin letter or the Weiner conversation, and had made no representation that this had been done.

The supplemental affidavit of Francis X. Worthington was lodged with the Board on November 21, 1958, accompanied by handwritten notes taken by FBI agents at interviews with Budenz in December 1945, which were submitted for the Board's *in camera* inspection, with petitioner taking the position they were merely frag-
18291 mentary jottings and not producible to respondent as statements.[1] On November 26, 1958, respond-

[1] On their face, these notes were taken at interviews on December 6, 7, 10 and 12, 1945, and our *in camera* inspection of the notes confirms petitioner's representations that they are mere fragmentary jottings, and not conceivably substantially verbatim and they are therefore not producible to respondent. Also, these notes, except for those dated December 6, cover

ent filed objections to the supplemental affidavit and a motion to reopen the hearing (which it later supplemented on December 8, 1958) for the purpose of establishing through the testimony of FBI agents who interviewed Budenz that Budenz did not at any time or in any form relate to the FBI the alleged incidents concerning the Starobin letter and the Weiner conversation to which he had testified at the original hearing, and further to establish that Budenz' testimony concerning these incidents was a fabrication.

By memorandum and order of December 3, 1958, the supplemental affidavit was accepted for filing and for the reasons set forth in that memorandum the Board therein ordered petitioner to produce for its *in camera* inspection all documents, etc., in petitioner's possession relating to communications by Budenz to the FBI concerning the Starobin and Weiner incidents for appropriate Board determination as to whether any such documents were "statements." Petitioner thereafter requested and was granted an extension of time in which to comply with the Board's order of December 3, 1958, and on December 12, 1958, submitted for the Board's *in camera* inspection four documents consisting of FBI inter-office memoranda dated June 7, 1946, August 2, 1950, and February 7, 1947 (the latter being a cover memorandum with attached summaries), and an internal FBI letter dated March 4, 1947. Petitioner took the position that these documents were not "statements," as defined in 18 U.S.C. 3500 and therefore not producible to respondent.

On December 17, 1958, the Board ordered petitioner to produce the authors of the relevant portions of the above-described documents to assist it in determining whether

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the so called December 1945 interviews which were recorded on discs, verbatim extracts of which have been produced to respondent and received in evidence as Communist Party Exhibits 97, 98, 99A, 99B, 100 and 101. The above supplemental affidavit of Mr. Worthington is hereby designated Board Exhibit 4A and the notes will be sealed in the record as Bor 1 Exhibit 5.

these pertinent portions constituted "statements" within the guides afforded by 18 U.S.C. 3500. By memorandum filed December 19, 1958, petitioner withdrew its objections to giving respondent the relevant portions of the above-described documents and requested the Board to make the appropriate excisions and to make available to respondent the relevant extracts.

18292 On December 22 and 23, 1958, the relevant excerpts of the four documents were turned over to counsel for respondent, and respondent was given until December 29, 1958, to file an appropriate memorandum in the light thereof. On that date respondent filed the aforementioned supplemental motion to reopen the hearing and motion for production of documents, which we rule upon herein. In view of the documents received December 22, 1958, respondent in this motion withdrew its motion of November 26, 1958, to reopen the hearing for the purpose of adducing evidence that Budenz had never related to the FBI the incidents concerning the Starobin letter and the Weiner conversation.

In its supplemental motion to reopen the hearing, respondent contends that the documents produced to it reveal that Budenz gave the FBI several versions of the Starobin and Weiner incidents which were self-contradictory and which contradict his testimony in this proceeding. Respondent seeks to reopen the hearing and to examine the FBI agents who were authors of these documents for the purposes of (1) determining the existence and whereabouts of contemporaneous handwritten notes or transcriptions thereof recording statements attributed to Budenz in these documents; (2) determining the date of the interview with Budenz referred to in the office memorandum of June 7, 1946; (3) ascertaining which of the statements by Budenz contained in the summaries of information covered by office memorandum dated February 7, 1947, were made by him in December 1945 and which

were made by him in April 1946; (4) determining whether the interviewing agents questioned Budenz concerning alleged contradictions and inconsistencies in his statements about the Starobin and Weiner incidents; (5) ascertaining whether agents of the FBI had knowledge of Budenz' prior statements concerning the two incidents at or about the time he gave his testimony at the original hearing in this proceeding; (6) introducing into evidence the excerpts produced to it on December 22, 1958, and making the unexcerpted documents part of the formal record; and (7) examining all FBI agents having knowledge of the facts to ascertain whether or not petitioner has produced all matters relating to the Starobin and Weiner incidents.

Further, respondent moves for the production to it of the unexcised recordings of the Budenz interview with the FBI in December 1945, the unexcised office memoranda dated June 7, 1946, February 7, 1947, and August 2, 1950, and the unexcised intra-Bureau letter dated March 4, 1947, on the grounds that the provisions of 18 U.S.C. 3500 for the excision of documents are inapplicable to Board proceedings, or, if applicable, are unconstitutional. Respondent also moves the Board to require production of all statements in the possession of the petitioner made by all of petitioner's witnesses on any matters to which their testimony in this proceeding relates on the ground
18293 that the hearing panel had erroneously established a principle of denying production to respondent unless it first showed a contradiction between the testimony of the witnesses and the statements sought to be produced, and that therefore respondent's counsel were not obliged to continue to make fruitless motions for production.

Petitioner on January 7, 1959, replied to respondent's supplemental motion to reopen and its motion for production of documents, taking the position that the motions should be denied, except in one particular noted below. Petitioner represents, in response to point (1) above of

the motion to reopen, that it has produced everything which is conceivably demandable, including the only handwritten notes of FBI agents which are extant of relevant interviews with Budenz, and represents that other notes in this connection have been destroyed and if they or typewritten transcriptions thereof were in existence, they would have been produced. As to the date of the interview with Budenz referred to in the office memorandum of June 7, 1946, set forth above in point (2) of respondent's motion, petitioner points out that the document itself states that the interview was "recent" and represents the date to have been May 22, 1946, but contends this fact is hardly material.

Concerning point (3) above of respondent's motion, petitioner states that all portions of the summaries of information covered by office memorandum of February 7, 1947, relate to statements made by Budenz in December 1945 and that a separate memorandum which covers the April 1946 interview referred to in the office memorandum will be submitted to the Board upon request for its *in camera* inspection and will reveal that nothing in that interview related to the Starobin or Weiner incidents.[2]

18294 In reply to points (4) and (5) of respondent's motion, petitioner contends that it is patent from the documents produced that the FBI agents did not question Budenz concerning any alleged inconsistencies in his

[2] The Board on January 8, 1959, directed petitioner to submit the proffered memorandum of the April 1946 interview, and this was done the following day. On January 12, 1959, respondent tendered an answer (which is hereby filed) to petitioner's reply to its supplemental motion stating that a comparison of pages 4 and 13 of the summaries of information which accompanied the February 7, 1947, inter-office memorandum furnished to it on December 22, 23, 1958, when compared with an excerpt from the disc recorded interview with Budenz on December 7, 1945, (Communist Party Exhibit 99B), showed material in the former which was lacking in the latter and that therefore it was reasonable to infer that either all relevant memoranda and records of the 1945 interviews have not been produced or that petitioner's representation that the summaries attached to the February 7, 1947, memorandum refers solely to interviews in December 1945, is incorrect.

versions of the two subject incidents because if they had done so, this matter would be related in these documents. Further, petitioner asserts that whether agents of the FBI knew of Budenz' testimony in this proceeding, is irrelevant to the issue of Budenz' credibility. It is petitioner's position that in view of Budenz' unavailability he cannot now be confronted and hence testimony of agents should not be received to impeach him.

Concerning leave to introduce into evidence the excerpts produced to respondent on December 22, 1958, as requested in point (6) above, and to make the unexcerpted documents from which they were taken part of the record, petitioner interposes no objection. As to respondent's request (point (7) above) to examine FBI agents to ascertain if petitioner has produced all material called for by the Court and the Board, petitioner submits that its representations that all such material has been produced should be accepted.

In opposition to respondent's motion to produce the unexcised recordings and documents, petitioner contends that this is merely a fishing expedition which goes far beyond the scope of the remand and is an attempt to disregard the clarification order of June 16, 1958, of the Court of Appeals which limited production to statements relating to the Starobin and Weiner incidents. Further, petitioner represents that it has produced to the Board all documents conceivably demandable within the meaning of 18 U.S.C. 3500 and has fully complied with the mandate of the Court of Appeals. Moreover, it contends that the Board is not the proper forum to determine the constitutionality of 18 U.S.C. 3500.

In opposing respondent's demand for all statements by all of petitioner's witnesses touching upon their testimony in this proceeding, petitioner points out that this is beyond the scope of the remand and is controlled by the language in the Court's clarifying order dated June 16,

1958, wherein it states: ". . . the Party could not in subsequent ancillary proceedings make new demands for further material for cross-examination." Petitioner further points out that the Court of Appeals in its opinion in this proceeding dated January 9, 1958, (254 F. 2d 314), and its order dated April 11, 1958, considered similar blanket demands by respondent for production of statements of petitioner's witnesses, and denied them.

Preliminarily, we might state that due to the posture of this proceeding when Budenz' unavailability was 18295 established at the hearing the Board has sought to proceed with the Court's remand instructions as far as practicable, given the unavailability of the witness.[3]

We accept petitioner's unequivocal representation that all Budenz documents or other recordings relating to the Starobin letter and the Weiner conversation in petitioner's possession (see, e.g., petitioner's response, pp. 6-7, to the instant supplemental motion) have been submitted to the Board and we are of the view that, with the exception that the parties will be given opportunity for final argument and to move documents into evidence, the Board has pursued the production question as far as it can reasonably do so under the circumstances of unavailability of the witness. After the argument set below, the Board will reach a final determination on the Budenz question.

We have considered the various grounds of respondent's pending motions and except as noted hereafter find them

[3] After petitioner produced to respondent, as excised by the hearing member, the disc recorded statements of Budenz to the FBI, request was made for the recall of Budenz for further cross-examination. Thereupon at the hearing on August 7, 1958, counsel for petitioner presented a physician's letter indicating the unavailability of Budenz by reason of a grave heart condition (Board Exhibit 3C). Subsequent independent investigation directed by the hearing member confirmed the condition of Budenz' health and it was agreed by the parties that Budenz could neither testify at the hearing, nor give testimony by deposition, nor by interrogatories.

to be without merit. The Court previously ruled specifically on the limits of its remand concerning Budenz and we see no supervening circumstances warranting an expansion in order to comply with the spirit of the remand. Respondent's efforts to expand the Court's instructions are without merit. We feel that, given the witness' unavailability for testimony, respondent has been granted as full an exploration of the question as is practicable and equitable.

The Board is of the further view that petitioner's representations in responding to respondent's motions on the factual details as to dates, etc., are sufficient for respondent's purposes. Our *in camera* inspection of the proffered memorandum of the April 1946 interview shows that it does not relate to the two subject matters under inquiry. This document is sealed in the record as Board Exhibit 6. The unexcised office memoranda of June 7, 1946, August 2, 1950, and February 7, 1947, and the letter of March 4, 1947, are sealed in the record as Board Exhibit 7.

Respondent's attack on the applicability of the excision provisions of 18 U.S.C. 3500 and their constitu-
18296 tionality is not meritorious. The excision by the Board, after *in camera* inspection, of irrelevant portions of documents, follows prevailing judicial procedure and such procedure was recognized by the Court of Appeals in its opinion of January 9, 1958, in this proceeding (254 F. 2d 314, 329). The constitutional attack on those provisions is not, in any event, a question for Board determination.

Accordingly, it is

ORDERED that respondent's motion filed November 26, 1958, as supplemented on December 8, 1958, to reopen the hearing, is considered withdrawn and respondent's motions filed December 29, 1958, are hereby denied, except insofar as the motions go to an opportunity to move into evidence

as exhibits the documents furnished to respondent on December 22 and 23, 1958, and it is further

ORDERED that the hearing in this proceeding will convene on January 19, 1959, at 10:00 A.M. in the Board's hearing room (113), Lafayette Building, 811 Vermont Avenue, N. W., Washington, D. C., to afford respondent the opportunity to offer in evidence the above-described documents and to hear such further argument as the parties may desire to make concerning the question of Budenz' credibility and other matters deemed pertinent. Arguments shall be limited to forty-five minutes for each side.

By the Board (Member Donegan not participating).

DOROTHY MCCULLOUGH LEE
Dorothy McCullough Lee
*Chairman*

(SEAL)

January 13, 1959
Washington, D. C.

**C. P. Exhibit 95**

May 28, 1958

# MARY STALCUP MARKWARD

From March 31, 1943, to January 24, 1958, Mary Stalcup Markward has been paid a total of $26,160.95.

## MARY STALCUP MARKWARD

| DATE | | PURPOSE FOR WHICH MADE | AMOUNT |
|---|---|---|---|
| 1943 | | | |
| March | 31 | For information furnished | $ 3.00 |
| April | 14 | For literature & information: no breakdown | 6.00 |
| April | 21 | For information furnished | 5.00 |
| April | 28 | For information furnished | 7.00 |
| May | 5 | For information furnished | 8.00 |
| May | 12 | For information furnished | 10.00 |
| May | 19 | For information furnished | 5.00 |
| May | 26 | For information furnished | 10.00 |
| June | 2 | For information furnished | 2.00 |
| June | 9 | For information furnished | 10.00 |
| June | 16 | For information furnished | 8.00 |
| June | 23 | For information furnished | 3.00 |
| June | 30 | For information furnished | 8.00 |
| July | 7 | For information furnished | 10.00 |
| July | 14 | For information furnished | 10.00 |
| July | 21 | For information furnished | 15.00 |
| July | 28 | For information furnished | 10.00 |
| August | 5 | For information furnished | 10.00 |
| August | 11 | For information furnished | 15.00 |
| August | 18 | For information furnished | 4.95 |
| August | 25 | For information furnished | 15.00 |
| September | 1 | For information furnished | 15.00 |
| September | 8 | For information furnished | 15.00 |
| September | 15 | For information furnished | 15.00 |
| September | 22 | For expenses: 4 tickets to Elizabeth Gurley Flynn mass meeting of the Communist Party to be held 10/1/43 at Press Club Auditorium, Washington, D. C. | 2.00 |
| September | 22 | For information furnished | 15.00 |
| September | 29 | For information furnished | 15.00 |
| October | 6 | For information furnished | 15.00 |
| October | 13 | For information furnished | 15.00 |
| October | 20 | For information furnished | 15.00 |
| October | 27 | For information furnished | 18.00 |
| November | 3 | For information furnished | 20.00 |
| November | 10 | For information furnished | 20.00 |
| November | 19 | For information furnished | 20.00 |
| November | 24 | For information furnished | 25.00 |
| December | 1 | For information furnished | 20.00 |
| December | 8 | For information furnished | 20.00 |
| December | 15 | For information furnished | 25.00 |
| December | 22 | For information furnished | 25.00 |
| December | 29 | For information furnished | 20.00 |
| TOTAL 1943 | | | $ 509.95 |

MARY STALCUP MARKWARD (continued)

| DATE | PURPOSE FOR WHICH MADE | AMOUNT |
|---|---|---|
| 1944 | | |
| January 5 | For information furnished | $ 20.00 |
| January 12 | For information furnished | 25.00 |
| January 19 | For information furnished | 25.00 |
| January 26 | For information furnished | 25.00 |
| February 2 | For information furnished | 25.00 |
| February 9 | For information furnished | 25.00 |
| February 16 | For information furnished | 30.00 |
| February 23 | For information furnished | 25.00 |
| March 1 | For information furnished | 25.00 |
| March 8 | For information furnished | 30.00 |
| March 15 | For information furnished | 25.00 |
| March 22 | For information furnished | 30.00 |
| March 29 | For information furnished | 25.00 |
| April 5 | For information furnished | 30.00 |
| April 12 | For information furnished | 30.00 |
| April 19 | For information furnished | 35.00 |
| April 26 | For information furnished | 35.00 |
| May 3 | For information furnished | 35.00 |
| May 10 | For information furnished | 25.00 |
| May 17 | To obtain information | 25.00 |
| May 31 | For information furnished | 50.00 |
| June 7 | For services rendered | 30.00 |
| June 14 | For services rendered | 30.00 |
| June 21 | For information furnished | 35.00 |
| June 28 | For information furnished | 35.00 |
| July 5 | For services rendered | 35.00 |
| July 12 | For services & information furnished: no breakdown | 35.00 |
| July 19 | For services & information furnished: no breakdown | 35.00 |
| July 26 | For services & information furnished: no breakdown | 35.00 |
| August 2 | For information furnished | 35.00 |
| August 9 | For services rendered | 35.00 |
| August 23 | For services rendered | 70.00 |
| August 30 | For expenses: trip to New York City & attendance at The Jefferson School during the week beginning 8/13/44: no itemization | 50.00 |
| August 30 | For information furnished | 35.00 |
| September 6 | For information & services rendered: no breakdown | 35.00 |
| September 13 | For information furnished | 35.00 |
| September 20 | For information furnished & services: no breakdown | 35.00 |
| September 27 | For information furnished | 35.00 |
| October 4 | For information furnished | 35.00 |
| October 11 | For information furnished | 35.00 |
| October 18 | For information furnished | 38.00 |
| October 25 | For information furnished | 35.00 |
| November 1 | For information furnished | 35.00 |
| November 8 | For information furnished | 35.00 |
| November 15 | For information furnished | 35.00 |
| November 22 | For information furnished | 35.00 |
| November 29 | For information furnished | 35.00 |
| December 6 | For information furnished | 35.00 |
| December 13 | For information furnished | 35.00 |
| December 20 | For information furnished | 38.00 |
| December 27 | For information & services rendered: no breakdown | 35.00 |
| TOTAL 1944 | | $1,696.00 |

MARY STALCUP MARKWARD (continued)

| DATE | PURPOSE FOR WHICH MADE | AMOUNT |
|---|---|---|
| 1945 | | |
| January 3 | For information furnished | $ 40.00 |
| January 10 | For information furnished | 40.00 |
| January 17 | For information furnished | 40.00 |
| January 24 | For information furnished | 40.00 |
| January 31 | For information furnished | 40.00 |
| February 7 | For information furnished | 40.00 |
| February 14 | For information furnished | 40.00 |
| February 21 | For information furnished | 40.00 |
| February 28 | For information furnished | 40.00 |
| March 7 | For information furnished | 40.00 |
| March 14 | For information furnished | 40.00 |
| March 21 | For information furnished | 40.00 |
| March 28 | For information furnished | 40.00 |
| April 4 | For information furnished | 40.00 |
| April 11 | For information furnished | 45.00 |
| April 20 | For information furnished | 40.00 |
| May 3 | For information furnished | 80.00 |
| May 11 | For information furnished | 40.00 |
| May 16 | For information furnished | 40.00 |
| May 25 | For information furnished | 45.00 |
| June 1 | For information furnished | 40.00 |
| June 8 | For information & services rendered: no breakdown | 45.00 |
| June 15 | For information & services rendered: no breakdown | 45.00 |
| June 22 | For information & services rendered: no breakdown | 45.00 |
| June 29 | For information & services rendered: no breakdown | 45.00 |
| July 6 | For information & services rendered: no breakdown | 45.00 |
| July 13 | For information & services rendered: no breakdown | 45.00 |
| July 24 | For information & services rendered: no breakdown | 45.00 |
| July 27 | For information & services rendered: no breakdown | 45.00 |
| August 9 | For information & services rendered: no breakdown | 45.00 |
| August 9 | For information & services rendered: no breakdown | 45.00 |
| August 27 | For information & services rendered: no breakdown | 45.00 |
| August 27 | For information & services rendered: no breakdown | 45.00 |
| September 7 | For information & services rendered: no breakdown | 45.00 |
| September 7 | For information & services rendered: no breakdown | 45.00 |
| September 7 | For information furnished | 60.00 |
| September 14 | For information & services rendered: no breakdown | 45.00 |
| September 25 | For information & services rendered: no breakdown | 90.00 |
| October 5 | For information & services rendered: no breakdown | 45.00 |
| October 12 | For information & services rendered: no breakdown | 45.00 |
| October 19 | For information & services rendered: no breakdown | 45.00 |
| October 24 | For information & services rendered: no breakdown | 50.00 |
| November 2 | For information & services rendered: no breakdown | 50.00 |
| November 9 | For information & services rendered: no breakdown | 50.00 |
| November 16 | For information & services rendered: no breakdown | 90.00 |
| November 23 | For information & services rendered: no breakdown | 90.00 |
| November 30 | For information & services rendered: no breakdown | 100.00 |
| December 11 | For information & services rendered: no breakdown | 90.00 |
| December 14 | For information & services rendered: no breakdown | 90.00 |
| December 21 | For information & services rendered: no breakdown | 100.00 |
| December 28 | For information & services rendered: no breakdown | 100.00 |
| TOTAL 1945 | | $2,660.00 |

MARY STALCUP MARKWARD (continued)

| DATE | PURPOSE FOR WHICH MADE | AMOUNT |
|---|---|---|
| 1946 | | |
| January 5 | For information & services rendered: no breakdown | $ 90.00 |
| January 10 | For information & services rendered: no breakdown | 90.00 |
| January 21 | For information & services rendered: no breakdown | 90.00 |
| January 28 | For information & services rendered: no breakdown | 90.00 |
| February 8 | For information & services rendered: no breakdown | 90.00 |
| February 15 | For information & services rendered: no breakdown | 90.00 |
| February 25 | For information & services rendered: no breakdown | 90.00 |
| March 1 | For information & services rendered: no breakdown | 90.00 |
| March 8 | For information & services rendered: no breakdown | 100.00 |
| March 15 | For information & services rendered: no breakdown | 90.00 |
| March 22 | For information & services rendered: no breakdown | 90.00 |
| March 29 | For information & services rendered: no breakdown | 90.00 |
| April 5 | For information & services rendered: no breakdown | 90.00 |
| April 17 | For information & services rendered: no breakdown | 180.00 |
| April 29 | For information & services rendered: no breakdown | 180.00 |
| May 15 | For information & services rendered: no breakdown | 180.00 |
| May 27 | For information & services rendered: no breakdown | 180.00 |
| June 15 | For information & services rendered: no breakdown | 270.00 |
| July 12 | For information & services rendered: no breakdown | 90.00 |
| July 24 | For information & services rendered: no breakdown | 180.00 |
| August 5 | For information & services rendered: no breakdown | 180.00 |
| August 16 | For information & services rendered: no breakdown | 100.00 |
| August 28 | For information & services rendered: no breakdown | 180.00 |
| September 13 | For information & services rendered: no breakdown | 180.00 |
| September 27 | For information & services rendered: no breakdown | 270.00 |
| October 9 | For information & services rendered: no breakdown | 90.00 |
| October 21 | For information & services rendered: no breakdown | 180.00 |
| November 4 | For information & services rendered: no breakdown | 180.00 |
| November 22 | For information & services rendered: no breakdown | 270.00 |
| December 11 | For information & services rendered: no breakdown | 180.00 |
| December 23 | For information & services rendered: no breakdown | 200.00 |
| TOTAL 1946 | | $4,450.00 |
| 1947 | | |
| January 6 | For information & services rendered: no breakdown | $ 135.00 |
| January 22 | For information & services rendered: no breakdown | 270.00 |
| February 10 | For information & services rendered: no breakdown | 270.00 |
| February 17 | For information & services rendered: no breakdown | 90.00 |
| March 7 | For information & services rendered: no breakdown | 180.00 |
| March 24 | For information & services rendered: no breakdown | 270.00 |
| April 8 | For information & services rendered: no breakdown | 180.00 |
| April 24 | For information & services rendered: no breakdown | 180.00 |
| May 15 | For information & services rendered: no breakdown | 270.00 |
| June 10 | For information & services rendered: no breakdown | 360.00 |
| July 17 | For information & services rendered: no breakdown | 360.00 |
| August 14 | For information & services rendered: no breakdown | 400.00 |
| August 22 | For information & services rendered: no breakdown | 180.00 |
| September 9 | For information & services rendered: no breakdown | 270.00 |
| October 2 | For information & services rendered: no breakdown | 270.00 |
| October 16 | For information & services rendered: no breakdown | 180.00 |
| October 30 | For information & services rendered: no breakdown | 180.00 |
| November 13 | For information & services rendered: no breakdown | 180.00 |
| November 25 | For information furnished | 180.00 |
| December 11 | For information & services rendered: no breakdown | 180.00 |
| December 30 | For information furnished | 300.00 |
| TOTAL 1947 | | $4,885.00 |

MARY SPALCUP MARKWARD (continued)

| DATE | PURPOSE FOR WHICH MADE | AMOUNT |
|---|---|---|
| 1948 | | |
| January 15 | For information & services rendered: no breakdown | $ 180.00 |
| January 27 | For information & services rendered: no breakdown | 180.00 |
| February 3 | For information & services rendered: no breakdown | 90.00 |
| February 17 | For information & services rendered: no breakdown | 180.00 |
| March 1 | For information & services rendered: no breakdown | 90.00 |
| March 10 | For information & services rendered: no breakdown | 180.00 |
| March 17 | For information & services rendered: no breakdown | 90.00 |
| April 5 | For information & services rendered: no breakdown | 180.00 |
| April 13 | For information & services rendered: no breakdown | 180.00 |
| April 22 | For information & services rendered: no breakdown | 90.00 |
| May 4 | For information & services rendered: no breakdown | 180.00 |
| May 11 | For information & services rendered: no breakdown | 90.00 |
| May 27 | For information & services rendered: no breakdown | 180.00 |
| June 9 | For information & services rendered: no breakdown | 180.00 |
| June 22 | For information & services rendered: no breakdown | 180.00 |
| June 29 | For information & services rendered: no breakdown | 90.00 |
| July 8 | For information & services rendered: no breakdown | 90.00 |
| July 19 | For information & services rendered: no breakdown | 200.00 |
| August 6 | For information furnished | 180.00 |
| August 17 | For information & services rendered: no breakdown | 180.00 |
| August 30 | For information & services rendered: no breakdown | 180.00 |
| September 14 | For information & services rendered: no breakdown | 180.00 |
| September 28 | For information & services rendered: no breakdown | 180.00 |
| October 12 | For information & services rendered: no breakdown | 180.00 |
| October 26 | For information & services rendered: no breakdown | 180.00 |
| November 9 | For information & services rendered: no breakdown | 180.00 |
| November 23 | For information & services rendered: no breakdown | 180.00 |
| December 7 | For information & services rendered: no breakdown | 180.00 |
| December 21 | For information & services rendered: no breakdown | 200.00* |
| TOTAL 1948 | | $4,630.00 |

* In a previous tabulation this payment was shown as $175.50. The correct amount is $200.00.

| | | |
|---|---|---|
| 1949 | | |
| January 4 | For information & services rendered: no breakdown | $ 180.00 |
| January 18 | For information & services rendered: no breakdown | 180.00 |
| February 1 | For information & services rendered: no breakdown | 180.00 |
| February 15 | For services rendered | 180.00 |
| March 1 | For information & services rendered: no breakdown | 200.00 |
| March 15 | For information & services rendered: no breakdown | 200.00 |
| March 29 | For information furnished | 200.00 |
| April 12 | For information & services rendered: no breakdown | 200.00 |
| April 26 | For information & services rendered: no breakdown | 200.00 |
| May 10 | For information furnished | 200.00 |
| May 26 | For information and assistance furnished: no breakdown | 200.00 |
| June 7 | For information and assistance furnished: no breakdown | 200.00 |
| June 21 | For information & services performed: no breakdown | 200.00 |
| July 12 | For information & assistance: no breakdown | 180.00 |
| July 28 | For information & services rendered: no breakdown | 150.00 |
| August 16 | For information & services rendered: no breakdown | 150.00 |
| September 6 | For information & services rendered: no breakdown | 225.00 |
| September 22 | For information & services rendered: no breakdown | 150.00 |
| October 6 | For information & services rendered: no breakdown | 150.00 |
| October 24 | For information & services rendered: no breakdown | 100.00 |
| November 8 | For information & services rendered: no breakdown | 150.00 |
| December 13 | For information furnished | 100.00 |
| TOTAL 1949 | | $3,875.00 |

MARY STALCUP MARKWARD (continued)

| DATE | PURPOSE FOR WHICH MADE | AMOUNT |
|---|---|---|
| **1950** | | |
| February 24 | For information furnished | $ 100.00 |
| April 10 | For information received & services rendered: no breakdown | 100.00 |
| June 16 | For information & services: no breakdown | 100.00 |
| October 23 | For information furnished | 50.00 |
| November 28 | For information furnished | 50.00 |
| December 21 | For information & research being performed; no breakdown | 50.00 |
| TOTAL 1950 | | $ 450.00 |
| **1951** | | |
| January 9 | For information furnished | $ 50.00 |
| February 27 | For information & services: no breakdown | 50.00 |
| May 22 | For information & services: no breakdown | 50.00 |
| June 22 | For services | 50.00 |
| July 27 | For services | 50.00 |
| September 4 | For services | 50.00 |
| October 6 | For services & information furnished: no breakdown | 50.00 |
| October 10 | For travel & incidental expenses for trip to New York City at request of U. S. attorney: no itemization | 45.00 |
| November 9 | For services rendered | 50.00 |
| December 20 | For services & information: no breakdown | 50.00 |
| TOTAL 1951 | | $ 495.00 |
| **1952** | | |
| January 24 | For services & information: no breakdown | $ 50.00 |
| February 27 | Expenses for trip to New York City for pre-trial interview with U. S. attorney: no itemization | 50.00 |
| March 3 | For services | 50.00 |
| April 14 | For services & information: no breakdown | 50.00 |
| June 9 | For services & information: no breakdown | 100.00 |
| July 15 | For services & information: no breakdown | 50.00 |
| August 22 | For services | 50.00 |
| December 22 | For services | 100.00 |
| TOTAL 1952 | | $ 500.00 |
| **1953** | | |
| January 6 | For services | $ 45.00 |
| March 6 | For services | 95.00 |
| April 27 | For services & information: no breakdown | 70.00 |
| June 24 | For services & information: no breakdown | 80.00 |
| August 25 | For services & information: no breakdown | 90.00 |
| October 15 | For services & information: no breakdown | 70.00 |
| December 23 | For services & information: no breakdown | 100.00 |
| December 23 | For information furnished | 5.00 |
| TOTAL 1953 | | $ 555.00 |

MARY STALCUP MARKWARD (continued)

| DATE | PURPOSE FOR WHICH MADE | AMOUNT |
|---|---|---|
| 1954 | | |
| February 26 | For information received & services rendered: no breakdown | $ 60.00 |
| May 10 | For information received & services rendered: no breakdown | 75.00 |
| May 28 | For information received & services rendered: no breakdown | 30.00 |
| July 2 | For information received & services rendered: no breakdown | 50.00 |
| July 30 | For information received, services rendered, and expenses incurred: no breakdown | 40.00 |
| September 27 | For information received, services rendered, and expenses incurred: no breakdown | 80.00 |
| November 22 | For information received, services rendered, and expenses incurred: no breakdown | 90.00 |
| December 23 | For information received, services rendered, and expenses incurred: no breakdown | 40.00 |
| TOTAL 1954 | | $ 465.00 |
| 1955 | | |
| February 10 | For information received, services rendered, and expenses incurred: no breakdown | $ 70.00 |
| April 15 | For information received, services rendered, and expenses incurred: no breakdown | 90.00 |
| June 16 | For information received and services rendered: no breakdown | 90.00 |
| August 22 | For services rendered | 80.00 |
| October 18 | For services rendered | 80.00 |
| TOTAL 1955 | | $ 410.00 |
| 1956 | | |
| January 19 | For services rendered | $ 90.00 |
| March 21 | For services rendered | 80.00 |
| June 13 | For services rendered | 120.00 |
| September 14 | For information received & services rendered: no breakdown | 120.00 |
| December 13 | For services rendered | 80.00 |
| TOTAL 1956 | | $ 490.00 |
| 1957 | | |
| February 20 | For information received | $ 40.00 |
| June 19 | For services | 30.00 |
| TOTAL 1957 | | $ 70.00 |
| 1958 | | |
| January 24 | For services rendered | $ 20.00 |
| TOTAL 1958 | | $ 20.00 |

**C. P. Exhibit 96**

Saturday, March 19, 1949

There was a practice meeting of the leadership of the Communist Party of Maryland and D. C. under conditions which they expect to have to follow with the passage of the Ober Bill in Maryland. Sealed orders were given to group leaders who were not to open them until a designated time on Saturday evening. Groups were given a time and place where they were expected to meet and were instructed not to wait more than 5 minutes for anyone who was late. There was a schedule worked out at which time each group was supposed to enter the meeting hall. Members came in groups of 4 or 5 at about 5 minute intervals. My group entered the hall at 2101 Callow avenue Baltimore, Md. at 7:37 p.m. Group leaders were instructed to turn in their instructions to Phil Frankfeld. 3 leaders failed to do this stating that the orders were destroyed. It was stated that written orders would not be given in the future. Two groups were criticised because one came 5 minutes late and one approximately 5 minutes early. Phil Frankfeld chaired the meeting and called it a meeting of the Interracial Cultural Society. He stated that in the future that the Interracial Cultural society might meet in swanky hotels etc. He stated that every word said in the hall must be free to be printed on the front page of the Baltimore Sun. However he constantly referred to instructions and suggestions from our friends on the Ninth floor etc. There was some concern over the fact that there was a car parked across the street with a man and a woman in it. There was some indecision as to whether the meeting should be held at all under such circumstances. It was decided to continue with the meeting only after Howie Seaman went out and reported that the car had left. there was self criticism on the part of Washington members who had arrived in Baltimore too early and had gone to Pennsylvania Station to eat.

Phil Frankfeld criticised himself for having gone through with a meeting of the Baltimore leadership on the previous Thursday at his home. He stated that there had been 8 FBI cars waiting outside of his home and they had followed the leading people from his home to their own homes.

There was a decision that no leading body in the District will meet in groups larger than 3 in the future. This includes club executive committee meetings as well as all committees commissions etc. Clubs will meet in groups not larger than 5 and in many cases in groups of 3. They were instructed not to meet in the homes of leading Communists but to seek out other places. It was suggested that the more public places were perhaps the best. Restaurants were suggested also the possibility of meeting in automobiles and riding around while carrying on discussions. All of this was previously discussed with the friends on the ninth floor according to Phil Frankfeld. Phil Frankfeld also suggested the greatest vigilance in the ranks. He stated that there would be no hesitancy to remove those in leadership who were not carrying out their assignments, particularly in regard to Mass work. At this stage he stated that we are struggling to save Bourgeois democracy. He mentioned that it would probably be necessary to remove a member from Cumberland who was on the District Committee (The only Cumberland member on the District Committee is Boyd Coleman) Members are to be called friend or brother in the future not Comrade. The question of replacing Elsie Smith and Herb Kransdorf was referred to the District Board. Phil Frankfeld stated that 8 people were being considered for these vacancies. Those selected will not be announced publicly.

Phil Frankfeld discussed the passage of the Ober Bill under the light of the need to work to secure necessary signatures to have the bill put to referendum in November 1950. He cited the greatest need to involve the broad-

est group of people in the referendum drive on the grounds that the rights of labor, the jews, negroes, even the Catholic church were at stake. He stated that 10,000 signatures were needed to put the law to referendum and that only 5,000 could be gotten in Baltimore, City. 5,000 of these must be gotten by June 1st. It was felt that some aspects of the law would go into effect before the referendum even with the required signatures. The legal aspect as applied to this has not been studied out as yet. The goal is to get 25,000 signatures so the petitions for referendum will in themselves be a mass protest.

Phil Frankfeld spoke on the Statement of Foster and Dennis. He said there had been some discussion in Baltimore as to its correctness. Phil stated that the statement was correct, timely, and necessary. That it would have been a desertion for the U. S. Communists to omit making such a statement after the statement or similar ones had been made by other Communist leaders throughout the world. Rob Hall spoke on the 'timely' by stating that the call for peace was the thing which gave leadership to the CPUSA and the thing which made it different. He said that without this our program for higher wages, etc. was no different than the program of many people and organizations. A vote was taken stating that the members were in agreement with the statement and also the statement made by Phil Frankfeld to the press in which he stated his agreement. The members also voted on the fact that the statement was Timely and Necessary. Everyone in the room voted in the affirmative by a hand vote with the exception of Artie who is chairman of the white collar section (in Baltimore) He abstained.

Immediately when Artie abstained a furore arose and the abstention was called unsatisfactory on the part of a comrade in such a leading position. Finally it was resolved that a discussion would take place between Artie and Phil within a week and that Artie would be removed if he did not see his way clear to agree with the statement.

It was stated that there would probably not be such a large meeting called in the future. Socials can be held if they are held under broad auspices.

Washington will not begin to function entirely in the group system at present but will make its system ready for operation at any time.

There were approximately 50 members present. 49 chairs were filled and a few more brought in. There was only indication that two members who had been notified were absent. Sally Peek from Washington was one and the other was from Baltimore. Members identified were: Rob Hall, Isador Pascoff, Charles Payne, Mary Stalcup, Roy Wood, Robert Paul, Rose Clinton, Julius Kaplan, William Johnson, Henry Thomas. Phil Frankfeld, George Meyers, Dorothy Blumberg, Ruth Fox, Sam Fox, Sam Gordon, Lil (Balto.), Jeannette Fino, Esvend Jones, George Jones, Milt Neuman, Maurice Braverman, Arthur (Cumberland), Howie (Seaman,), Bill Wood, Artie (W. C. Chairman), Garland Winkler, Sally Winkler, Herb Hall, Mary Smith, Irving Randel.

It was decided that disciplinary measures would be taken in any instance where the telephone was used in reference to Party work.

Clubs and members were urged to lay in supplies of paper hectographs and other supplies to use during the emergency.

**C. P. Exhibit 97**

EXCERPT FROM BUDENZ RECORD NO. 6

Q. Now we'll get on to whatever you want to talk about. A. * * * * Well I'd say, of course, during the time I was in Chicago I was here in New York once a month on National Committee meetings or something else. The Record was in terrible condition. I had to come here and try to raise money all the time.

**C. P. Exhibit 98**

EXCERPT FROM BUDENZ RECORD NO. 8

Q. What, in your opinion, is the basis for Browder's original collaborationist policy? A. Well, that is very clear. He and I had a number of discussions on it. I don't want you to think I was detached from these people, in fact Browder and I used to go to lunch very frequently,—well, I mean off and on. His position was very definitely that Communism was not going to extend in Europe at the present time, and that there would be maybe an intermediate government,—that it was necessary that therefore the Soviet Union and the United States work together. He looked at it from the viewpoint of the Soviet Union, too (few unintelligible words) but at any rate that it have a long period of reconstruction—and that in Europe there was not to be the swing toward Communist that a lot of people expected. He said that many times (few unintelligible words) but that being the case the United States and the Soviet Union should work together, that the people wanted peace and this was the way to harmonize the two relationships and work out what would be good for the Soviet Union and for the United States.

**C. P. Exhibit 99A**

EXCERPT FROM BUDENZ RECORD NO. 10

Q. Now this collaborationist policy (few unintelligible words) this tactic continued on through the November 1944 election, continued on through the rest of the winter and spring of 1945, and apparently it continued up to the time when the San Francisco conference was convened. In fact up until about the second week of the conference when we voted to allow Argentina to enter and at the same time we excluded the Lublin Poles. Is that when the policy ended?

**C. P. Exhibit 99B**

EXCERPT FROM BUDENZ RECORD NO. 10

Q. Is that when the policy ended? A. Well, whether that was the time or not, it was in San Francisco that a great deal of the—ah—I mean when, when it was clear from the—you see Fields and Starobin were in San Francisco, and it was clear from their dispatches—from their private communications sent from Starobin to us, which were very lengthy and disturbed, that we were already attacking the United States and that was pretty early, I should say. I don't know whether it was when Argentina came up. It may have been advance information as to the discussions about it, you see, but at any rate I remember these long reports that came by airmail special delivery and some were even in wire form, various of these reports, but most of them were by air mail special delivery.

Q. Now, Starobin isn't a big enough man, we certainly feel, to establish that change in policy? A. Oh no, no, no. In fact he isn't even well thought of as a foreign editor today. He's considered to have too many personal slants, you know. He's very conscious of the fact that he's a Polish Jew—he said that—he's that type, that is, very subjective. Without a doubt he's not very highly regarded—I mean—I don't mean as a person—but as a foreign editor.

Q. Do you think then that the instructions relative to this change of policy that Starobin and Fields must have received came from the Russian delegation? Oh, you said maybe Manuilsky, the Ukrainian delegate? A. Sure, sure, I mean—after all, they got the atmosphere there. In fact I mentioned Manuilsky very much, because definitely he is a figure in the CI.

Q. He certainly is. A. He used to lay down the law like a general, you know, to his troops. He was there as the Ukrainian President or something.

**C. P. Exhibit 100**

EXCERPTS FROM BUDENZ RECORD NO. 16

A. Now, I'll tell you what I thought I'd do, if you don't mind, make a little summary of my own for you of some things, I mean you indicated some subjects—now, for instance, on finances—I have just been trying to wonder how I could help you on that. You see we did have financial problems, we had them at both the "Daily Worker" and the "Middlewest Daily Record" but in most of those cases, so as far as I can see, there's nothing there that's of any very great interest as far as I can see. Of course, you'll appreciate that finances can be concealed very rapidly, from me who was supposed to supervise it—I mean to say, the way we raised money for things—we [laughter] the way the money was raised for things is through the districts,—I think you know the general way of raising money—through the districts and naturally, you could put in 5,000 there and nobody could tell. I couldn't check it, I mean where it came from when it comes from the districts. All money raised in these financial drives comes from the districts but I do know that when you add the financial drive money up and the money from ads and the money from returns, it looks fairly legitimate, at least on the papers. The only question would be there about the way that these funds come in on the drives . . . you know—how the districts handle it. Now, that I don't know anything about. In regard to the supervision of funds—Oh—the "Middlewest Daily Record" I did tell Father Rowan once that I wished that I could see some of that Moscow money. I mean that, I was very sincere. I was so pressed there we went to the wall that I was trying to get some money very desperately. What did happen though, we did get some money for that paper from the National Office. Now, of course, where this money from the National Office comes, I have no particular means of knowing except the general reports given to the National Committee every so

often—Mostly once a year which generally are published, by the way. So they don't tell much, you know.

Q. Have you ever seen any indication of funds coming from Russia or Soviet sources? A. The only indication would be is that in addition to Krumbein as Treasurer, Weiner still maintains a certain general supervisory control over finances.

Q. Weiner as well as Krumbein? A. That's right. Weiner acts something like Chairman of the Finance Committee. Now you know, he formerly was Treasurer until he got into technical difficulties and if anything would happen it would happen along that line. You see, there's no doubt that he's trusted financially as well as Krumbein. I mean Krumbein is treasurer and acts on the job and all that, but certainly Weiner has to be in on all big decisions. If you are going to make a big move for money from the National Office or anything like that, Weiner has to be consulted. Now, he doesn't sit in regularly, for example, on the financial committee of the paper or anything like that. If you want to,—if for instance, we do—I'll tell you—on the paper itself, we generally have a fairly legitimate looking situation as far as I can see. For example, when we are short of money, we have to borrow on that machinery downstairs. We generally borrow from the Metropolitan News Company—they're the credit corporation.

Q. Which company? A. Metropolitan News Company. You know that—they mortgage the presses, you see.

Q. The Party, too, furnishes you money? A. Oh, I was going to say—they raise the big money. That's where the only possibility would be, see. That's where I could never tell. I have regular financial sheets submitted to me all the time and signed checks and did a lot of things as President—but certainly everything looked all right. Only I had no reason to check on the districts you understand what I mean, I couldn't do it alone.

Q. Was there any reverse flow of funds from the "Worker" to the Party? A. No, except in this way.

That somebody might be put on the payroll awhile. It was always legitimate in the sense of these people working for the paper, to a certain extent giving it advice. Do you understand?

Q. I see. A. But I have no recollection of money flowing to the paper. Now, of course, certain loans are made. There may be loans too from the IWO and the unions, that I'm not quite sure. You know—. I should say that if there is any money that comes from abroad—I don't know whether it is necessary, to tell you the truth, at least not for the publications, they get along pretty well.

Q. From a business standpoint, is the Daily Worker a going proposition? A. No. It is if you count this financial drive every year.

Q. I see. A. You see, that is the only place, they would be able to insert funds. For instance, if the New York District raises—it may be that takes place, I wouldn't want you to put this down because this is such a smelly thing. Sometimes I suspected that because the New York District raises such a tremendous—of course, that is natural anyway—New York and the waterfront leads the nation. That is not suspicious in itself, but you see there is no way for a person like myself to check on those funds of the district. No way, under the sun—I mean, even if I tried to, I'd have to have an accountant with me. It would have to be—.

Q. Who paid you as Business Editor? A. As Managing Editor.

Q. Yes. A. Oh, the Daily—the Freedom of the Press Corporation, of which I was President.

Q. The Freedom of the Press Corporation pays all of the employees of the Daily Worker? A. Oh, yes.

Q. And if the Freedom of the Press Corp. gets in the hole financially, it will either get a loan [unintelligible] or will get money from the headquarters of the Party. A. Well, there may be a loan from an individual. I just can't recall any right now but this Heller is very active about that. You know, A. A. Heller.

Q. I don't know, I don't think he's got so much money has he, he's got some? A. Well, he has some money, I know that. He's got money but he's rather active on that sort of thing, and he will give money, loan money, when they're in need, and there are a few people of that type who looked as though they have money. See? Now the only thing that I think is indicative is Weiner's position because I can't see any reason, never did, for Weiner's being a sort of a super, ahhh—that's just surmise, you understand. You must be very careful on that. But I can't see why he's a super financial person. See, unless there's something.

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**C. P. Exhibit 101**

EXCERPT FROM BUDENZ RECORD No. 42

Q. Are there, to your knowledge, any foreign or Soviet funds available in this country to a particular known Communist or otherwise which can be used for the purpose of assisting the Party? A. No. None that I know of—very definitely.

**C. P. Exhibit 102**

Office Memorandum • United States Government

June 7, 1946

Louis Budenz

Incidental to the information furnished me by Budenz in the course of my recent contact with him in South Bend, he furnished the following information which will be of interest to the Security Division.

• • • • • • • • • • •

In discussing the question of the Communist line, particularly its international aspects, Budenz stated that the following are the chief sources of information for the Party in this country, which sources are utilized frequently and pursued completely without variation:

New Times
Pravda
Izvestia
The Bulletin of the Embassy of the USSR
Stalin's speeches
Statements by Dimitrov
Statements by Manuilski

In addition, Budenz stated that he and his associates on the staff of the Daily Worker frequently had recourse to the New York Times which publishes daily "Items of Interest", emanating from such sources in the Soviet Union as Pravda, Izvestia, Stalin, Molotov, etc.

• • • • • • • • • • •

When I inquired of Budenz as to the media utilized by the Soviets in getting messages to this country concerning any alteration in the plan, line, or in general international Communist policies, he, in addition to referring to the sources mentioned above, described the following incident which will serve to throw some light on this question.

Budenz recalled that within a few days after the United Nations Conference on International Organization was convened at San Francisco, the Communist Party in this country reversed its policy completely with regard to the question of supporting the United States. Budenz advised that this reversal in policy, as evidenced so completely in the Daily Worker, was predicated upon receipt of a lengthy letter which was addressed to Budenz at Party Headquarters in New York City by Joseph Starobin, who was then representing the Daily Worker at UNCIO in San Francisco. In this letter, which was considered so highly confidential that Budenz was not permitted to retain it in his office overnight, Starobin advised that "the French comrades have the line and the support of the Soviet Union—and the French comrades blasted Stettinius and the United States Delegation, and therefore Starobin directed that the Party in this country should immediately

blast Stettinius and the United States Delegation." Budenz stated that in this letter Starobin inferred that he and/or his associates at the Conference had conferred with Manuilski regarding this question, and that the changed policy was predicated upon Manuilski's instructions as well as on advice received from French Communists at UNCIO.

. . . . . .

On the question of Soviet funds, Budenz stated that he could recall only one instance wherein it was indicated that the Soviet Union might be sending money to the United States for the purpose of furthering the efforts of the Communists in disseminating propaganda. This instance occurred when Budenz was affiliated with the Daily Record, Communist organ in Chicago, Illinois. Budenz stated that his newspaper in Chicago was in extremely poor financial condition; that he went to New York to discuss the matter with Communist officials; that he met with Maurice Childs and William Weiner, on which occasion Childs said to Weiner, "Don't you soon expect a consignment from across the sea?" Weiner immediately changed the subject matter, indicating that he did not want to discuss the question of transmission of Soviet funds in the presence of Budenz, even though Budenz was a trusted Communist. Budenz concluded from the remark that was made that funds were actually being sent to this country at that time by the Soviet Union for propaganda purposes.

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**C. P. Exhibit 103**

Office Memorandum • United States Government

Date: August 2, 1950

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Budenz was interviewed at his home in Crestwood, New York, on July 13, 1950 in regard to CP, USA—Funds by SA.

. . . . . .

In regard to the transmission of funds between Russia, including the satellite countries, and the CP, USA, Budenz advised that he has no direct knowledge of such transmissions. However, he stated that he has always been under the impression that there was such transmissions as the Party needed much more money to carry on its operations than it could possibly raise from dues and its various fund drives.

In this connection reference is made to Bureau letter dated June 2, 1950 instructing to question Budenz regarding a "secret or conspiratorial fund", mentioned in his book "Men Without Faces", and operated by William Weiner and William Browder. Budenz stated that the terms "conspiratorial fund" and "secret fund" are his own terminology. Budenz advised that he had once been informed by William Browder that large sums of money was maintained in bank accounts for Party operations and that Browder had told him this money, at times, totalled a million dollars. Budenz doesn't know if this money was available to the Party, being held in reserve for Moscow or earmarked for various Communist organizations. He stated that this fund was operated by Browder, William Weiner, Lemuel Harris and Jack Childs. Further, that while he was in the Party, particularly during the time he was editor of the Mid-West Daily Record, in Chicago, he had a conversation with Weiner and Mort Childs, CP officials in Chicago at the time, in regard to funds and Childs asked that funds be advanced him by Weiner from the reserve fund and Weiner advised that he didn't have any at that time as his communication system had temporarily broken down. Budenz took this to mean that Weiner's source of supply was from foreign countries, particularly Russia.

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**C. P. Exhibit 104**

Office Memorandum • United States Government

Date: February 7, 1947

Luis F. Budenz

Attached are the original, two carbons, and a yellow of a series of summaries of information furnished to the Bureau by Mr. Louis F. Budenz in December, 1945, and in April, 1946.

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Budenz stated that in addition to his being Managing Editor of the "Daily Worker," he was President of the Freedom of the Press Corporation. The Freedom of the Press Corporation paid the employees of the "Daily Worker." He said that when the Freedom of the Press was in bad straits financially on occasions a loan would be obtained from an individual. He referred to one of these individuals as being Abraham Heller whom he thought to have money available. In connection with finances for the "Daily Worker," Budenz seemed to stress the position that William Weiner appeared to be a "super finance person"

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In referring to the collaboration of policy which existed for approximately a year and a half between the Communist Party and the Administration and that collaboration's demise in 1945, Budenz referred to the attack made on the United States along with Great Britain in its stand taken at the UNO, particularly with regard to the Lublin Polish Delegation and the Argentine Delegation. He said that Joseph Starobin and Frederick Vanderbilt Field were representing the "Daily Worker" at the United Nations Conference in San Francisco and that they had sent back a communication to the "Daily Worker" which indicated the concern over this stand on the part of the United States Delegation. Budenz interpreted the communication as meaning that they had been in contact with Soviet repre-

sentatives, mainly Dmitri Manuilsky. Manuilsky, it is to be recalled, an official Soviet Delegate, was most antagonistic over the American stand. He said that the Political Committee of the Communist Party interpreted the entire situation as meaning that it was necessary to send letters and telegrams of protest to the American Delegation demanding that they adhere to the policies of Roosevelt.

* * * * * * * * * *

Budenz went on to state that he had lunch frequently with Browder and that from these luncheons he gathered that Browder's position was that very definitely Communism was not going to extend in Europe at the present time and that there would be an intermediate type of government in the various countries. Therefore, it was necessary that the Soviet Union and the United States work together. Budenz explained, however, that Browder retained the viewpoint of the Soviet Union. He also said that Browder had commented that there would be a long period of reconstruction in Europe at which time there would not be a swing toward Communism as a lot of people expected. According to Budenz, he made that observation on many occasions and further that Browder observed the United States and the Soviet Union should work together since the people wanted peace and this was the way to harmonize relationships and to work out what would be good for both the United States and the Soviet Union.

* * * * * * * * * *

Budenz stated that the collaborationist policy continued until the United Nations Organization Conference in San Francisco. He said then he learned that it was clear from private communications sent to Stachel by Frederick Vanderbilt Field and Joseph Starobin that the Communist Party was already attacking the United States. (This was in all probability April of 1945). Budenz said it may have been advance information, referring to the Duclos article, but Starobin was not a big enough man to establish a change in policy. Budenz said that he felt that instruc-

tions as to the change in policy may have come from Dmitri Manuilsky, who was an official delegate at the Conference and who, Budenz said, was to be recalled as a "figure" in the Communist International.

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With regard to financing the "Daily Worker," Budenz stated that it had financial problems. The "ninth floor" (Communist Party National Headquarters) was supposed to supervise the methods of raising funds. He said he could not determine whether money came from the Districts or from other sources with the exception of the "Daily Worker" fund drives. He said he had no indication of any "Moscow money" being given to the Communist Party or to the "Daily Worker."

He said when they needed money desperately, they would get money from the National Office but that he had no means of knowing how the National Office of the Communist Party got the money other than what was said in reports published on behalf of the National Committee.

With regard to the Treasurer of the Communist Party, he said that Krumbein was the Treasurer although William Weiner maintained a general supervisory control over finances, acting something like a Chairman of the Finance Committee. Budenz said that Weiner formerly was Treasurer until he got into technical difficulty (passport fraud). He said that Weiner had to be in on all of the big decisions and that if one had to make a "big move" for money from the National Office or anything, Weiner had to be consulted. He pointed out that Weiner did not act regularly.

As regards the "Daily Worker's" funds, he said that when it was short of money, they obtained a loan, offering as security the printing machinery. The borrowing was usually done from the Metropolitan News Company.

Budenz said that there was no reverse flow of funds from the "Daily Worker" to the Communist Party although "somebody might be put on the pay roll for a while." He said it was always legal in the sense that these people

working for the paper to a certain extent gave it advice. Budenz stated that there were loans from the International Workers Order and certain unidentified unions although he was not quite sure as to the latter. He described the "Daily Worker" as "not a going proposition," but for the fact that the financial drives raised the additional funds.

* * * * * * * * * *

Budenz stated that he got the impression that on occasions big loans were made to the Communist Party by the International Workers Order. He said he had no knowledge as to foreign or Soviet funds available to the Party.

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**C. P. Exhibit 105**

March 4, 1947

Re: Louis F. Budenz

Dear Sir:

Confidential Informant ND 402 was interviewed February 26, 1947 on two questions relative to the Communist Party, USA—Brief.

* * * * * * * * * *

Confidential Informant ND 402 recalled that back in 1939 or thereabout, when the Informant was connected with the Mid-west Daily Record, the Communist Party newspaper in the Mid-west, Childs was on the National Committee and was the District Organizer in the Mid-west, and was also probably on the Political Committee. The Daily Record was in a bad financial condition at the time and both Childs and Confidential Informant ND 402 were anxious to save it. They had a meeting with William Weiner, who controls the finances of the Party, in a restaurant in New York City. Childs suggested that Weiner try to get some money from Moscow to finance the paper. Weiner stated that he had temporarily lost his contacts in Moscow, hence, he could not do anything. Confidential Informant ND 402 stated that prior to Childs requesting Weiner to aid the

paper, the paper had been given fifty thousand dollars. Confidential Informant ND 402 did not know where this money came from.

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**A. G. Exhibit 500**

[CPA members, exclusive of WC, as of 10-25-44]

. . . . . .

Moss, Annie Lee—72 R St. S. W.

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**A. G. Exhibit 502**

Partial List of Members
North East Branch Communist Party

. . . . . .

19. Moss, Anna Lee—72 R St. S. W. (Pentagon)

Feb 15 1944

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**A. G. Exhibit 504**

August 21, 1944

The composition of the Communist Political Association of Washington is largely as follows: (this analysis is not altogether a rigid one however most of the people were classified into the group they best fitted)

. . . . . .

Unassigned

. . . . . .

Anna Lee Moss

**A. G. Exhibit 505**

Recruits

45. Book No. —; Slip Returned —; Name and Address: Annie Moss; Sex: F; Color: N; Age: 37; Occupation: Cafeteria; Union: CIO; Recruited by: —; Branch: —; Initiation Pd: √; Branch Assigned to: NE; Date Assigned: —; Date Reported to District: 3/28.

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**A. G. Exhibit 506**

Unless otherwise specified address is NW
Dues are for month shown thru June
Club Subs are due for month shown etc.

Name: Moss, Anna Lee; Address: 72 R St Sw; Old Bk #: 55149; New Bk #: —; Dues: April; Club Sub: Jan; Remarks—

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**A. G. Exhibit 509**

Old Record Stanton Park Club Communist Party.
January—June 1944

Record of Attendance and Dues Payments Book

These records shall be kept by the Membership Director, or by the Branch Financial Secretary.

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Record of Attendance and Dues Payments

Moss, Annie Lee—Government

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**A. G. Exhibit 510**

Membership Record Communist Political Asso.
July—Dec 1944

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Record of Attendance and Dues Payments

Name or Initials: Moss, A. L.; Book Number: 55149; Transferred: In club, Out sub; January: Attendance 1SF — 2 —, Dues 30; February: Attendance 1SF — 2 —, Dues 30; March: Attendance 1SF — 2 —, Dues 30; April: Attendance 1SF — 2 CS, Dues, 10; May: Attendance 1 — 2 —

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**A. G. Exhibit 511**

Membership Record Frederick Douglas Club
Communist Party.
Jan-June 1944

Record of Attendance and Dues Payments Book

These records shall be kept by the Membership Director, or by the Branch Financial Secretary.

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Record of Attendance and Dues Payments

13. Name or Initials: Moss, Annie Lee; Book Number: 53395; Transferred: In —, Out —; July: Attendance 1 — 2 —, Dues 25; August: Attendance 1 — 2 —, Dues 25.

[fol. 2375]

**BEFORE**
**SUBVERSIVE ACTIVITIES CONTROL BOARD**

Docket No. 51-101

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WILLIAM P. ROGERS, JR., Attorney General
of the United States, Petitioner,

—v.—

THE COMMUNIST PARTY OF THE UNITED STATES
OF AMERICA, Respondent.

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Oran H. Waterman, Francis X. Worthington, Lafayette E. Broome, Joseph M. Wysolmerski, and James L. Weldon, Jr., for petitioner.

John J. Abt and Joseph Forer for respondent.

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**Modified Report of the Board on Second Remand—**
**February 9, 1959**

[File endorsement omitted]

This case is before us on remand pursuant to the judgment of the United States Court of Appeals for the District of Columbia Circuit upon review of our Modified Report issued December 18, 1956.[1] In its decision issued January 9, 1958 (254 F. 2d 314), the Court remanded for the production to respondent of reports by the witness Markward to the Federal Bureau of Investigation.[2] By a subsequent ruling issued April 11, 1958, on respondent's petition for rehearing and accompanying motions, and clarification of its ruling issued June 16, 1958, the scope of the remand was enlarged by the Court to include the production of "statements" (as defined in 18 U.S.C. 3500) in the possession of the Government given by the witness Budenz to the FBI on two of the subjects about which he had testified in the original hearing before this Board.

Hearings for the purpose of producing the documents required by the Court's orders took place before Board Member Francis A. Cherry. On September 19, 1958, a Recommended Decision was issued which proposed the striking of certain of Budenz' testimony and, after reevaluation of the credibility of witnesses Markward and Budenz and reexamination of the evidence, recommended that the Board make certain modifications in its Modified Report and reaffirm its determination that the Communist Party is a Communist-action organization as defined in the Internal Security Act of 1950. Written exceptions to

[1] In the Modified Report we had set forth our determinations after reconsideration pursuant to an earlier remand by the Supreme Court under section 14(a) of the statute. See *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115.

[2] The Court also found that references to Attorney General Exhibit 484, appearing on folios 2499 and 2595 of the Modified Report, should be stricken. We do so and have removed this exhibit from our consideration (see Appendix). Upon reappraisal of the evidence, absent this exhibit, no alteration in the Board's findings is indicated. Additionally, review of the record reveals that a reference to Attorney General Exhibit 481 quoted at folio 2550 of the Modified Report should likewise be stricken (see Appendix). As this exhibit was cumulative in effect, its deletion does not affect the remainder of the Board's findings.

the Recommended Decision were filed by the Communist Party on October 8, 1958, and a memorandum in answer thereto was filed by petitioner on October 21, 1958. Oral argument on exceptions was heard by the Board the next day.

While we had the case under advisement, petitioner filed a motion, the effect of which was to request that the Board stay its final decision pending the filing of a supplemental affidavit, which later was filed on November 21, 1958. As a result of this affidavit further proceedings ensued, with final argument taking place on January 19, 1959.

[fol. 2379] We set forth below the issues presented during this remand proceeding not heretofore resolved by Board ruling, as well as the considerations and rulings resulting from a reconsideration of the entire record. In so doing, we take into account the recent Recommended Decision of Member Cherry and the exceptions and arguments directed thereto.

We shall consider first the issues relating to the witness Markward, then the issues relating to the witness Budenz, and, lastly, other matters raised by respondent by way of exceptions. Except as otherwise indicated herein or obviated by our findings, respondent's exceptions are deemed to be without merit and are overruled.

All changes in, or deletions from, the Modified Report, including minor changes of a clerical type, are set forth in the Appendix hereto. A copy of the Modified Report containing these changes and marked with appropriate black brackets, and the word "STRICKEN" stamped over the text, to show all matters deleted is also appended to this Report.

## The Witness Markward

The Court directed that the Board order the Attorney General to produce (1) Markward's reports to the FBI and her testimony in a Defense Department security hearing involving one Annie Lee Moss; (2) Markward's report to the FBI concerning the Frankfeld matter; and (3) records of Markward's compensation from the FBI. On the basis of the record, during the second remand respondent moved to strike all of Markward's testimony. This

was denied by the Member-Examiner in his ruling of August 25, 1958, and respondent excepts thereto. Each of these matters will be discussed seriatim. Pertinent background on these questions appears in the Court's opinion (254 F. 2d 314, 326-330) and except where necessary this history will not be repeated here.

Concerning the Moss question, in conformity with the orders of the Court of Appeals, Markward's FBI reports concerning Moss, being 13 in number, were produced to respondent at the reopened hearing, as was Markward's testimony concerning Moss in the Defense Department security hearing. Markward was recalled for further cross-examination and cross-examined by respondent's counsel on other matters but not concerning the Moss question, *e.g.*, witness Markward's identification of an Annie Lee Moss as a onetime Party member.[3]

[fol. 2380] Thereafter, upon offer by petitioner, Markward's FBI reports concerning Moss, the majority being copies of actual Communist Party records such as club and branch attendance and membership and dues rosters, were received in evidence (A.G. Exs. 499 to 511, inc.). Similarly, a copy of the pertinent Markward testimony in the Moss Security Hearing was received in evidence (A.G. Ex. 498-A).

During the prior remand proceeding, the Board, after inspecting the security hearing transcript *in camera*, ruled that respondent's assertion that witness Markward testified falsely in the Moss proceeding and was disbelieved in that proceeding was not supported. In view of the respondent's failure to conduct cross-examination on the Moss question, the instant remand proceeding has added factually for the Board's consideration only the 13 FBI documents produced.

The Member-Examiner concluded that the documents produced to respondent corroborate Markward and show

[3] There was no testimony by Markward concerning Moss at the original hearing. The Moss question was introduced into the record by respondent's motions made to the Court and the Board during the first remand (to which were attached affidavits) charging that Markward had perjured herself in the Defense Department security hearing.

the Party's perjury charge against her on the Moss matter to be baseless. Respondent excepts to this conclusion on the grounds that—

> 4. (a) the non-production of the decisions of the Security Board and the Defense Department in the *Moss* matter and the rulings preventing respondent from exploring the Defense Department's action, precluded respondent from showing that the Defense Department had disbelieved Markward's testimony regarding Mrs. Moss and the reasons for such disbelief; and (b) the documents relied on for the finding were not competent evidence.

Regarding the decision of the Security Board, the Court of Appeals previously ruled specifically that respondent was not entitled to it (Order of Court of Appeals issued June 16, 1958).[4] As to the decision of the Defense Department (as distinguished from its Security Board), under the Court's ruling respondent would be no more entitled to it than the Security Board's decision. The fact is, however, that there is in evidence a letter from the Secretary of Defense to the Secretary of the Army which relates the decision of the Secretary of Defense and the reasons for it (A.G Ex. 497).

We see no merit to the remaining exception that Markward's reports to the FBI (A.G. Exs. 499 to 511, inc.) and her testimony in the Moss Security Hearing (A.G. Ex. 498-A) are not competent evidence. Though it did not [fol. 2381] cross-examine Markward on the Moss question respondent sought, nevertheless, to leave her credibility under serious attack. Under those circumstances, the documents were admissible though offered by petitioner, who proffered the witness.

The situation that has resulted on the Annie Lee Moss question is that copies of the Communist Party's own records, the authenticity of which the Party has at no time disputed, were produced to it (A.G. Exs. 499 to 511, inc.)

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[4] Respondent acknowledged at oral argument before the Board that any quarrel on this point must be with the Court and not the Board in view of the Court's prior ruling on the point.

and show that one Annie Lee Moss, 72 R Street, S. W., Washington, D. C., was a Party member in the mid-1940's. Yet, on several occasions before the Court of Appeals and the Board the Party charged that witness Markward had committed perjury before the Defense Department in the Moss Security Hearing in testifying to what the Party's own records showed to be the fact.

We conclude that upon production of the documents demanded by respondent, the Communist Party's charge that Markward gave perjurious testimony was not substantiated. Consequently, Mrs. Markward's credibility is in no way impaired by the Annie Lee Moss matter.

Turning to the Frankfeld question, the Court, in its opinion of January 9, 1958, ordered produced to respondent the report made by the witness Markward to the FBI concerning a Party meeting in Baltimore, Maryland, where according to her testimony, Party leader Frankfeld made a statement to the effect that Party members would not bear arms against the Soviet Union. As the Court noted in its opinion (254 F. 2d at p. 327), the Board, in assaying Markward's credibility during the earlier remand proceeding, had inspected this FBI report *in camera* and had concluded that it afforded no basis for a finding of perjury (Mod. Rept., fol. 2409).

During the instant remand, respondent did not cross-examine Markward concerning the contents of her report but asked questions which dealt mainly with its identification and the method and manner in which she made reports to the FBI. Though the witness was not later confronted with the contents of the report as an inconsistent statement, the report was proffered by respondent and received in evidence without objection. (C.P. Ex. 96.) In assaying Markward's credibility in the light of the report, it is necessary to take into consideration certain other documents about which Markward testified at the original hearing and which pertain to the Frankfeld statement.[5]

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[5] As stated in *Wigmore on Evidence*, 3d Ed., § 1040, p. 725, "inconsistency is to be determined, not by individual words or phrases alone, but by the *whole impression or effect* of what has been said or done [citing cases]."

[fol. 2382] The March 1, 1949, issue of *For a Lasting Peace For a People's Democracy* (A.G. Ex. 333) contained a statement of Maurice Thorez, then General Secretary of the Communist Party of France, made in answer to the query: "What would you do if the Red Army occupied Paris?", wherein he said that the Soviet Union "can never be an aggressor" but, "if under such conditions the Soviet Army . . . were forced to enter our territory, could the working people and the entire people of France conduct themselves any differently in relation to the Soviet Army than the working people and peoples of Poland, Rumania, Yugoslavia had done?" Thereafter, *For a Lasting Peace For a People's Democracy* of March 15, 1949 (A.G. Ex. 334) carried a number of excerpts from comments on the Thorez statement made by leaders of Communist Parties in countries throughout the world with a blocked caption reading as follows:

> The statement made by Maurice Thorez, General Secretary of the Communist Party of France, about the attitude of the working class and working people of France in the event of aggression against the Soviet Union and the New Democracies has been echoed by the Communist Parties and working people of the capitalist countries. Millions have voiced their determination *to frustrate the plans of the Anglo-American warmongers and to defend the bulwark of peace—the Soviet Union* and the countries of People's Democracy. * * * *Similar statements were made by the Communist Parties of the United States* . . . and other countries. (Emphasis supplied.)

Such a statement by Foster and Dennis, leaders of the Communist Party of the United States, was published in the *Daily Worker* of March 3, 1949 (A.G. Ex. 331) which Markward had read prior to attending the meeting on March 18, 1949, where the Frankfeld statement in question was made. The *Daily Worker* in an italicized lead paragraph significantly emphasized the gist of the Foster-Dennis statement as follows:

> William Z. Foster and Eugene Dennis, Chairman and General Secretary of the Communist Party, yes-

terday declared that, in the event Wall Street succeeded in starting a new world war, despite the efforts of peace forces to prevent it, American Communists would oppose such *"an unjust, aggressive, imperialist war"* and would work *"with all democratic forces" to bring that war to an end.* (Emphasis supplied.)

[fol. 2383] The Frankfeld statement in question was made, according to Markward, at a Party meeting in Baltimore where a prior statement that he had made to the *Baltimore Sun* newspaper commenting on the Foster-Dennis statement was also discussed. Excerpts from the Frankfeld statement made in answer to an inquiry from the *Baltimore Sun* are set forth in *The Worker* for March 13, 1949 (A.G. Ex. 332) which Markward had read. As reported in that exhibit, Frankfeld announced "that Communist Party members in this country would oppose Wall Street's plans to embroil this country in any war of aggression and would 'co-operate with all democratic forces to defeat the predatory war aims of American imperialism and bring such a war to a speedy conclusion on the basis of a democratic peace.'"

At the original hearing Markward first testified that "The chief topic of discussion at that meeting [the Baltimore meeting] was the question of the statement which had been made by Thorez . . . that the Communist Party members of France would not bear arms against the Soviet Union. *This was the essence of what the statement was.*" (Emphasis supplied.) (J.A. 744.) She further testified that Eugene Dennis and William Foster joined in a similar statement and that Phil Frankfeld had made a statement to the *Baltimore Sun* along the same line stating that the members of the Communist Party would not bear arms in any conflict between the United States and the Soviet Union.

Under cross-examination at the original hearing, Markward was asked where A.G. Ex. 331, containing the Foster-Dennis statement, and A.G. Ex. 332, containing the excerpts from the Frankfeld statement to the *Baltimore Sun*, contained any assertion that Communists would not bear arms in any war between the Soviet Union and the United States.

She testified that those words in that form are not in these statements but explained that the references therein defining such a war as an unjust war, and stating that it would be opposed and that Communists would not take part in such a war is the manner in which these exhibits convey what she interpreted to mean that Communists would not bear arms against the Soviet Union. She admitted, however, that her recollection was confused on the actual wording of what Frankfeld had said to the *Baltimore Sun* but testified that Frankfeld had made the statement concerning the bearing of arms in the meeting where a discussion of the statement he had made to the *Baltimore Sun* had taken place.

Markward's FBI report thus became germane because she was asked if she had made a report in writing concerning what Mr. Frankfeld had declared on this issue at the meeting, and she testified, "I reported the discussion which took place at this meeting, which did contain *the essence* of what I had to say about not participating in a war with the Soviet Union." (Emphasis supplied.) (S.J.A. 2275.) Markward's report to the FBI (C.P. Ex. 96) does not contain any specific mention that Frankfeld had stated Party members would not bear arms against the Soviet [fol. 2384] Union in the event of war with the United States. The report does show, however, that at the meeting Frankfeld discussed the statements previously made by Foster and Dennis and his own prior statement to the *Baltimore Sun*, and the report contains the comment that Frankfeld said, "it would have been a desertion for the U.S. Communists to omit making such a statement after the statement or similar ones had been made by other Communist leaders throughout the world." (C.P. Ex. 96.)

The Board did not rely upon Markward's testimony concerning the Frankfeld statement in the Modified Report because of its conclusory nature and the imprecision therein exposed by cross-examination at the original hearing. There having been no cross-examination on the produced document for our consideration, we see no reason to alter our evaluation on this point and her testimony on the so-called Frankfeld statement therefore remains uncredited. This is not to say, however, that Markward's interpretation

of these statements is deliberate fabrication. The evidence in this record and the findings of the Board set out in other sections of the Modified Report pertaining to "just" and "unjust" wars and the so-called "forces of peace" and "People's Democracies", show that no other rational interpretation, from the Communist viewpoint, would be warranted concerning the Thorez, Foster-Dennis, and Frankfeld statements than that given by Markward on what the essence of these statements was. Moreover, Markward testified as to the essence of these statements.

Turning now to the issue of Markward's compensation from the FBI, Markward testified on direct examination at the original hearing that she was not paid a salary; that she received contributions to the expense of the work she was doing which included reimbursement for expenses such as paying dues, making contributions, buying literature, and other types of expenses, including those for transportation. Under cross-examination at the original hearing she testified that she volunteered her services to the FBI without remuneration of any kind and that no formal financial arrangements were made; that she at no time ever submitted a statement for expenses to the FBI; and that, through periodic meetings with agents, the FBI had an idea of what she was doing and it was at its initiative that she was given money. She gave receipts for the money received, but was unable to recall any specific amounts of money she received for any specific year or for the entire period of her activity from the year 1943 to 1949. She could not be more specific than to say that she received irregular amounts at irregular times.

Pursuant to the direction of the Court of Appeals (254 F. 2d 314, 329-330), the records of Markward's compensation from the FBI were produced to respondent, and during the instant remand proceeding Markward was subjected to extensive cross-examination on this matter. The compensation records were received in evidence (C.P. Ex. [fol. 2385] 95). In summary, this exhibit shows that the FBI accounted for payments to Markward for the period 1943 through 1949 on a weekly or semi-monthly basis, and that from 1950 to 1958 payments were docketed generally on a monthly or a bi-monthly basis with occasional lapses

in regularity. The majority of single payments made at the frequency and over the period just indicated were in amounts of $30, $40, $50, $90, $100, $180, and $200.

Under cross-examination at the hearing on the instant remand, Markward disputed that she actually received money regularly on a weekly or semi-monthly basis at a given rate such as $40 or $90 a week over a given period of time. She explained the increase in payments in the latter part of 1945 from $45 per week to $90 per week as occurring during the time she resigned her job as a hairdresser and devoted her entire time to Communist Party activity. She did not dispute that she received the total amounts of money indicated in C.P. Ex. 95 and stated that she assumes from the exhibit that the FBI made payments to her according to some rate but that she had no knowledge of this and had no arrangements for payment. She stated she was paid either in cash or the money was deposited to her checking account but she was unable to recall receiving any specific payments at any specific times, such as a single payment totaling $400 made in August of 1947.

Markward further explained under cross-examination what she considered as items of expenses and it is clear that the witness' concept of that term does not coincide with the FBI's use of the term in its accounting records. For example, in C.P. Ex. 95 there are several years when no entries whatsoever for expenses are made, yet obviously Markward must have had some expenses, under the ordinary business connotation of that term, during those years in performing her function as an informant. On the other hand, it is apparent that, taking the most generous estimate of what Markward herself considered as expenses, she received substantial payments for services in excess of what her expenses would be.

Taking fully into account the Member-Examiner's findings concerning Markward's demeanor and all of her testimony, we find that her direct testimony concerning receipt of compensation from the FBI is not acceptable and this is considered in evaluating her credibility.

Respondent in its exception 7 distorts the Recommended Decision wherein it asserts that the Member-Examiner

found that reliance on Markward's testimony in the Modified Report should not be disturbed because it is a minor factor in this proceeding. We do not so read the Recommended Decision. In any event, the Board does not conclude that because her testimony is a minor factor it should be credited. The fact remains, however, that findings [fol. 2386] based upon her testimony are minimal; and the effect of her entire testimony upon the Board's Modified Report is inconsequential. (See Mod. Rept., fol. 2409, fn. 5.)

Turning now to the cumulative effect of these matters on Markward's credibility, the Party contended by way of exceptions and argument that Markward's testimony concerning the Frankfeld matter and her compensation from the FBI, when viewed with her assertedly false testimony in the *Blumberg* case (see *CPUSA* v. *SACB*, 254 F. 2d 314, 330, for background on the *Blumberg* case) reveals a series of deliberate falsehoods which render her entire testimony untrustworthy and requires that it be disregarded as tainted.[6]

The Member-Examiner's observations concerning Markward do not constitute a finding that she palpably lied or that she testified in this or other proceedings to a deliberate series of falsehoods. Upon our independent review of the record, taking fully into account the cumulative effect of the credibility issues concerning Markward, we conclude that such a finding would not be warranted. Nor do we feel that Markward's testimony should be regarded as completely untrustworthy and tainted and should therefore be stricken. Upon a reassessment of her credibility, however, we conclude that Markward's testimony should be assayed with caution. We have scrutinized her testimony with care and conclude that the few findings in the Modified Report which are based in whole or in part upon her testimony

[6] In view of the Board's reevaluation of Markward's credibility which appears herein and supersedes all prior evaluations, there is no need to discuss respondent's exception 11 which objects to the Member-Examiner's failure to recommend striking a prior Board statement (Mod. Rept., fols. 2408, 2409) in evaluating Markward's credibility.

are in no way impaired in their evidentiary support.[7] Respondent's motion to strike Markward's entire testimony is premised upon credibility considerations heretofore resolved and the motion is denied.

## The Witness Budenz

Louis Budenz, a functionary of the Communist Party from 1935 to 1945, testified as a witness for petitioner at the original hearing concerning, among other things, a letter sent in 1945 (while Budenz was still in the Party) to the *Daily Worker* by its correspondent, Joseph Starobin, then in San Francisco (herein referred to as the "Starobin letter"), and to a conversation in 1939 with the then Com-[fol. 2387] munist Party treasurer, Charles Weiner (herein referred to as the "Weiner conversation").

In its decision issued January 9, 1958, the Court affirmed on the record at that time the action of the Board in refusing to order production of "alleged reports" made by Budenz to the FBI dealing with these two subjects. The Communist Party then petitioned the Court for rehearing and moved *inter alia* for leave to adduce as additional evidence all transcriptions and memoranda of oral statements made by Budenz to the FBI on the above two subjects. In the course of preparing a response to the petition and motion, Government counsel discovered that in the files of the Federal Bureau of Investigation were disc recordings of an interview witness Budenz had with the FBI in December 1945 which, as represented by Government affidavit, had been recorded without Budenz' knowledge. This circumstance was related to the Court and, concurrently, the Board acceded to so much of the respondent's petition for rehearing and motion as pertained to the two requests the Party had made at the original hearing for the production of statements which Budenz had made to the FBI, which requests had been denied by the Board. (See the two memoranda for the Board filed in the Court of Appeals on February 7, 1958.)

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[7] The fact is that, as pointed out in the Recommended Decision (p. 9), in the few instances relied upon, Markward is, with two minor exceptions, corroborated by other credited evidence.

The Communist Party then filed in the Court a supplemental motion for leave to adduce additional evidence which related to the Budenz matter and, in substance, sought to broaden the scope of the remand acceded to by the Board. On April 11, 1958, the Court entered an order, accompanied by a memorandum, remanding the Budenz matter to the Board for the production of certain "statements" (as defined in 18 U.S.C. 3500) by Budenz to the Federal Bureau of Investigation. Subsequently, the Board asked for clarification by the Court of its order and memorandum, and on June 16, 1958, the Court stated that the order of April 11, 1958, should be construed as restricting production to Budenz' "statements" relating to the Starobin letter and the Weiner conversation only. The Court did not, as the Party requested, order production of all Budenz' "statements" relating to the subject matter of his entire testimony in this proceeding.

Pursuant to the Court's rulings, the Board in reopening the hearing ordered petitioner to produce all "statements" (as defined in 18 U.S.C. 3500) made by Budenz to the FBI concerning the "Starobin letter" and the "Weiner conversation," and denied a Communist Party motion to expand the production to include statements concerning other topics. (See memoranda opinions and orders of the Board issued April 29, 1958, May 20, 1958, and June 18, 1958.)

Thereafter, petitioner produced to the Member-Examiner, for *in camera* inspection, and excision of irrelevant matter, 30 disc recordings made on December 7, 10, and [fol. 2388] 12, 1945, while Budenz was being interviewed by the FBI. The Member-Examiner extracted from the discs and gave to counsel for respondent in typed form the portions found to be producible under the directions of the Court. Without objection, the excerpts were later received in evidence (C.P. Exs. 97, 98, 99A, 99B, 100, and 101). The entire set of discs are sealed and made a part of the record as Board Exhibit 2.

After respondent's receipt of the excerpts, the Member-Examiner indicated respondent's request for the recall of

the witness Budenz for further cross-examination would be granted and thereupon counsel for petitioner submitted a letter from Budenz' personal physician stating the physician's opinion that it would imperil Budenz' health due to a heart condition to appear as a witness in this proceeding. The Member-Examiner deemed it advisable to have an independent physical examination conducted by a heart specialist in New York City. By affidavit dated August 4, 1958, the specialist reported the results of his physical examination of Budenz and his conclusion that due to an "extremely serious cardiovascular disease" any examination of Budenz "were it to be carried out before the Board or by deposition or by cross-interrogatories in his home, might seriously affect his health or cause his death." He was of the opinion that "even the slightest amount of emotion could very well precipitate a serious outcome in [the] patient's life." (Board Exhibit 3-C.)

Upon receipt of the doctor's affidavit, the hearing was reconvened on August 7, 1958, and the parties agreed Budenz was unavailable for recall. Thereupon, respondent moved to strike all of Budenz' testimony, and in the alternative moved (1) to strike Budenz' testimony in so far as it relates to the Sfarobin letter and the Weiner conversation, (2) for an order directing the Attorney General to produce for respondent's examination the agents of the FBI who participated in the December 1945 interviews with Budenz, and directing that such agents bring with them their complete notes taken during the interviews and any statements or writings furnished the FBI by Budenz either prior to or during such interviews, and (3) that all other portions of the recorded interviews with Budenz (Board Exhibit 2) which are relevant to any matter to which Budenz testified in this proceeding be made available to it.

The Member-Examiner on August 25, 1958, denied the motions with the exception that he granted respondent's request to strike Budenz' testimony on the Starobin letter and the Weiner conversation, due to the unavailability of the witness for further cross-examination.

On November 13, 1958, while we had the case under advisement following oral argument on the exceptions to

the Recommended Decision, petitioner requested leave to file a supplemental affidavit because of contentions made [fol. 2389] by respondent at the oral argument. The Board stayed its decision and the supplemental affidavit was filed on November 21, 1958. The Board's review of this affidavit indicated counsel for petitioner may have been taking an erroneous view of the law in the matter of production of documents. For this reason, the Board on December 3, 1958, entered a further order, calling for all documents (of every description) purporting to record oral or written communications by Budenz to the FBI relating to the two pertinent topics. Counsel for petitioner thereupon produced to the Board four documents, portions of which related to the two topics; but contended they were not "statements," (as defined). Subsequently, however, without conceding they were "statements," petitioner agreed that after excision of irrelevant matter they be given to respondent for inspection, thereby removing the necessity of a Board determination on the question. Pertinent excerpts of these documents were given to respondent and later received in evidence without objection (C.P. Exs. 102 to 105, inc.).[8]

In the final argument on January 19, 1959, respondent merely took the position, without supporting analysis, that the produced documents establish (1) that Budenz' testimony on the Starobin letter and the Weiner conversation was deliberately false and (2) that there was information in the possession of the Department of Justice which so indicated, and hence his entire testimony should be stricken. Respondent contends that even if that position were not accepted Budenz' entire testimony must be stricken because it has been deprived of opportunity to develop "even

[8] Certain motions were filed by respondent subsequent to argument on exceptions. In view of petitioner's supplemental affidavit, respondent filed a motion on November 26, 1958, which it supplemented on December 8, seeking the reopening of the hearing to call all FBI agents who interviewed Budenz. Following production of C. P. Exs. 102 to 105 (inc.), this motion was withdrawn. In lieu thereof, respondent on December 29, 1958, filed motions to reopen the hearing and for the production of documents. The December 29 motions were denied by Board memorandum opinion and order issued January 13, 1959.

more damaging evidence concerning the nature of these discrepancies" and thus has been deprived of "important cross-examination going to the credibility of the witness."

Petitioner, on the other hand, contends that the documents confirm Budenz' testimony on the two topics and show that none of his testimony should be stricken.

We have here the unusual situation where an appellate court has remanded for the production of documents containing prior statements of a witness going to a portion of his testimony, and, after production of such statements and recall of the witness for further cross-examination, it then develops that the witness is unavailable for testimony. In view of respondent's motion to strike the entire testimony of Budenz, opposed by petitioner, we are faced ultimately with the question of what is the fair thing to do in relation to his testimony, all circumstances considered. [fol. 2390] On the one hand, for example, there is lack of opportunity for further cross-examination in light of the documents and, on the other, there is on the witness' part a lack of opportunity to be confronted with any alleged inconsistencies in the documents.[9]

The motion to strike Budenz' entire testimony leads to a review of pertinent circumstances of record. We have reviewed the contents of the documents produced and do not agree with respondent's assertion that on their face the documents produced show that Budenz' testimony on the Starobin and the Weiner matters was "deliberately false." From this it follows that we likewise do not conclude, as respondent contends, that petitioner had knowledge that the testimony was "deliberately false."

Respondent contends that (1) the responsibility for the deprivation of cross-examination rests with petitioner and (2) the loss of opportunity to cross-examine Budenz is a material loss; and that, under either contention, his entire testimony must be stricken. As to the first, we do not see that petitioner should be charged with responsibility for Budenz' unavailability for further cross-examination and,

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[9] Budenz was, however, cross-examined at the original hearing on other documents containing prior statements relating to his testimony on the Starobin letter and the Weiner conversation.

for this reason, lose the benefit of his entire testimony as respondent contends. In opposing production of pertinent reports in the Government's possession at the original hearing, petitioner was merely taking a legal position which at that time had wide judicial support in various circuits; and petitioner's position was sustained at the hearing. It was not until later that the Supreme Court clarified the law on production of documents in the Government's possession (*Jencks* v. *U.S.* (1957) 353 U.S. 657).

In sum, we have considered respondent's various assertions in support of its contention that the entire testimony should be stricken because petitioner is responsible for the witness' unavailability for further cross-examination but we do not agree.

Concerning the asserted material loss of cross-examination, it is pertinent to state that Budenz testified on direct examination at the original hearing for almost 2 days and was cross-examined for 5 days. There were 8 transcript pages of direct on the Weiner conversation and 10 pages of cross. Our review of the record shows that respondent clearly had adequate opportunity, which was utilized, to conduct cross-examination on those portions of Budenz' testimony not involving the Starobin and the Weiner incidents. In presenting its evidence, respondent was given full opportunity to rebut his testimony. None of his other testimony was dependent upon, or inseparable from, his testimony on the Starobin and the Weiner matters.

[fol. 2391] As stated, Budenz was exhaustively cross-examined for 5 days on his testimony at the original hearing. To establish a material deprivation of cross-examination due to unavailability of the witness, respondent can point only to the lack of opportunity to pursue the cross-examination on the basis of the produced statements relating to the Starobin letter and the Weiner conversation. We conclude from our review that the preclusion of further cross-examination on the produced documents due to unavailability was not sufficient to constitute a material deprivation of cross-examination on his testimony as a whole.

We believe, however, that in this situation where the witness is unavailable upon production of his prior statements and where, resolving all doubts in favor of the cross-examiner, any room is seen for further cross-examination in the light of such documents, the fair thing is to strike the testimony on the Starobin letter and the Weiner conversation. We do this because of lack of opportunity for further cross-examination on the two topics.

There are additional considerations which militate against striking more than the above testimony, *e.g.*, corroboration by other credited evidence, either documentary or oral. Also, Budenz was specific as to names, dates, and places and none of the persons named by him was called in rebuttal or denial of the events with which they were associated by the witness. Even in the relatively few instances where there is no other supporting testimony, Budenz' testimony is not directly rebutted and is credible on the record as a whole.

To illustrate the corroborative testimony, both Lautner and Budenz testified that the references in the Communist Party constitution concerning the upholding of American democracy and the United States Constitution are incompatible with Marxism-Leninism, upon which the Party avowedly bases its activities and policies (see J.A. 975, 979, 1153-1154; Mod. Rept., fols. 2440, 2441). Likewise, other credible evidence corroborates Budenz' testimony concerning Gerhardt Eisler (see, *e.g.*, J.A. 969-970; Mod. Rept., fol. 2509).

As an example of testimony inherently probable from the record and unrebutted, Budenz testified that in 1940 Party official Eugene Dennis stated at a meeting of Party functionaries held during the period of the Hitler-Stalin Pact that the Party should be prepared if the United States joined Great Britain in the war against Hitler to turn the so-called imperialist war into a civil war, as Lenin advocated. Dennis, to whom the statement was attributed, was not called to deny it. This testimony is credible in view of documentary evidence, as well as oral testimony, which shows that the program of turning imperialist wars into civil wars, if conditions are favorable, is part of the doc-
[fol. 2392] trine of the Communist movement. (See, for

example, the doctrine of Marxism-Leninism at Mod. Rept., fol. 2424, first par., and the evidence set forth at Mod. Rept., fols. 2533, 2534, and 2605.)[10]

The corroboration of Budenz on most of his testimony and the inherent probability of his unrebutted testimony on other topics are pertinent considerations in evaluating such testimony. In fact, even if it were assumed, *arguendo,* that he deliberately lied about the Starobin letter and the Weiner conversation, we would not be *required* to disbelieve or strike the whole of his testimony. *Communist Party* v. *SACB,* 254 F. 2d 314, 330-331; *NLRB* v. *Universal Camera Corp.,* 2 Cir., 179 F. 2d 749, 754, reversed on other grounds, 340 U.S. 474.

In view of the foregoing considerations, we conclude that the fair disposition of the question is to strike the Budenz testimony on the Starobin letter and the Weiner conversation and deny the motion to strike the testimony in all other respects.[11]

There remains for consideration the effect upon the Board's Modified Report as a result of striking that testimony.

Due to the striking of Budenz' testimony concerning the Starobin letter, there are deleted from the Modified Report

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[10] Respondent's exceptions 16, 17, and 18 directed to the findings in the Recommended Decision relating to crediting Budenz' testimony on the Party constitution, Eisler and Dennis are rejected. In exception 19, respondent repeats its contention that the original cross-examination of Budenz on such topics as Gerhardt Eisler, Eugene Dennis, and Runag demonstrated that he is an untrustworthy witness. We have twice examined the charges that perjury or taint have been shown by the original cross-examination and have concluded consistently that there was no warrant to strike his testimony. This conclusion was affirmed by the Court (*CPUSA* v. *SACB,* 254 F. 2d 314, 331) and nothing has developed during the instant remand to cause us to change our conclusion.

[11] The testimony stricken from the record is as follows: concerning the Starobin letter, R. 13837, line 1, through R. 13840, line 22; R. 13841, lines 3 through 10; R. 13841, line 24, through R. 13844, line 10; R. 14096, line 9, through R. 14125, line 19; concerning the Weiner conversation, R. 13818, line 10, through R. 13819, line 21, and R. 14061, line 15, through R. 14070, line 13. Communist Party Exhibit 67, which was introduced during cross-examination on the Starobin letter, is also stricken.

at page 98 the findings of fact based upon such testimony. (See Appendix.) The Party excepts (No. 12, p. 6) to the Member-Examiner's finding (Rec. Dec., p. 11) that the [fol. 2393] deletion does not give rise to any change or modification in the Board's conclusion (Mod. Rept., fol. 2505) that:

> . . . in 1945 respondent reverted to "its basic Communist principles" (*supra*) and reemphasized Marxism-Leninism upon the issuance of a statement to the effect that it should do so by a leading foreign spokesman of the world Communist movement.

As appears from the Modified Report, the "leading foreign spokesman of the world Communist movement" referred to in the above conclusion is Jacques Duclos, a leading official of the French Communist Party and onetime member of the Executive Committee of the Communist International; also, the "statement" above referred to is the article written by Duclos in April of 1945, known in the record as the "Duclos article." (See Mod. Rept., fol. 2502, 2d par. and fn. 70b.)

The now stricken Budenz testimony which was a portion of the evidence considered in reaching the above conclusion was, in substance, that Starobin wrote to the *Daily Worker* that Manuilsky, a Soviet Communist official, while in this country as a representative to the United Nations Conference, stated that the American Party should observe more carefully the guidance and counsel of the French Communists. (Mod. Rept., fol. 2503.)

We have reevaluated the conclusion quoted above without the Budenz testimony on the Starobin letter and find it is established by a preponderance of the evidence. As found in the Modified Report, the American Communist Party from its inception to 1944 faithfully operated as a disciplined Communist organization in the United States, applying the fundamentals of Marxism-Leninism for the overthrow of capitalism and the establishment of a Communist dictatorship of the proletariat. For about one year commencing in 1944, the Party called itself the Communist Political Association and under the leadership of Earl Browder accepted a deemphasis of militant doctrine but in the 1945

reorganization reverted to its basic organizational form and policies.

This reorganization was formalized in June and July of 1945. The Modified Report summarizes the evidence and concludes that the reorganization resulted from the Duclos statement, issued in April of 1945. Among the facts so summarized are Duclos' statement that the 1944 change of the American Communist Party to the Communist Political Association was wrong and contrary to proper Marxist-Leninist doctrine; that a powerful Communist Party in the United States is necessary; and, that Browder as leader of the [fol. 2394] Communist Political Association was guilty of revisionist errors.[12] Upon the release of the Duclos article, it was published by the Party in *Political Affairs* and the *Daily Worker* and meetings and conferences were called with dispatch and held throughout the Party to involve the membership in action to correct the errors pointed out by Duclos and to reconstitute the Party along the lines enunciated by Duclos.

At these meetings and conferences high Party officials expressed appreciation for and praise of the Duclos article. One such official informed the members present that they had been assembled for the purpose of discussing the Duclos article and that the article did not represent Duclos' views alone but those of the European Communists. In this connection, the record shows that the Duclos article attacked many aspects of the policy of the United States along the same lines then appearing in the official Soviet press. The Attorney General's expert witness, Dr. Mosely, established that the Duclos article represented an authoritative criticism and series of recommendations by an outstanding leader of the international Communist movement; and this is otherwise confirmed by the record.

At a meeting attended by petitioner's witness Meyer, which had been called following the publication of the Duclos article, Meyer took the position that the Duclos article was

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[12] Among the statements of Duclos were: that in changing to the Communist Political Association, the Party "swerved dangerously from the victorious Marxist-Leninist doctrine whose rigorously scientific application could lead to but one conclusion, not to dissolve the American Communist Party but to work to strengthen it" (A. G. Ex. 208, p. 670).

a policy of war between the United States and the Soviet Union whereupon Meyer was condemned by Party leader Jack Stachel as "provocative, and revisionist and liquidationist." (J.A. 707.) Respondent's Executive Board passed a resolution supporting the Duclos statement. At a *Daily Worker* staff meeting, likewise called on the Duclos article, the Party functionary serving as advisor on foreign affairs to the *Daily Worker* stated that the Duclos statement on revisionism and for rejection of class peace should be interpreted to mean that socialism could be obtained with the help of the Red Army. Party leader Stachel opposed that position as not specifically in line with the Duclos statement and said it would expose the Party.[13]

Only three months after the issuance of the Duclos article, the Party reverted to the type of organization prescribed in that article. Browder, whose policies as leader of the CPA were condemned by Duclos, was deposed as leader [fol. 2395] and subsequently expelled from the Party. (Mod. Rept., fols. 2503-2504.) At the original hearing, respondent presented no satisfactory explanation of such hasty changes and for the fact that the pre-reconstitution Party meetings revolved primarily around the Duclos article.[14]

The Party contends that without the Budenz testimony on the Starobin letter there is no record support for the "insinuation" that the 1945 reconstitution "was in response to a message . . . from a foreign leader of the 'world Communist movement' "; and that A.G. Ex. 210 and the uncontradicted testimony of its witness Elizabeth Gurley Flynn show that the Duclos article was written to the French Communists, that it was never regarded by American Party leaders as a message to them, and that it served only to

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[13] This latter finding is based upon testimony of the witness Budenz and is credible in the light of the Meyer testimony.

[14] In a report to the special convention held in July 1945 which reconstituted the Party as the American Communist Party, a high Party official without further explanation stated that: "Because of the limited time to prepare this special convention and the need for the convention to center its attention on the correction of our revisionist errors as well as the reorganization of our leadership, it has not been possible to involve the membership in a real discussion on amending the Constitution." (A. G. Ex. 209, p. 800.)

accelerate a development which would shortly have taken place had the article never been written.

A.G. Ex. 210, relied upon here by the Party, does not show that the Duclos article served only to accelerate a change in the Party which would shortly have taken place without the article. The exhibit is a resolution adopted by the Party in July 1945 in connection with the reconstitution. In fact, this document expresses appreciation of the "basic correctness of the sound fraternal, Marxist opinions expressed in the recent article of Jacques Duclos" (Mod. Rept., fol. 2504) and acknowledges the "validity of Comrade Duclos' criticism and of Comrade Foster's repeated warnings." (A.G. Ex. 210, p. 832.) Thus, any inference from this Party resolution would be that the Duclos article was authoritative in the hasty reconstitution.

Party witness Flynn testified that prior to May 1945 there was a great deal of discontent among older members of the Party over the formation of the Communist Political Association and discussions were going on in the Party about it; and that the Duclos article was of great interest although:

> I doubt very much if we would have given it the same attention, possibly six months before, but the changing conditions of our country as reflected in the discussions in our own Party sharpened our interest in what the leader of a sister Party had to say. In that sense, and in that sense only, was the article read and discussed. (J.A. 1295.)

[fol. 2396] Flynn also testified that she later met Duclos in France; that she told him the American Party had been reconstituted and appreciated very much his contribution; and that he looked surprised and said he had written his article for the French Party using the American mistakes as an example. To the extent that Flynn's testimony is designed to show that the Duclos article did not play an important hole in the Party reconstitution, it is contrary to the preponderance of the evidence.

The incident of the Starobin letter is not connected with any of the evidence above summarized showing the nature

of the Duclos article and its hasty acceptance by the Party and, in any event, is not necessary to the finding. It was the Duclos article, not the Starobin letter, that was the subject of speedy indoctrination and action. We find that the conclusion in the Modified Report (fol. 2505) concerning the 1945 reorganization of the Party is fully supported in the record after striking Budenz' testimony on the Starobin letter.

Turning now to the striking of Budenz' testimony on the Weiner conversation, there is deleted from the Modified Report (fol. 2564) the finding based thereon. (See Appendix.) This stricken finding was merely an instance indirectly indicating financial aid to the Party from foreign Communist sources prior to 1939. In the Modified Report we concluded that there was no evidence of any substantial foreign financial aid to the Party after 1940 (the date when the Party announced disaffiliation from the Communist International) and no evidence of any such aid after 1944. The only significance given to the *entire* evidence concerning financial aid was in arriving at the conclusion that such aid was furnished by the Soviet Union "during the formative period of respondent in the United States" (Mod. Rept., fol. 2568), which obviously was prior to 1940. No inference has been drawn as to continued aid and we found that foreign financial aid disappeared when the Party "became a going organization" (*ibid.*).

Included in the evidence presented by the Attorney General on the issue of financial aid was the testimony of Budenz to the effect that during the 1930's indirect aid was rendered the *Daily Worker* in the form of free political news dispatches furnished by the Moscow news agency Runag. The Party contends that the finding thereon should not be retained because it was shown to be false on original cross-examination and because it exhibits "the same pattern of fabrication which has been established in the case of the witness' testimony concerning the Starobin letter and the Weiner incident." (Exception 13, p. 6.) We believe for the reasons set forth above that even if this particular testimony were to be disregarded the limited conclusion that foreign financial aid was given only during the Party's formative years would be unchanged. However,

there is no basis for disregarding the testimony. The charge that cross-examination showed Budenz' direct testi- [fol. 2397] mony on Runag to be false is one of the matters mentioned, *supra*, that has twice before been considered by us and rejected.

The early financial aid is established by a clear preponderance of direct evidence without regard to the indication given from the now stricken incident of the Weiner conversation, which by its nature had little materiality. Accordingly, the deletion thereof does not require any modification in our conclusion on the issue of financial aid as set forth at folio 2568 of the Modified Report.

### Other Questions

In exceptions II (1A), (B) and (C) respondent argues, in substance, that (a) the Member-Examiner erred in concluding that the reversals of convictions in *Yates, et al.* v. *United States*, 354 U.S. 298, and *United States* v. *Jackson*, 257 F. 2d 830, have no cognizable effect on the Board's findings and that convictions of respondent's leaders under the Smith Act (18 U.S.C. 2385) are irrelevant but, if not, acquittals and dismissals of indictments in Smith Act cases involving respondent's members and leaders are also relevant; (b) the *Yates* decision, for the reasons stated in the Party's memorandum regarding applicability of *Yates* v. *United States* previously filed with the Court of Appeals prior to this remand,[15] requires the striking of certain findings in the Modified Report (fols. 2445, 2600, 2601, 2602, 2607, 2609) in relating to overthrow of this Government; and (c) the decisions of the Supreme Court in *Yates* v. *United States, supra*, and *Nowak* v. *United States*, 356 U.S. 660, have precluded a finding that (1) adherence to Marxism-Leninism excludes adherence to the Constitution and (2) adherence to Marxism-Leninism, and being a vanguard Party, are evidence of Soviet domination and control and

[15] The Court of Appeals had this memorandum before it prior to its decision on January 9, 1958, and, obviously, did not agree with respondent's position since it did not set aside the Board's order.

operation to advance the objectives of the world Communist movement described in section 2 of the Act.

As to the first contention, we believe it is proper to notice the reversal of the convictions of respondent's officers. The references to the convictions thereof in footnote 126 at folio 2602 of the Modified Report are accordingly stricken, and resultant minor modifications are made in the subsidiary findings, at folio 2604 of the Report. (See Appendix.) These subsidiary findings, as modified, remain supported by the record. The fact remains that respondent's foremost leaders were convicted and the convictions upheld. (See, *e.g., Dennis, et al.* v. *United States*, 341 U.S. 494, and *Flynn, et al.* v. *United States*, 216 F. 2d 354, cert. den., 348 U.S. 909). Concerning the contention regarding relevancy, the fact of those convictions is one consideration in a mass of evidence establishing the Board's finding in relation to the "allegiance" criterion of the Act (sec. 13(e)(8); see Mod. Rept., [fol. 2398] fols. 2599 to 2607, inc.). We reassert that, on this record, such evidence is relevant in considering whether respondent's leaders and a substantial portion of the membership consider the allegiance they owe to the United States is subordinate to their loyalty and obligations to the Soviet Union. As to the alternate contention, *viz.*, the acquittals and dismissals are likewise relevant, suffice it to say that after modifying the finding to delete the names of the pertinent individuals, we have reevaluated the evidence and findings and have concluded that such deletions require no further modification in the Modified Report.

We come now to the contention that *Yates* requires the striking of the findings described above. We do not agree. That case was a criminal trial of individuals under the Smith Act. The issues there were markedly different from those in this proceeding and we do not read *Yates* as requiring the striking of the findings to which respondent alludes. As to the remaining contention, we do not find in *Yates* or *Nowak* any holding warranting the conclusions drawn by respondent. In each proceeding, both involving different issues, the Court found an insufficiency of evidence in regard to the individuals tried.

[fol. 2399] CONCLUSION AND RECOMMENDATION

Upon reevaluation of the entire record in the light of the foregoing, we reaffirm as established by the preponderance of the evidence all the findings and conclusions in the Modified Report of the Board issued December 18, 1956, with the changes and modifications herein made. We also reaffirm the conclusion on the preponderance of the evidence that the Communist Party is a Communist-action organization, as defined in the statute. Accordingly, it is

RECOMMENDED that the United States Court of Appeals for the District of Columbia Circuit affirm the Board's Order entered April 20, 1953, requiring the Communist Party of the United States to register as a Communist-action organization under section 7 of the Subversive Activities Control Act of 1950.

Dorothy McCullough Lee, Chairman; Francis A. Cherry, Member; R. Lockwood Jones, Member; James R. Duncan, Member (Member Donegan not participating)

[Seal]

February 9, 1959
Washington, D. C.

[fol. 2400] APPENDIX

The following, designated by page and line, constitute all findings stricken, corrected and changed in the Modified Report of the Board as issued on December 18, 1956.

| *Modified Report* | |
|---|---|
| Folio 2442 (line 5) | Change: "Markward" to read "Meyer". |
| Folio 2499 (lines 11-15) | Strike: "We note in this connection that in August 1951 respondent quoted with approval in *Political Affairs* a statement by the leader of the Communist Party of China that the *History of the Communist Party of the Soviet Union* 'is the highest synthesis, the highest generalization of the world Communist movement.' (Pet. Ex. 484, p. 35.)" |
| Folio 2503 (lines 27-34) | Strike: "Budenz testified that while at the *Daily Worker* office he read part of a letter from Starobin, the *Daily Worker* correspondent attending the United Nations Conference on Organization in San Francisco, which was to the effect that Manuilsky [a leading Soviet Union Communist and Ukranian representative to the United Nations Conference] had expressed indignation that the American Communist Party had not criticized the American Government leaders more severely, and stated the American Party should observe more carefully the guidance and counsel of the French Communists.[70c]" |
| Folio 2503 (lines 37-41) | Strike: "[70c] Respondent contends that cross-examination showed that Budenz made in- |

consistent statements regarding this matter in a book he had previously written and in prior testimony before the House Un-American Activities Committee. We do not read those prior statements as substantially inconsistent and the essence of his testimony on this is credited."

[fol. 2401]
*Modified Report*

Folio 2525 (lines 30-37)

Strike:

"Speaking through *Political Affairs* for August 1951, respondent took the position that 'The scales are weighed in favor of the people's peace forces, headed by the Soviet Union' and there is quoted with obvious approval the statement of Comrade Mao Tse-Tung, 'the tested leader of the Communist Party of China' that the *History of the Communist Party of the Soviet Union* 'is the highest synthesis, the highest generalization of *the world Communist movement.*' (Pet. Ex. 484, pp. 11, 35, emphasis added.)"

Folio 2535 (line 24)

Change:

"(Pet. Ex. 406.)" to read "(Pet. Ex. 405)".

Folio 2550 (lines 2-12)

Strike:

"This same official in an article published in *Political Affairs* in May 1951 similarly stated:

'Within the boundaries of our country, an oppressed nation, the Negro people in the Black Belt of the South, is fighting for full freedom . . . not only the Negro workers, but the Negro people as a whole . . . are a

most important and staunch ally of the American working class, and . . . the future fate of the American working class is closely bound up with the future of the Negro nation.' (Pet. Ex. 481, p. 32.)"

Folio 2564 (lines 22-26) Strike:

"In 1939 the treasurer of the CPUSA stated that it was impossible to put additional CPUSA funds into the *Midwest Daily Record,* a CPUSA-controlled paper, because at that time communications to their sources of funds abroad, i.e., the Soviet Union, had been disrupted."

[fol. 2402] *Modified Report*

Folio 2602 (lines 33-35) Strike:

". . . Alexander Trachtenberg, George B. Charney, Sidney Steinberg (Stein), James Jackson, William Schneiderman, Dorothy R. Healey, Rose C. Kusnitz, and Frank Carlson."

Folio 2602 (lines 38-39) Strike:

". . . *U.S.* v. *Trachtenberg, et al.,* C-136-7 pending on appeal U.S.C.C.A. Second Circuit; *Yates* v. *U.S.,* 225 F. 2d 146, now pending on writ of certiorari."

Folio 2604 (line 18) Change:

"three" to "two".

Folio 2604 (line 19) Change:

"Four" to "Three".

Folio 2604 (line 20) Strike:

"Schneiderman".

[fol. 2403]

BEFORE SUBVERSIVE ACTIVITIES CONTROL BOARD

Docket No. 51-101

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HERBERT BROWNELL, JR., Attorney General of the United States, Petitioner,

—v.—

THE COMMUNIST PARTY OF THE UNITED STATES OF AMERICA, Respondent.

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William A. Paisley, Joseph Alderman, Nathan B. Lenvin, Lawrence K. Bailey, Rex A. McKittrick, Noel E. Story, B. Franklin Taylor, Jr., Frank DeNunzio, Clifford J. Nelson, Rourke J. Sheehan, Robert B. Gaston, James T. Devine, Herbert E. Bates, Thomas J. Brennan, David L. Ketter, Benjamin C. Flannagan, and Joseph M. Wysolmerski, for petitioner.

Vito Marcantonio (since deceased), John J. Abt, and Joseph Forer, for respondent.

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**Modified Report of the Board—December 18, 1956**

[fol. 2406] PRELIMINARY STATEMENT

On November 22, 1950, the Attorney General of the United States, petitioner herein, acting under section 13(a) of the Subversive Activities Control Act of 1950, hereinafter called the Act, filed a petition with the Board for an order requiring the Communist Party of the United States of America (CPUSA), respondent herein, to register with the Attorney General as required by sections 7(a), (c), and (d) of the Act. The petition alleges that respondent is a Communist-action organization as defined in the Act and it sets forth numerous allegations of fact in support of its contention.

Hearings for the purpose of taking evidence on the petition commenced before a Hearing Panel of Board

Members on April 23, 1951, and terminated on July 1, 1952.[1]

On October 20, 1952, the Hearing Panel issued its Recommended Decision finding respondent to be a Communist-action organization as defined in the Act and recommending that the Board issue an order requiring respondent to register as such with the Attorney General of the United States.

Exceptions to the Recommended Decision were filed, as was a motion by respondent to reopen for additional evidence on three of petitioner's witnesses, the latter being later denied by the Board. Oral argument on the exceptions took place on January 7, 1953, and the Board on April 20, 1953, issued its Report and Order finding the Communist Party to be a Communist-action organization and ordering it to register as such with the Attorney General.

While the proceeding was pending review in the United States Court of Appeals for the District of Columbia Circuit, the Party pursuant to section 14(a) of the Act moved the Court for leave to adduce additional evidence which would show that petitioner's witnesses Crouch, Johnson and Matusow were untrustworthy and should be ac- [fol. 2407] corded no credence. This motion was denied by the Court on December 23, 1954, and on the same date the Court affirmed the Board's order of registration, *sub nom. Communist Party* v. *Subversive Activities Control Board*, 223 F. 2d 531.

The Supreme Court of the United States granted certiorari on May 31, 1955. On April 30, 1956, the Supreme Court found error in the denial by the Court of Appeals of the Party's motion for leave to adduce additional evidence and, without deciding other issues, reversed and remanded the case to the Board for appropriate proceedings, 351 U.S. 115.

The Board moved in the Supreme Court on May 2, 1956, that its judgment be certified to the Court of Appeals forthwith, and the Party opposed on the grounds that it

[1] As will appear later, the hearing was reopened on December 11, 1956.

was considering filing a motion for rehearing or in the alternative for modification of the terms of remand. The Supreme Court, notwithstanding the Party's opposition, certified the judgment to the Court of Appeals on May 15, 1956, and that Court on May 16, 1956, issued its "Order Pursuant To The Judgment Of The Supreme Court," remanding the case to the Board "for proceedings in conformity with the opinion of the Supreme Court. See section 14(a) of the Subversive Activities Control Act of 1950 . . ."

The Party on May 21, 1956, filed three motions with the Board, one to reopen for additional evidence going to the merits of the proceeding and two going to the credibility of witnesses. After oral argument, the Board denied the motions by Memorandum Opinion and Order of August 10, 1956. On the same day the Party filed these three motions with the Board it moved in the Court of Appeals for an amendment and clarification of that Court's Order entered May 16, 1956, pursuant to the judgment of the Supreme Court seeking to have the Court expressly set aside the Board's order directing the Party to register ". . . in order to insure that further proceedings before the Board will conform to the judgment of the Supreme Court and that the Board will not erroneously deny petitioner an opportunity to introduce material evidence." The Court denied the Party's motion per curiam without opinion on June 13, 1956.

On August 17, 1956, the Party, pursuant to section 14(a) of the Act, again moved in the Court of Appeals for leave to adduce additional evidence which assertedly would show (1) that the Board's findings that there exists a world Communist movement as described in section 2 of the Act [fol. 2408] and that it is a Communist-action organization were erroneous when made and in any event are not now true and (2) that the testimony of petitioner's witness Markward "was tainted with perjury and was false."

These motions were denied by the Court of Appeals in its order of November 5, 1956. In so doing, however, the Court stated that insofar as the motion related to an alleged perjury by the witness Markward in respect to one

Annie Lee Moss "permission [is] here granted to the Subversive Activities Control Board to entertain a motion upon the same matter if sufficient and appropriate showing is made to it for that purpose." Subsequently, on November 16, 1956, the Party filed with the Board another motion with supporting affidavit, directed in part to the foregoing subject matter, seeking a reopening of the hearing to show that witness Markward "is a perjurer, whose testimony should be expunged from the record of this case." In its supporting affidavit, respondent charged, additionally, that Mrs. Markward had committed perjury in *United States* v. *Blumberg*, Cr. No. 17963, U.S.D.C., E.D. Pa., a prosecution under the so-called membership clause of the Smith Act, in that reports made by her to the FBI did not, upon production in Court, contain statements to which she had there testified. The Board granted the motion in part[2] and the hearing was reopened on December 11, 1956, with the full Board presiding, and closed the same day. At the reopened hearing the witness Markward was examined and, among other things, her previous testimony with respect to Annie Lee Moss[3] was probed by counsel for respondent. At Board direction, pertinent portions of her testimony in the *Blumberg* case, *supra*, designated by both parties, were submitted and are in evidence. (C.P. Ex. 93.)

Since the hearing was reopened solely to examine the credibility of witness Markward we observed her with particular care while she testified; and we reassessed her testimony after she testified at the reopened hearing. She strikes us as a sincere, forthright witness who strives for the truth as best she knows it. She does not appear to be one who would deliberately fabricate testimony. At the reopened hearing, respondent did not approach establishing Mrs. Markward had committed perjury in any of her testimony concerning Annie Lee Moss.

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[2] See Memorandum Opinion and Order of the Board issued December 3, 1956; see also the one issued December 13, 1956.

[3] We might say that Annie Lee Moss plays no part in the merits of this proceeding and was not referred to in the hearing in chief.

[fol. 2409] In reevaluating the witness we have also considered the transcript of the submitted portion of her testimony in the *Blumberg* case, *supra*.[4] There, it developed that reports made by her to the FBI regarding Party meetings and a Party class did not contain, in *haec verba* or what in ordinary parlance would be synonymous terms statements testified to by her as having been made by individuals at such meetings or class. In assessing that development, however, we have considered as best we could under the circumstances the pertinent cross, redirect, and re-cross examination, as submitted (C.P. Ex. 93, *supra*). Having done this, we are unable to conclude that perjury was shown, though the review served as a caution in assessing her testimony here. At the outside, our duty ends there. By this we mean, it is not for us to attempt to project ourselves into that trial to determine to what extent the effect of her direct examination had been shaken. No Court would impose such a burden. And, certainly, no Court would hold that witnesses whose direct testimony is disturbed in cross-examination are, therefore, perjurers and their testimony in other cases should be stricken. If so, there would be few willing witnesses left in the land. As we interpret the Supreme Court's opinion in *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115, the Board is in effect abjured to consider, realistically, whether witnesses before it have deliberately fabricated testimony in other proceedings involving subject matter similar to Board proceedings. That direction could, of course, make for an endless road unless reasonably construed. And a reasonable construction is what we have sought here.

In reassessing witness Markward's testimony after the reopened hearing we not only see no reason to strike her

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[4] We have, additionally, examined *in camera* a report by the witness to the FBI concerning a Party meeting testified to in the hearing in chief which we ordered produced when reopening the hearing. Upon review, we concluded it should not be made available to respondent and remains in the record, sealed. (See Memorandum Opinion and Order of the Board dated December 13, 1956.)

testimony, as respondent would have us do, but no reason to substantially discredit her.[5]

[fol. 2410] In proceeding upon remand pursuant to the Supreme Court's opinion and the order of the Court of Appeals we have expunged from the record, for the reasons stated in our Memorandum Opinion of August 10, 1956, all testimony of the witnesses Crouch, Johnson, and Matusow, and all documentary evidence received through them which depended upon such testimony to establish competency, relevancy or materiality, namely, Petitioner's Exhibits No. 146 through 148, inclusive, 150 through 155, inclusive, 293, 294, 419, 420, 423, and Communist Party Exhibits 11, 20, 63, 63-A.[6] On September 18, 1956, oral argument took place on whether the Board's order could be supported by a preponderance of the evidence on the record as expurgated.

As the Supreme Court directed, we have reconsidered our determination on the record as expunged, and have reassayed the findings of the Board's Report in so doing and the exceptions originally filed. Our reconsideration leads to the conclusion that all major findings in the Board's Report remain supported and, in fact, the expunction left no substantial gaps in the evidence. In the interest of a Report readily reviewable we decided that a modified Report containing all findings rather than one which must be read with the original Report was indicated. Such procedure, in addition, enabled the Board to make such restatements, modifications, comments on witnesses, or formal rearrangements as commended themselves on reconsideration.

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[5] It so happens the Report rests upon a comparatively few findings which are supported in whole or in part by her testimony. We might say the really vital part of petitioner's case is documentary evidence, which to a considerable extent needs relatively little oral illumination, as a scrutiny of the Report will show, see, e.g., the sections of the Report on "World Communist Movement," "Marxism-Leninism," and those containing respondent's major policies and organizational structure. The section on "Nondeviation" rests more heavily on testimony, Dr. Mosely's, to illuminate the exhibits but respondent does not attack his credibility.

[6] Petitioner's objections to striking its exhibits Nos. 294, 422, and 423 are overruled.

This was a lengthy proceeding with a record of some 14,000 transcript pages and approximately 500 exhibits, many of which are book length. Due to the nature of the issues, it was necessary to examine respondent's entire existence, some 30-odd years. Being the type of organization it is—prolific in its writings and, by its own admission, frequently obscure in some of its activities—it is necessary to piece together a myriad of activities and official statements to ascertain its nature and status.

Testimonial evaluation problems are present in the record, due in some instances to the remoteness in point of time of events the subject of testimony. There are several occasions where inconsistencies were developed on cross-examination. Where the Board considered the evaluation problem was such that reliance should not be placed upon disputed testimony it has been disregarded. To set forth and resolve all such details in a record of this mag- [fol. 2411] nitude would hardly be expected. Where warranted, however, we treat specifically with conflicts in the evidence and the credibility of witnesses in the body of the Report.

Several of petitioner's witnesses are in the category of "FBI operatives" and in varying degrees received financial remuneration from the Government; most of the remainder were formerly in the Party and either left or were expelled.[7] The Board scrutinized their testimony with the care due under the particular circumstances, having regard for judicial precedents; and it likewise considered the interest of petitioner's witnesses where manifested.

Two of respondent's three witnesses are top officials of respondent and have an obvious interest in this proceeding. Both have been convicted of conspiring to teach and advocate the overthrow of the Government by force and violence (Smith Act). The third was an expert witness—a member of respondent—who indicated a like interest, which is ordinarily not anticipated in an expert witness. There was a significant lack of rebuttal by respondent on a multiplicity of specific conversations and events put in

[7] Pertinent background data on all witnesses is set forth in Appendix A.

evidence by petitioner at which witnesses available to respondent were present.

We have weighed these considerations, *inter alia*, in assessing the evidence.

As noted above, the parties were notified that the Board would proceed on remand by expunging the testimony of the three witnesses under attack and would reconsider its earlier determination in the light of the record without such testimony. Thereafter, the parties were heard orally before the full Board on the issue of the sufficiency of the evidence, after the expunction, to support the registration order. No additional evidence on the merits of the case has been adduced on remand. At the reopened hearing on the credibility of a witness the full Board presided. Pursuant to section 14(a) of the Act, this Modified Report and Recommendation will be filed in the Court of Appeals.

[fol. 2412] FINDINGS OF FACT

Respondent is an organization in the United States within the meaning of the term as defined in section 3(2) of the statute and is not a diplomatic representative or mission of a foreign government accredited as such by the Department of State within the exemption of section 3(3) of the statute.

Respondent was organized in 1919 and has been in existence continuously since that date. It consists of many thousands of members in the United States organized at city, county, state and district (including multi-state) levels which include clubs, cells, fractions, branches, and sections, and committees thereof. The National Committee is the top internal administrative and executive body controlling the internal affairs between conventions. Its executive committee is referred to as the Politbureau and in reality is the controlling committee of the Communist Party. Various operating committees are maintained for specific purposes.

The official organs of respondent are the *Daily Worker*, issued daily with a Sunday edition called *The Worker*, and *Political Affairs*, issued monthly, formerly named *The Communist*. Respondent has also issued a number of pam-

phlets, circulars, local area newspapers, leaflets and other publications. The official organs and the other publications which are used in this Report are found to be reliable and probative of the facts for which used, including evidence as to the policies, purposes, aims, and programs of respondent. We later make additional findings on the nature and character of respondent's official organs. Since it is fundamental to respondent, we treat first with Marxism-Leninism.

1. MARXISM-LENINISM

Respondent's 1948 constitution (Pet. Ex. 374), readopted in 1950, and its amended answer assert that Marxism-Leninism is basic to the CPUSA. We recognize that the merits of the theory of Marxism-Leninism, as such, is not an issue in this proceeding. Nor is it our purpose to consider the merits of capitalism vis-a-vis communism. Marxism-Leninism is basic to respondent, however, and there is the considerable evidence of record concerning it. We record our findings, therefore, of what it is in essence, so far as relevant, and how it is applied by respondent. The extent to which respondent applies Marxism-Leninism is more specifically treated throughout the other parts of this Report.

[fol. 2413] The sources of Marxism-Leninism and also its corpus are to be found in the writings of Marx, Engels, Lenin, and Stalin and their collaborators, which writings are referred to in this proceeding as the "Communist Classics." In order to understand the content of these "Classics." it is desirable to examine something of the background in which they were produced and also to indicate what we consider to be the chief, relevant contributions of the above individuals to the corpus of Marxism-Leninism.

Lenin's classic *Imperialism* (Pet. Ex. 140) was written in 1916 and revised by him in 1917; *State and Revolution* (Pet. Ex. 139) was written by Lenin in 1917, being released in August, and was issued with a minor amendment in the second edition in December 1918. Stalin wrote *Foundations of Leninism* (Pet. Ex. 121) in 1924, and his work

called *Problems of Leninism* (Pet. Ex. 138) followed in sequence. Dimitroff's *The United Front* (Pet. Ex. 149) is basically a compilation of reports, speeches, and articles made by him as general secretary of the Communist International from August 1935 to the end of 1937. Dimitroff's *Working Class Unity—Bulwark Against Fascism* (Pet. Ex. 141) is a pamphlet edition of his report to the Seventh Congress of the Comintern, held in Moscow in July 1935. Stalin's *Mastering Bolshevism* (Pet. Ex. 335) consists primarily of the text of his reports as general secretary of the Communist Party of the Soviet Union to that Party's Central Committee made in March of 1937. *Strategy and Tactics of the Proletarian Revolution* (Pet. Ex. 343) is a compilation of writings, in the main, of Lenin and Stalin, and is primarily concerned with the tasks, strategy, and tactics of the Communist International as the organized apparatus of the world Communist movement and in fact comprised Chapter VI of the *Programme of the Communist International* (Pet. Ex. 125), issued in 1928. The *History of the Communist Party of the Soviet Union (B)* (Pet. Ex. 330), first issued in 1939, was edited by a commission of the Central Committee of the Communist Party of the Soviet Union, and is generally considered a work of Stalin.

Also fundamental to the corpus of Marxism-Leninism are the official *Theses and Statutes of the Third (Communist) International* (Pet. Ex. 8), issued in 1920; its *Programme* (Pet. Ex. 125, *supra*); and the *Resolutions* (Pet. Ex. 137) of the Seventh Congress, held in Moscow in 1935.

Of the other documents of record in which the corpus of Marxism-Leninism is to be found, this leaves only *The Communist Manifesto* of Marx and Engels (Pet. Ex. 31), written in 1848, and Lenin's *What Is To Be Done?* (Pet. Ex. 417), written in 1902.

[fol. 2414] Hence it is readily apparent that the corpus of Marxism-Leninism, as evidenced in this record and as appears to be the fact, is comprised mainly of the works of Lenin and Stalin and their collaborators and were authored by them as leaders of the Communist Party of the Soviet Union, the Communist International, and the Soviet State. Moreover, they are of a relatively current character

and, as is established in the case of the *History of the Communist Party of the Soviet Union (B)* (Pet. Ex. 330), issued in 1939, it is reasonable to conclude that they were designed to promulgate the doctrines of Marxism-Leninism throughout the world, and primarily for application outside the Soviet Union, where state power was already in the hands of the Communists.[8]

In the summaries of, and quotations from, the "Classics" which follow we have endeavored to hold closely to the essence of the material being analyzed. We are aware that in excerpting passages from a document, and particularly from a book, the question often arises as to whether the excerpt is out of context and standing alone conveys a meaning contrary to the sense of the document. The excerpts and paraphrases of the documents used herein in our judgment are representative of the whole tenor of the writing from which they are taken and reflect the essence of the document, and Marxism-Leninism, in each instance.

We might indicate at this juncture that there may be, and probably are, those who subscribe to portions of Marxism-Leninism, e.g., the labor theory of values and public ownership of the means of production, and yet would [fol. 2415] advance toward their objective within the prin-

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[8] This is borne out even with reference to Lenin's earlier works by Stalin's statement in *Problems of Leninism* refuting a "national" as opposed to an "international" definition of Leninism: "Have Lenin's works, such as *Imperialism; State and Revolution, The Proletarian Revolution and the Renegade Kautsky*, and *'Left-Wing' Communism: an Infantile Disorder*, etc., significance only for Russia and not for all imperialist countries in general? Is not Leninism the generalisation of the experience of the revolutionary movement of *all* countries? Are not the foundations of the theory and tactics of Leninism suitable and obligatory for the proletarian parties of all countries? Was Lenin wrong when he said that: 'Bolshevism can serve as a model of tactics *for all*'? . . . Was Lenin wrong when he spoke of the *'international significance* [My italics. —J. S.] of the Soviet power and of the foundation of Bolshevik theory and tactics'? (*'Left-Wing' Communism.*) • • • How can this nationally restricted definition of Leninism be reconciled with internationalism?" (Pet. Ex. 138, pp. 8-9.)

ciples of the Constitution.[8a] But that is not this respondent. It at no time asserts it embraces only isolated portions of Marxism-Leninism, such as those just specified. It espouses Marxism-Leninism in its totality and then proceeds to the position that in so doing it nevertheless embraces the Constitution and is an independent, domestic political organization.

As the evidence now to be discussed will show, respondent's adherence to Marxism-Leninism and its operations on the basis thereof exclude adherence to the Constitution as the Party proclaims.

Historically it was in the middle of the nineteenth century that Karl Marx and Frederick Engels developed what became known as Marxism. This is a form of socialism, a basic tenet of which is the ownership by the state of all the means of production and distribution. According to Marx, all hitherto existing society consisted of antagonistic classes, the principal one being the bourgeoisie or capitalist class, which, as a result of owning privately the means of production, exploited the propertyless working class. Marx announced particular interest in the propertyless factory workers whose numbers had increased as a result of industrialization then taking place in Europe. These factory workers he designated as the proletariat. Marx was influenced by the dynamic theories of the German philosopher Hegel, and applied Hegel's dialectics to the materialistic concepts of the Greek philosophers and developed a system which he called dialectical materialism. This is a theory of reality assuming continuous transformation of matter and dynamic interconnection of things and concepts and implies social transformation through socialism toward a classless society. Marx came to the conclusion that the only true value was the labor of the industrial working class. It was his thesis that capitalism had to expand in order to continue to exist and, as it spread, the proletariat would correspondingly increase in numbers. According to his conception of history, capitalism contained

[8a] And, as former Chief Justice Stone once indicated, the Constitution does have readily ascertainable principles. *Schneiderman v. United States*, 320 U.S. 118, 181. It is no vague document.

the seeds of its own destruction and consequently it was inevitable that the classless state of society which he designated as communism would ultimately come about. In order to expedite this, he theorized, it was necessary that the proletarian class, which would be greater in numbers than the bourgeoisie, be organized and be given leadership by a political party of all the workers of the world. The objective of this party would be to bring capitalism to an end and substitute for it a dictatorship of the proletariat in a socialist state. Eventually, according to his [fol. 2416] theory, the dictatorship of the proletariat would not be necessary because the state would wither away as soon as classes disappeared and its citizens had been conditioned to living in a one-class society.

Two of the most basic considerations of Marx which inhere in Marxism-Leninism as developed by Lenin and Stalin and their collaborators are the concept of an international class struggle and the world-wide character of the revolution. Illustrative of this, *The Communist Manifesto* (Pet. Ex. 31) proclaimed: "The history of . . . society is the history of class struggles." (*Ibid.*, p. 9.) "The bourgeoisie has played a most revolutionary role in history." (*Ibid.*, p. 11.) But "not only has the bourgeoisie forged the weapons that bring death to itself; it has also called into existence the men who are to wield those weapons . . . the proletarians." (*Ibid.*, p. 15.) The proletarians have become organized into a class and consequently into a political party. Of all the classes opposing the bourgeoisie, the proletariat alone is a really revolutionary class. The Communists are a proletarian party whose aim is the conquest of political power by the proletariat. The proletariat will become the ruling class and will use its political supremacy to wrest all capital from the bourgeoisie. The measures used to do this will be different in different countries. The Communist everywhere must support every revolutionary movement against the existing order of things. Their ends can only be attained by the forcible overthrow of all existing social conditions. Workingmen of all countries are exhorted to unite for the Communist revolution. (See *ibid.* pp. 16-31.)

Lenin adapted Marxism to Russian revolutionary purposes.[9] He proceeded to implement it in a way that gave it a practical turn. He concluded that for the success of the proletarian revolution two things were most important: rigidity of organization and flexibility of policy. Organizationally, one of his first postulates was the necessity of creating a homogeneous group of disciplined professional revolutionists, among whom no factionalism or dissent would be tolerated, as a nucleus for the party of the proletariat. It should be noted that the Communist Party was formed in 1898 in Russia. Lenin's group therein, the Bolsheviks, obtained control of that party in Russia primarily because they were an intransigent group permitting no deviation or compromise.

[fol. 2417] Stalin gave the Marxist-Leninist ideas a practicality which developed somewhat differently from Marxist theoretical schemes. Marx, Lenin and Stalin, as the record reveals, became the supreme authorities of what is known as Marxism-Leninism and after Lenin's death Stalin became the supreme interpolator of Lenin.[10] All postulated the revolution on a worldwide basis. Lenin, and after him Stalin, proclaimed that it was not necessary to wait until the proletariat throughout the entire world was ready for a revolution, but that the attack against the capitalist world rightfully began by breaking its chain at the weakest link, which proved to be Russia. The Communists in Russia having succeeded, they then sought help from the proletariat throughout the world to consolidate and support their victory. They also proceeded to foment and aid revolution in any part of the world where it had a chance of being successful and pursuant to this purpose organized the present world Communist movement and as its organizational apparatus, the Communist International, which served as such until 1943. (See the next section of this Report.)

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[9] See foreword to *What Is To Be Done?* (Pet. Ex. 417) by Alexander Trachtenberg, one of respondent's leaders and manager of International Publishers.

[10] Currently, Marxism-Leninism might be more appropriately termed Leninism-Stalinism.

In the writings of Lenin and Stalin, the international and revolutionary aspects of Marxism are stressed and developed. In *State and Revolution* (Pet. Ex. 139), Lenin objects to the "chauvinism" of those "'leaders of Socialism'," who would water down Marx's doctrine by limiting it to single states. Speaking of the Russian Revolution of 1917, he states: "This revolution can be understood in its totality only as a link in the chain of Socialist proletarian revolutions called forth by the imperialist war." (*Ibid.*, pp. 5 and 6.), "A Marxist is one who *extends* the acceptance of class struggle to the acceptance of the *dictatorship of the proletariat.*" (*Ibid.*, p. 30.) In *Foundations of Leninism* (Pet. Ex. 121), Stalin said that Leninism is not merely a Russian but an international phenomenon (p. 9); and that the Russian Communists were impelled by the whole situation, domestic and foreign, to transfer the struggle to the international arena (p. 17). This is also in Stalin's definition of Leninism (*Problems of Leninism*, Pet. Ex. 138, pp. 7-9; see also p. 19). The movement called for in Marxism-Leninism is regarded by its founders and chief protagonists as an internationalism which must operate with common theory and strategy and tactics in all countries. That those working for the ultimate ends of the movement must work in unison and in one cohesive organization on a world-wide basis is expressed clearly in the *Theses and Statutes of the Third (Communist) International* (Pet. Ex. 8, p. 67), discussed *infra*, and suffuses the "Classics" throughout. It is not a tenet that can be accepted here and rejected there. Like a fast dye, it colors every portion of the movement and cannot be eradicated because it is of its essence.

[fol. 2418] It would burden this section unduly to quote *in extenso* the references in the "Classics" to the international and revolutionary nature of Marxism-Leninism and the interrelation of the Communist Parties in all countries which it requires. These references are deemed significant to illustrate this: *Foundations of Leninism* (Pet. Ex. 121, pp. 17-19; p. 45, last paragraph, and p. 46); *History of the Communist Party of the Soviet Union (B)* (Pet. Ex. 330, pp. 273-275); and *State and Revolution* (Pet. Ex. 139, pp. 5-6).

Another factor of Marxism-Leninism which pervades the "Classics" is the dominant position of the Soviet Union. After the successful revolution in Russia, Stalin points out (*Problems of Leninism*, Pet. Ex. 138, p. 64) that for an ultimate victory of socialism in the world, the protection of the Russian victory by workers of all countries is necessary. In *Foundations of Leninism* (Pet. Ex. 121, p. 19) he quotes Lenin:

> "'History has now confronted us [i.e., the Russian Marxists—J. S.] with an immediate task which is the *most revolutionary* of all the *immediate* tasks that confront the proletariat of any country. The fulfilment of this task, the destruction of the most powerful bulwark, not only of European, but also of Asiatic reaction, would make the Russian proletariat the vanguard of the international revolutionary proletariat.'...
>
> "In other words, the centre of the revolutionary movement was bound to shift to Russia.
>
> "As we know, the course of the revolution in Russia has more than vindicated Lenin's prediction.
>
> "Is it surprising, after all this, that a country which has accomplished such a revolution and possesses such a proletariat should have been the birthplace of the theory and tactics of the proletarian revolution?
>
> "Is it surprising that Lenin, the leader of this proletariat, *became the creator of this theory and tactics and the leader of the international proletariat?*" (Pet. Ex. 121, p. 19, emphasis added.)

The international position held by the Soviet Union in Marxism-Leninism is further brought out in *The United Front*, written in the late 1930's, which sets forth as the test of true adherence to the cause one's attitude toward the Soviet Union. The following is among the statements contained therein:

> [fol. 2419] "... You cannot carry on a real struggle against fascism if you do not render all possible assistance in strengthening the *most important buttress* of this struggle, the Soviet Union. You cannot carry

> on a serious struggle against the fascist instigators of a new world blood bath, if you do not render undivided support to the U.S.S.R., a *most important factor* in the maintenance of international peace. You cannot carry on a real struggle for socialism in your own country, if you do not oppose the enemies of the Soviet State, where this socialism is being fulfilled by the heroic efforts of the working people. . . . " (Pet. Ex. 149, p. 279.)

Whereas in the Soviet Union the Party is the core of the movement, in the world scheme the USSR becomes the center.[11] As such, it must be protected, and from it will emanate leadership which will direct and hold together the Party in other countries. This is expressed in *Strategy and Tactics of the Proletarian Revolution*:

> "In the struggle to defend against fascism the bourgeois-democratic liberties and the gains of the toilers, in the struggle to overthrow fascist dictatorship, the revolutionary proletariat prepares its forces, strengthens its fighting contacts with its allies and directs the struggle toward the goal of achieving real democracy of the toilers—Soviet power.
>
> "The further consolidation of the Land of the Soviets, the rallying of the world proletariat around it, *and the mighty growth of the international authority of the Communist Party of the Soviet Union,* the turn toward revolutionary class struggle which has set in among the Social-Democratic workers and the workers organized in the reformist trade unions, the increasing mass resistance to fascism and the growth of the revolutionary movement in the colonies, the decline of the Second International and the growth of the Communist International, *are all accelerating and will con-*

[11] This is illuminated by a statement of the Cominform in 1948 (Pet. Ex. 345) relating to its resolution excoriating Tito, that all Communist Parties announced agreement, including respondent, that in displaying anti-Soviet Union tendencies Tito deviated from the principles of Marxism-Leninism. This indicates that to break wth the Soviet Union is construed by respondent as a break with Marxism-Leninism.

*time to accelerate the development of the world Socialist revolution.*" (Pet. Ex. 343, p. 81, emphasis added.)

[fol. 2420] It is declared that if the Soviet Union army is engaged in war to defend socialism, "the Communists will call upon all toilers *to work, with all their means at their disposal and at any price, for the victory of the Red Army over the armies of the imperialists.*" (Pet. Ex. 343, p. 96.)

Thus allegiance to the Soviet Union assumes considerable proportions in the "classics" of Marxism-Leninism.[12] Its role as the leader of a world revolution is stressed. At all times, loyalty and assistance are due it in any conflict which may arise between it and any "imperialist" power.

"Imperialism" as an historical epoch is defined by Lenin as "capitalism in transition, or more precisely, as moribund capitalism" (Pet. Ex. 140, p. 126); as "a world system of financial enslavement and colonial oppression of the vast majority of the population of the earth by a handful of 'advanced' countries." (Pet. Ex. 121, p. 35.) Among the countries which Lenin and Stalin designate as imperialistic are Great Britain, France, Germany, Italy, Japan, and the United States.[13]

Various characteristics are ascribed by Lenin and Stalin to capitalism in the epoch of imperialism which are said to result in imperialism being "'the eve of the socialist revolution.'" (Pet. Ex. 121, p. 34.) These stated characteristics include the "omnipotence of the monopolist trusts and syndicates, of the banks and the financial oligarchy, in the industrial countries"; the "frenzied struggle for monopolist possession" of foreign territory; and, "the most barefaced exploitation and the most inhuman oppression

[12] We use "allegiance to the Soviet Union" here in a nontechnical sense, i.e., as not to include formal requirements of citizenship. A later section of this Report is devoted to "Allegiance."

[13] As our findings herein will show, the United States is given particular attention in Marxism-Leninism as the principal and mightiest imperialist nation and, therefore, the main enemy of the proletarian revolution.

of hundreds of millions of people inhabiting vast colonies and dependent countries . . . to squeeze out super-profits." (*Ibid.*, pp. 13-14.) Although picturing imperialism as capitalism in a dying state and containing the seeds of its own destruction, Marxism-Leninism advocates that the replacement of imperialism by the dictatorship of the proletariat is "impossible without a violent revolution." (Pet. Ex. 139, p. 20.)

[fol. 2421] Using these theories on imperialism devised by Lenin and Stalin, Marxism-Leninism has as one of its primary objectives to hasten "overthrowing imperialism and achieving the dictatorship of the proletariat." (Pet. Ex. 121, p. 108.) It seeks to convince the working class that under imperialism they will "linger in misery as of old and sink lower and lower" unless they take the alternative of a working class revolution (*ibid.*, p. 13); that "imperialism subjects large masses of the proletariat of all countries—from the centers of capitalist might to the most remote corners of the colonial world—to the dictatorship of the finance-capitalist plutocracy," thus creating the necessity of uniting the workers of all countries "in a single international army of the proletariat . . . on the platform of Communism." (Pet. Ex. 125, pp. 5-6.)

It is also evident from the "Classics" that as the Soviet Union is to be considered the leader of the world proletariat in the class war, so the United States takes on a special importance as the mightiest of the "imperialist" powers, the arch enemy of the proletariat. Lenin, in *Imperialism* (Pet. Ex. 140, p. 125), states: "In the United States, economic development in the last decades has been even more rapid than in Germany, and *for this very reason* the parasitic character of modern American capitalism has stood out with particular prominence." Stalin points out in *Foundations of Leninism* (Pet. Ex. 121, pp. 55-56) that conditions in the United States had changed since the days of Marx and that this country could no longer be considered one in which there could be a "peaceful evolution of bourgeois democracy into a proletarian democracy." The United States has become definitely "imperialistic"[14] and "the law

[14] The record is replete with evidence that today the Soviet Union, foreign Communist Parties, and respondent consider the United States as the leading imperialist power.

of violent proletarian revolution," the law of the smashing of government instrumentalities as a preliminary of the revolution become applicable to it. This quotation from Lenin in this connection reveals how strongly the Soviet Union felt that action was required in this country:

> "'Today,' said Lenin, 'in 1917, in the epoch of the first great imperialist war, this qualification made by Marx is no longer valid. Both England and America, the greatest and the last representatives—in the whole world—of Anglo-Saxon "liberty", in the sense that militarism and bureaucracy were absent, have slid down entirely into the all-European, filthy, bloody morass of military-bureaucratic institutions to which everything is subordinated and which trample everything underfoot. Today, both in England and in [fol. 2422] America, the "preliminary condition for every real people's revolution" is the smashing, the destruction of the "ready-made state machine" (brought in those countries, between 1914 and 1917, to general "European" imperialist perfection).' (*Selected Works*, Vol. VII, p. 37.)" (Pet. Ex. 121, p. 56.)

A *Resolution on American Question* (Pet. Ex. 43), issued by the Communist International in 1929, asserts that: "The United States of America . . . has developed into the mightiest imperialist power"; and it specifies "The task of the Workers (Communist) Party is to form a broad united front to intensify the struggle against American imperialism." (See also Tr. 619, 667-668.) Specific attention is directed to this aspect of the approach to be used in applying Marxism-Leninism to the United States by Soviet leader Dimitroff in his work *The United Front* (Pet. Ex. 149, pp. 41-43) where an "anti-fascist" party is urged. We find, at page 43, some revealing language: "Our comrades in the United States acted rightly in taking the initiative for the creation of such a party . . . We should develop the most widespread movement for the creation of such a party, and take the lead in it." The *Theses and Statutes of the Third (Communist) International* (Pet. Ex. 8) has this to say:

> "The class struggle in almost every country of Europe and America is entering the phase of civil war. Under such conditions the Communists can have no confidence in bourgeois laws. They should create everywhere a parallel illegal apparatus, which at the decisive moment should do its duty by the party, and in every way possible assist the revolution. In every country where, in consequence of martial law or of other exceptional laws, the Communists are unable to carry on their work law,fully, [sic] a combination of lawful and unlawful work is absolutely necessary." (Pet. Ex. 8, p. 28.)

Further developing the objective of overthrowing imperialism, Marxism-Leninism declares that imperialism inevitably leads to wars brought on by capitalists seeking more power and more territories. From this, two principles are advanced, namely, the necessity of struggle against imperialist wars, and that imperialist wars, which [fol. 2423] will take place regardless of the efforts to prevent them, create "favourable conditions . . . for a direct onslaught upon the citadels of capitalism."[15] (Pet. Ex. 121, p. 15.)

The necessity of working to prevent imperialist wars has as a primary aim the defense of the Soviet Union since Marxism-Leninism theorizes that "international imperialism . . . could under no circumstances, under no possible conditions, live side by side with the Soviet republic . . . conflict is inevitable." (Pet. Ex. 138, p. 19.) The original theory of Marx of the antagonism between the bourgeois, or capitalist class, and the proletarian, or working class, is developed by Lenin and Stalin as the division of the world into "a united world front of revolution against the world front of imperialism" (Pet. Ex. 121, p. 34) and has been applied in the world Communist movement to align various countries and Communist Parties in a "camp of peace and democracy" headed by the Soviet Union to op-

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[15] Pertinent facts in this respect are contained in our findings under the heading "World Communist Movement," particularly at folios 2461-2462, 2471-2478.

pose the "camp of imperialism" of which the United States is treated as the principal nation.[16]

In addition to the program for the struggle against imperialist wars (in order to prevent war against the Soviet Union while it consolidates its gains, increases its strength, and prepares to further the proletarian revolution), Marxism-Leninism also sets forth the duty to aid and support certain wars. The two programs are contained in the concept of "just and unjust wars." So-called "just" wars which Marxism-Leninism holds must be aided and supported are those "to liberate the people from capitalist slavery, or, . . . to liberate colonies and dependent countries from the yoke of imperialism." (Pet. Ex. 330, pp. 167-168.) The "unjust" wars are the wars engaged in by the so-called imperialist countries and include a war against the Soviet Union. The imperialist wars are characterized as those "waged to conquer and enslave foreign countries and foreign nations." (Pet. Ex. 330, p. 168.)

[fol. 2424] As indicated by the foregoing, Marxism-Leninism, as it pertains to the overthrow of "imperialism" and the establishment of the dictatorship of the proletariat, includes both theory and action, specifically pointing out that "revolutionary slogans and resolutions are not worth a farthing if they are not backed by deeds." (Pet. Ex. 121, p. 25.) An important "deed" laid down is the policy "of transforming the imperialist war into civil war" (Pet. Ex. 121, p. 25) or of waging a resolute struggle against "unjust" imperialist wars "to the point of revolution and the overthrow of one's own imperialist government." [17] (Pet. Ex. 330, p. 168.) The

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[16] Respondent's witness Aptheker testified to the effect it is now held that because the "forces of peace" have become so strong it is possible, notwithstanding the existence of imperialism, to "really prevent a world war." (Tr. 13437.) There is no showing of any change in the doctrine regarding the use of the "favourable conditions" resulting from any so-called imperialist war, world-wide or otherwise, for an "onslaught upon the citadels of capitalism." Thus, when "imperialists" are "engrossed in war among themselves," they are unable "to concentrate their forces against . . . the proletariat." (Pet. Ex. 121, p. 94.)

[17] Marxism-Leninism recognizes the difficulties of this and points out "the necessity of a stubborn, continuous and determined struggle against the imperialist chauvinism of the 'Socialists' of the ruling

so-called "imperialist" wars, therefore, create the "favourable condition" of an opportunity for civil war and overthrow of the "imperialist" government.

The position taken by the "Classics" on the questions of minorities and colonials is also basic to Marxism-Leninism and is primarily a contribution of Lenin and Stalin.[18] (See Pet. Ex. 121, pp. 76-82; Pet. Ex. 138; Pet. Ex. 140; Pet. Ex. 343, pp. 63-65.) The founders of the movement were not concerned with purely local conditions in Russia. In *Foundations of Leninism* (Pet. Ex. 121) it is clear that the national problem is part of the general problem of the proletarian revolution to be used for that purpose but only to the extent that it is of advantage to the revolution. It is stated there that "support must be given to such national movements as tend to weaken, to overthrow imperialism, and not to strengthen and preserve it. Cases occur when the national movements in certain oppressed countries come into conflict with the interests of the development of the proletarian movement. In such cases support is, of course, entirely out of the question." (Pet. Ex. 121, p. 79.) This also appears from *Strategy and Tactics* (Pet. Ex. 343, pp. 63-65).

Equally basic with the international and revolutionary character of Marxism-Leninism is the tenet of the dictatorship of the proletariat. In view of the divergence of testimony of witnesses for petitioner and those of respondent concerning the meaning and application of this tenet, we have taken pains to ascertain its real character.

[fol. 2425] Lenin states in *State and Revolution*:

> "The replacement of the bourgeois by the proletarian state is impossible without a violent revolution. . . ." (Pet. Ex. 139, p. 20.)

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nations (Great Britain, France, America, Italy, Japan, etc.), who do not want to fight their imperialist governments, who do not want to support the struggle of the oppressed peoples in 'their' colonies for emancipation from oppression, for succession." (Pet. Ex. 121, p. 84.)

[18] Implementation of this concept by respondent and the world Communist movement are discussed in the next section hereof.

In *Problems of Leninism* it is stated:

"The Party is the main guiding force within the system of the dictatorship. . . ." (Pet. Ex. 138, p. 32.)

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"Without the Party as the main leading force, a dictatorship of the proletariat at all durable and firm is impossible." (*Ibid.*, p. 33.)

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"Here in the Soviet Union, *in the land of the dictatorship of the proletariat,* the fact that not a single important political or organizational question is decided by our Soviet and other mass organizations without directions from the Party must be regarded as the highest expression of the leading role of the Party. *In this sense* it could be said that the dictatorship of the proletariat is *in essence* the 'dictatorship' of its vanguard, the 'dictatorship' of its Party, as the main guiding force of the proletariat. . . ." (*Ibid.*, p. 34, emphasis added.)

In *Foundations of Leninism* Stalin states:

"The question of the proletarian dictatorship is above all a question of the main content of the proletarian revolution. The proletarian revolution, its movement, its scope and its achievements acquire flesh and blood only through the dictatorship of the proletariat. The dictatorship of the proletariat is the instrument of the proletariat revolution, its organ, its most important mainstay, brought into being for the purpose of, firstly, crushing the resistance of the overthrown exploiters and consolidating the achievements of the proletarian revolution, and, secondly, carrying the proletarian revolution to its completion, carrying the revolution to the complete victory of socialism. The revolution can vanquish the bourgeoisie, can overthrow its power, without the dictatorship of the proletariat. But the [fol. 2426] revolution will be unable to crush the resistance of the bourgeoisie, to maintain its victory and to push forward to the final victory of socialism unless, at a certain stage in its development, it creates a

special organ in the form of the dictatorship of the proletariat as its principal mainstay. (Pet. Ex. 121, p. 47.)

"'The fundamental question of revolution is the question of power.' (*Lenin.*) Does this mean that all that is required is to assume power, to seize it? No, it does not mean that. The seizure of power is only the beginning. For many reasons the bourgeoisie that is overthrown in one country remains for a long time stronger than the proletariat which has overthrown it. Therefore, the whole point is to retain power, to consolidate it, to make it invincible. What is needed to attain this? To attain this it is necessary to carry out at least the three main tasks that confront the dictatorship of the proletariat 'on the morrow' of victory:

"(a) to break the resistance of the landlords and capitalists who have been overthrown and expropriated by the revolution, to liquidate every attempt on their part to restore the power of capital;

"(b) to organize construction in such a way as to rally all the labouring people around the proletariat, and to carry on this work along the lines of preparing for the liquidation, the abolition of classes;

"(c) to arm the revolution, to organize the army of the revolution for the struggle against foreign enemies, for the struggle against imperialism.

"The dictatorship of the proletariat is needed to carry out, to fulfil these tasks." (Pet. Ex. 121, p. 48.)

The *History of the Communist Party of the Soviet Union (B)* calls the doctrine of the proletarian revolution and the dictatorship of the proletariat the "very core of Marxism." (Pet. Ex. 330, p. 21.)

In *Foundations of Leninism* (Pet. Ex. 121) the origin of the dictatorship of the proletariat is thus stated:

[fol. 2427] "Briefly: *the dictatorship of the proletariat is the rule—unrestricted by law and based on force—of the proletariat over the bourgeoisie, a rule enjoying the sympathy and support of the labouring and exploited masses. (The State and Revolution.)*

"From this follow two main conclusions:

"*First conclusion*: The dictatorship of the proletariat cannot be 'complete' democracy, democracy for *all*, for the rich as well as for the poor; the dictatorship of the proletariat 'must be a state that is democratic *in a new way—for** the proletarians and the propertyless in general—and dictatorial *in a new way —against** the bourgeoisie. . . .' (Lenin, *Selected Works*, Vol. VII, p. 34.) . . . * My italics.—J.S." (Pet. Ex. 121, p. 53.)

"*Second conclusion*: *The dictatorship of the proletariat cannot arise as the result of the peaceful development of bourgeois society and of bourgeois democracy;* it can arise only as the result of the smashing of the bourgeois state machine, the bourgeois army, the bourgeois bureaucratic machine, the bourgeois police." (*Ibid.*, p. 54, emphasis added.)

As shown above, the concept of the dictatorship of the proletariat postulates a rigid Party organization with a hard core of dedicated workers. The ends and objectives of Marxism-Leninism are to be effectuated through a vanguard Party operating upon an organizational principle known as "democratic centralism."

The *History of the Communist Party of the Soviet Union (B)* (Pet. Ex. 330) states that in July and August 1917, prior to the successful October Revolution, the CPSU adopted "new Party rules" providing that "all Party organizations shall be built on the principle of *democratic centralism*," (*ibid.*, p. 198) which provided *inter alia* that all directing bodies of the Party shall be elected; that they give periodic reports to Party organizations; that there be strict Party discipline and the subordination of the minority to the majority; and that all decisions of higher bodies shall be absolutely binding on lower bodies and on all Party members.

*Strategy and Tactics of the Proletarian Revolution* (Pet. Ex. 343) states:

"*The Party* is the vanguard of the working class, and consists of the best, most class-conscious, most active

> and most courageous members. It incorporates the whole body of experience of the proletarian struggle. Basing itself upon the revolutionary theory of Marxism [fol. 2428] and representing the general and lasting interests of the whole of the working class, the Party personifies the unity of proletarian principles, of proletarian will and of proletarian revolutionary action. It is a revolutionary organization, bound by iron discipline and strict revolutionary rules of democratic centralism, which can be carried out owing to the class-consciousness of the proletarian vanguard, to its loyalty to the revolution, its ability to maintain inseparable ties with the proletarian masses and to its correct political leadership which is constantly verified and clarified by the experiences of the masses themselves." (Pet. Ex. 343, p. 62.)

In the organizational structure of the dictatorship, the Party is the "main directing force," "whose mission it is to lead all these mass organizations" and "Without the Party as the main leading force, a dictatorship of the proletariat at all durable and firm is impossible." (Pet. Ex. 138, p. 33.)

"Democratic centralism" is stated by the witnesses for respondent to represent the highest form of democracy in that it provides that all decisions and policies of the Party are determined by the membership and that authority flowed up from this membership through intermediate local and regional committees to the Central Committee. A decision once made, however, would be binding on all members. Witnesses for petitioner testified that "democratic centralism" was theoretically a two-way process by which authority flowed upward from Party cells through intermediate local or regional committees to the top and discipline flowed downward from the same channels. However, they stated that in practice the double process is reduced to a single process in which discipline flows downward with limited right of discussion in the lower echelons on matters of local tactics.[19]

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[19] As witness Kornfeder states it, the Party's basic form of organization is a super-centralized political party with a high degree of discipline. He describes it as a military type of political organi-

[fol. 2429] This policy is expressed in the *Programme of the Communist International*:

> "This international Communist discipline must find expression in the subordination of the partial and local interests of the movement to its general and lasting interests and in the strict fulfillment, by all members, of the decisions passed by the leading bodies of the Communist International." (Pet. Ex. 125, p. 84.)

The idea behind democratic centralism is best expressed by Stalin in *Foundations of Leninism*, where it is stressed that discipline is considered vital both in an organizational sense and in adherence to doctrine. Deviation[20] from doctrine and practice is abjured and permitted only in the area of minor tactics on local problems:

> "The achievement and maintenance of the dictatorship of the proletariat is impossible without a party which is strong by reason of its solidarity and iron discipline. But iron discipline in the party is inconceivable without unity of will, without complete and absolute unity of action on the part of all members of the Party. . . ." (Pet. Ex. 121, pp. 119-121.)

As stated by Stalin, the existence of factions is incompatible either with the Party's unity or its iron discipline. He quotes Lenin:

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zation with an established chain of command, permitting lower units considerable leeway in discussing local tactical problems. He states that he was taught that the general staff or the general headquarters of the organization was the Communist International in Moscow. At the time of which he speaks, he says that the Communist Parties of all countries were affiliated with the Communist International. Witness Philbrick stated, when asked whether a member of his group could refuse to accept the decision of the Cominform and still continue membership in the Communist Party of the United States, that such member could not continue as a member of the Party. Witness Lautner says that it was a breach of democratic centralism for any Communist Party anywhere to refuse to follow the dictates of the Soviet Union.

[20] "Nondeviation" by respondent is treated later in a separate section.

> " 'In the present epoch of acute civil war', says Lenin, 'a Communist Party will be able to perform its duty only if it is organised in the most centralised manner, only if iron discipline bordering on military discipline prevails in it, and if its Party centre is a powerful and authoritative organ, wielding wide powers and enjoying the universal confidence of the members of the Party'. (*Selected Works*, Vol. X, p. 204.)" (*Ibid.*, p. 120.)

With the organizational structure thus indicated, the "Classics" then provide both general directions and strategic and tactical rules for the attainment of the objectives contemplated by Marxist-Leninist doctrine. While the ends to be reached are fixed, the manner and methods of reaching them, it will be seen, are flexible. What these are appear most concisely in *Strategy and Tactics of the Proletarian Revolution* (Pet. Ex. 343). In summary, it states [fol. 2430] the following. The strategy and tactics were elaborated in the period of proletarian revolution when the question of the overthrow of the bourgeoisie became a question of immediate practice. Lenin brought into the light of day the ideas of Marx and Engels on tactics and strategy and developed them further into a "*system of rules and . . . principles for the leadership of the class struggle of the proletariat.*" (Pet. Ex. 343, p. 8.)[21] Communists of every country must adapt themselves to the peculiar features of the economics, politics, culture and national composition of the country in which they are operating. As long as national and state differences exist among peoples and countries, the unity of international tactics of the Communist working class movement requires, not the elimination of variety, but an adaption of the "*fundamental principles of Communism (Soviet power and the dictatorship of the proletariat)*" to the national and state differences. (*Ibid.*, p. 15, emphasis added.) The vanguard of the working class having been won over, the next step is to seek the transition or approach to the proletarian revolution. The revolutionary class must

[21] This same statement is made by Stalin in *Foundations of Leninism*. The statement is also there made that "The strategy and tactics of Leninism constitute the science of leadership of the revolutionary struggle of the proletariat." (Pet. Ex. 121, p. 89.)

be able to master all forms of social activity and must be ready to pass from one form to another with the utmost expedition. The tactics of the Bolsheviks were correct because they were the only international tactics and did everything possible in one country for the development, support and stirring up of the revolution in all countries. "Bolshevism has helped in a practical way to develop the proletarian revolution in Europe and America." (*Ibid.*, p. 17.) The world proletarian revolution has been assisted, accelerated and supported by the victory of the proletariat in Russia. The objective elements of the working class movement are the economic development of the country, the development of capitalism, the disintegration of the old government, the spontaneous movements of the proletariat. The collision of classes proceeds irrespective of the will of the proletariat. But the subjective element, the reflection in the minds of the proletariat of these processes, is the subject of the directing influences of strategy and tactics. The theory of Marxism postulates that the fall of the bourgeoisie, the seizure of power by the proletariat and the replacement of capitalism by socialism are inevitable. Strategy is the determination of the direction of the main blow of the proletariat at a given stage of the revolution and it changes with the transition of the revolution from one stage to another and remains unchanged throughout the duration of a given stage. Tactics are the determination [fol. 2431] of the line of conduct of the proletariat during the ebb and flow of the movement, changing the forms of struggle and its slogans. Thus, in the Russian Revolution changes were made as the struggle progressed; strikes, boycotts, slogans were used and varied along with the forms of organization, a worker's party operated more or less openly, as the immediate situation required. In the earlier phases the Party was compelled to resort to tactics of retreat. When the revolution ebbed, operations were less open and the Party went underground; and cultural work and the organizations "permitted by law" took the place of revolutionary mass organizations. (*Ibid.*, p. 26.) The same was true during the subsequent stages of the revolution. The successful struggle for the dictatorship of the proletariat presupposes the existence in every country of a com-

pact Communist Party, hardened in the struggle, disciplined, centralized and closely linked up with the masses. The Party is a revolutionary organization, with these fundamental strategic aims: It must extend its influence over the majority of the members of its own class, including working women and youth. It must secure predominant influence in the broad mass proletarian organizations, e.g., trade unions, factory councils, cooperatives, sports and cultural organizations. It is particularly important to win over the trade unions.[22] Leadership of wide sections of the toiling masses should be acquired by the proletariat and the membership of the middle classes of the peasantry must be secured. In determining this line of tactics, each national Communist Party must take into account the concrete internal and external situation, the correlation of class forces, the degree of stability and strength of the bourgeoisie and fit slogans and methods of struggle to the circumstances of the particular country. Demands and slogans must be lent to the revolutionary aim of capturing power and overthrowing bourgeois capitalist society. The Party is to utilize the daily needs and struggles of the working class as a starting point from which to lead the working class to the revolutionary struggle for power. When the ruling class is disorganized, propaganda in favor of increasingly transitional slogans and mass action should be used. Strikes and armed demonstrations should be used, as well as intensified revolutionary work in the army and the navy. When conditions are right, it is dangerous to fail to start rebellion. When the revolutionary tide is at ebb, partial slogans and demands should be reverted to which correspond with the everyday needs of the workers. United front tactics should then be used. In this period of marking time, demands and slogans should be made in such spheres as labor, local politics and world politics, e.g., the attitude toward the USSR, the struggle against "imperialism" and the war danger, and systematic preparation for the fight against imperialist war. Also, systematic work must be carried on among the proletarian and peasant youth; and, in imperialist countries, Communist Parties must impair the war effort against

[22] The Party's application of this is discussed at fols. 2539-2544, *infra*.

[fol. 2432] colonies. The further consolidation of the Land of the Soviets, the mighty growth of the international authority of the Communist Party of the Soviet Union, the growth of the Communist International are all accelerating the development of the world Socialist revolution. The capitalist world is entering a period of sharp clashes. The united front of the working class must be established. The victory of the revolution has to be prepared for by a strong proletarian revolutionary party. *Should an imperialist war break out, the interest of the workers of all countries demands that the defense of the Soviet Union be considered paramount.*[23]

From this resume, it becomes apparent that the "rules" for reaching the goal have within them tactics for short range and long range action and that they are intended for more than local application. In addition, there has been provided an elasticity which makes them applicable under a variety of circumstances. The manner and extent of their application by the CPUSA is a factor to be considered in determining whether the United States Party is a part of a world-wide movement and whether it is dominated and controlled by the Soviet Union.

One of the primary tactical principles set forth in Marxism-Leninism, is that of the united front. An entire volume, Dimitroff's *The United Front* (Pet. Ex. 149) is devoted to it and its value is stressed throughout a number of the "Classics." This tactical principle is used at the local, national, and international levels and involves such issues as working conditions, social grievances, fascism, war and peace. It is a cardinal rule that this tactic must be utilized to further Communist objectives and never in such a way as to bolster capitalism. Dimitroff in his classic stresses that in utilizing this tactic Communists must not abandon the struggle "against theories and viewpoints hostile to the working class," pointing out that "the cause of the united front will not suffer from such a struggle; it stands only to gain from it." (*Ibid.*, p. 235.) He further makes clear that:

> "It should never be forgotten that . . . when we carry on a resolute struggle for the defense of democratic

[23] The activities of respondent in relation to World War II illustrate its application of this principle, see, e.g., "Nondeviation."

rights and liberties against reaction and fascism, we do so as Marxists, as consistent proletarian revolutionaries, and not as bourgeois democrats and reformists. Where we came forward in defense of the national interests of our own people, . . . their independence and liberty, we do not become nationalists or bourgeois patriots; we do so as proletarian revolutionaries. . . . When we come forward in defense of religious freedom, . . . we do not retreat from our Marxist outlook, which is free of all religious superstitions.

". . . when participating in joint action with other parties and organizations of the working people against [fol. 2433] the common enemy, and fighting for the vital interests and democratic rights of the working people, and for peace and liberty, the Communists do not lose sight of the historic need for the revolutionary overthrow of capitalism, which has outlived its day, and for the achievement of socialism. . . .

". . . We must not allow a situation where 'you cannot see the wood for the trees.' We must not allow practice to become divorced from theory, a gap to develop between the fulfillment of the urgent tasks of today, and the further perspectives and aims of the working class struggle. . . ." (Pet. Ex. 149, pp. 235-236.)

The simultaneous adoptions of united front programs by national Parties throughout the world stands out particularly in a number of instances of record such as the united front against fascism prior and subsequent to the Hitler-Stalin Pact (discussed *infra* in "Nondeviation").

In the "Classics" themselves certain basic programs and policies are provided for, all aimed at one objective: the forwarding of the revolution. That this term is not used in the "Classics" in the evolutionary sense such as the "industrial revolution" appears in *State and Revolution* (Pet. Ex. 139, pp. 52-53), where Lenin adopts Engels' definition: "Revolution is undoubtedly the most authoritative thing possible. It is an act in which one section of the population imposes its will on the other by means of rifles, bayonets, cannon, i.e., by highly authoritative means, and the victori-

ous party is inevitably forced to maintain its supremacy by means of that fear which its arms inspire in the reactionaries." Thus power is both obtained and maintained by force.

One such primary program is that pertaining to labor organization. As appears from Lenin's *What Is To Be Done?* (Pet. Ex. 417, pp. 105, *et seq.*) the Marxist should not be interested in labor unions, as such, but rather from the use which can be made of such organizations as part of the revolutionary scheme. As Stalin points out in *Problems of Leninism,* they are the all-embracing organizations of the working class. "They constitute a school of communism. . . . They unite the masses of the workers with their vanguard." (Pet. Ex. 138, p. 30.) In effect, what Lenin and Stalin are saying is: Here are ready-made groups of substantial size, made up of members of the class which according to the labor theory of value are the exploited, and consequently should be the base of the revolution; and infiltration of such groups by a hard core of diligent workers for the Party offers a ready field for propaganda and proselytizing.[24] As it is stated in the Comintern's *Theses and Statutes*:

> "Every party desirous of belonging to the Communist International should be bound to carry on systematic and persistent Communist work in labor unions, co-operatives and other labor organizations of the masses." (Pet. Ex. 8, p. 29.)

[fol. 2434] The same volume discusses the trade union movement (p. 53, *et seq.*), and (at p. 57) it states: "Consequently, the Communists must strive to create as far as possible complete unity between the trade unions and the Communist Party, and to subordinate the unions to the practical leadership of the Party, as the advance guard of the workers' revolutions." *Strategy and Tactics of the Proletarian Revolution* (Pet. Ex. 343, pp. 67-68) states that one of the principal tasks of a Communist is joining a union to win the leadership in the worker's struggle. This

[24] Application by respondent of this tactic is in the subsection "Trade Unions," *infra.*

is to conform with the principle that reforms should not be utilized for the sake of reforms but, rather, for the disintegration of the imperialist regime; and that a reform should be used as a base and ". . . as an aid in combining legal work with illegal work, to intensify under its cover, the illegal work for the revolutionary preparation of the masses for the overthrow of the bourgeoisie." (Pet. Ex. 121, p. 104.) Trade unions are thus considered as an important vehicle.

The "Classics" disclose that youth programs are considered important.[25] Concerning the Young Communist League, Stalin says in *Problems of Leninism* (Pet. Ex. 138, p. 31), "Its task is to help the Party educate the younger generation in the spirit of socialism. It provides young reserves for all the other mass organisations of the proletariat in all branches of administration." Lenin's attitude on the necessity of particular emphasis on youth is shown in part by quotations from Lenin's works in *Political Affairs* (Pet. Ex. 477, pp. 86 and 88):

> "Is it not natural for young people to predominate in our party, the party of revolution? We are the party of the future and the future belongs to the youth. We are a party of innovators and innovators are always followed most eagerly by the youth. We are a party of self-sacrificing struggle against the rotten old system, and the youth are always the first in self-sacrificing struggles.
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> "The youth will decide the issue of the whole struggle, the student youth, and still more the working-class youth. . . . Do not fear their lack of training, do not tremble at their inexperience and lack of development. If you are unable to organize and stimulate them to action, they will turn to the Mensheviks and the Gapons, and this inexperience of theirs will cause five times more damage. . . . Only you must unfailingly or- [fol. 2435] ganize, organize and organize *hundreds* of circles. . . . *Either you create new, young, fresh, ener-*

[25] Respondent's implementations of this program appear in the sub-section "Youth" *infra*.

*getic, militant organizations everywhere for revolutionary Social-Democratic work of all sorts and kinds, and among all strata, or you will perish, enveloped in the glory of 'committee' bureaucrats."*

Dimitroff offers another reason for enlisting the efforts of youth (*The United Front,* Pet. Ex. 149, p. 150):

"The whole anti-fascist youth is interested in uniting and organizing its forces. Therefore you, comrades, must find such ways, forms and methods of work as will assure the formation, in the capitalist countries, of a *new type* of mass youth organizations, to which no vital interest of the working youth will be alien, organizations which, without copying the Party, will fight for *all* the interests of the youth and will bring up the youth in the spirit of the class struggle and proletarian internationalism, in the spirit of Marxism-Leninism."

From the *Theses and Statutes of the Third (Communist) International* (Pet. Ex. 8, p. 8), it appears that the International League of Communist Youth was given a representative with a right to vote on the Executive Committee of the Communist International and the Communist International had the right to a similar representative on the Executive Committee of the League. A youth program is considered an essential part of the activities of the Party in all countries and is required by the dictates of Marxism-Leninism.

In addition to the necessity of working among the youth in order to win them over to the side of the Communists and to use youth organizations as "levers" and "belts" in establishing the dictatorship of the proletariat, the "Classics" point out that the youth represent a reservoir for the development of future Party leaders and cadres. Lenin, in *What Is To Be Done* (Pet. Ex. 417), early declared that no movement can be durable without a stable organization of leaders to maintain its continuity. The training of leaders is basic under Marxism-Leninism and in view of the centralized nature of the Communist Parties, leaders and cadres

once trained keep in touch with the center of the Communist movement and faithfully carry out their tasks.[26]

[fol. 2436] Secrecy and its uses also finds importance in the "Classics."[27] (See Pet. Ex. 343, pp. 22-26; and Pet. Ex. 417.) In *What Is To Be Done?*, which the record shows respondent urged its members to read in 1951, Lenin shows how Party members can use trade unions as a front, keeping their identity as unionists secret. Stalin, in his speeches on the CPUSA (Pet. Ex. 109), published by the Central Committee of the CPUSA in pamphlet form, speaks of the danger of exposing the "conspirative" nature of the Communist Party.

Having thus considered the documentary evidence we turn now to further scrutiny of the content of Marxism-Leninism in the light of the testimony of the witnesses for both sides. All of the witnesses (except petitioner's witnesses, Dr. Mosely, Logofet and Carrington) testified to some knowledge of the "Classics" and of Marxism-Leninism. They studied it, were taught it, or were subject to it in practice. Admittedly, the "Classics" have been in use by the members and leaders of the CPUSA up to the date of the hearings in this proceeding.

Respondent's chief witness on Marxism-Leninism is Dr. Aptheker, a Marxist-Leninist and a member of the Party. He is a doctor of philosophy, an author, teacher, and lecturer, and is apparently regarded by respondent as one of its foremost theoreticians. He was offered as an expert on Marxism-Leninism and is qualified as such.

Summarized, his testimony is to the effect that Marxism-Leninism is in its inception and thereafter to be found in the writings of Marx, Engels, Lenin, Stalin and others; that its heart is dialectic materialism; that its aim is the end of capitalism and the attainment of a socialist state which will eventually dissolve into communism; that it is a science, usable in all countries as such and that in this sense it applies to the United States which is an "imperialist" nation; that its international aspects are only fraternal and represent a similarity of interests of the working

[26] See "Training and Reporting," *infra*.

[27] A later section is devoted to respondent's "Secret Practices."

class of all countries; that the "Classics" are used only for illumination and for historical background by Communists; that Marxism-Leninism provides a guide for action only as a science would be a guide for a scientific experiment; that it contains no directives and the CPUSA is not controlled or dominated by the Soviet Union thereby; and that the name Marxism-Leninism is not used to denote any hidden meaning for the direction of initiates in the Communist movement.

[fol. 2437] Dr. Aptheker construes the term "dictatorship of the proletariat" as employed in Marxism-Leninism this way—"Socialism means the rule of the working people. The rule of the working people means the dictatorship of the proletariat." (Tr. 14211.) Thus he equates socialism with dictatorship of the proletariat. He then states that the term "dictatorship of the proletariat is used as distinguished from the dictatorship of the bourgeoisie, which is any capitalist society"; and that the state "rules in one case as Bourgeoisie, in the other case [as] the working class" (Tr. 14211); and that is the only connotation of the term dictatorship. He then points to the statement in *Foundations of Leninism* (Pet. Ex. 121, p. 53) to the effect that capitalist countries are dictatorships of an exploiting minority over the exploited majority, whereas the dictatorship of the proletariat is the dictatorship of the exploited majority over the exploiting minority. He continues to say that where force appears in the revolutionary transition the force comes from the exploiter; that it is in the effort to resist this force that force appears in a revolutionary transition; the force is accountable to the reactionary exploiters since they do not wish to accede to the peacefully expressed will of the vast majority of the population; that forcible resistance to this may then be offered by the majority and, in so doing, the machinery of repression of the reactionaries will be smashed; and that this is what is meant by "smashing of the state machine," which has happened in every revolution, e.g., the American Revolution. Thus it is his construction of Lenin's writings that ". . . unfortunately the American Bourgeois would resist forcefully, the peaceful change would not be possible." (Tr. 14217-18.) Dr. Aptheker's testimony on the general subject of

force and violence is that it need not occur in a Marxist-Leninist revolution and that it only occurs after the majority have legally and peacefully achieved the breakthrough. He states that if use of force and violence occurs ". . . Marxism-Leninism says, without any exception, at any time—there is no exception to this—if it does occur, says Marxism-Leninism, it will come as the result of the first offer of force and violence, illegally, subversively, by a minority, against the will and the peaceful development and the legal expressions of this peaceful development of the mass of the people." (Tr. 13520.) He testified further that under Marxism-Leninism ". . . revolution is not exported, . . . revolution is indigenous, . . . . it grows out of necessities of the given society and the given country." (Tr. 13527.) To support this the witness refers to a quotation by Lenin of Engels to this effect. And to give a more [fol. 2438] recent illustration, the witness supports this testimony with a statement by Stalin to Mr. Roy Howard of this country in 1936 wherein he said that " 'export of revolution is nonsense. Each country, if it wishes, will make its own revolution, and if it does not wish to there will be no revolution. Thus, for example, our country wanted to make a revolution and made it.' " (Tr. 13528.)[27a]

Dr. Aptheker further testified that the 21 conditions of membership in the Communist International (discussed *infra* in sub-section "21 Conditions of Membership") are utilized by the Party for "purely historic" reasons; that it is a current position of Marxism-Leninism which represents a theoretical change, that notwithstanding the existence of imperialism, it is now very possible the forces of peace, i.e., the strong world movement to socialism, would remove the inevitability of war. In support of his testimony on this change, he cites an article authored by Seleznev

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[27a] In giving such support for his testimony, we assume, of course, the witness sought to give current validity to Stalin's 1936 statement. In the face of developments in Eastern and Central Europe (after World War II) discussed in the section entitled "World Communist Movement," we do not credit his testimony on this point.

appearing in *Political Affairs*.[27b] To show another theoretical change in Marxism-Leninism, the witness cites an article by Sobolev, "which originally appeared in a Russian magazine a couple of years ago," (Tr. 13444) appearing in the May 1952 issue of *Political Affairs*. He testified further that no member or leader of respondent has altered any fundamental precept of Marxism-Leninism, and that the Party's present leaders have resisted any concept of American exceptionalism.[27c]

[fol. 2439] This witness testified also that intellectual freedom thrives in a country under a Marxist-Leninist program in that as the economy is released the intellect is also released, the intellect being allied with the economy; that fascism is a phenomenon which appeared after World War I and has capitalism as its fundamental social organization; that it is the reflection of the most intense contradictions of monopoly capitalism; and that the reason that Communists fight fascism is that the two are exact opposites, the fascists negate freedom and the Communists ennoble it.

The witness says, in conclusion, that there is no world Communist movement as described in the Act; and that the maintenance and extension of the democratic principles expressed in the Constitution is of the essence of Marxism-Leninism; and that Marxism-Leninism must have unity of theory and action and is based upon this unity; and that the ultimate test of any such theory is practice and objective reality.[28]

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[27b] Seleznev is a Soviet Union spokesman, thus indicating that the Soviet Union authored this significant theoretical change. The certainty is that respondent's expert on Marxism-Leninism did not cite this respondent as authority for the theoretical change asserted.

[27c] Dr. Aptheker's testimony on this tends to show that Marxism-Leninism is what the Soviet Union says it is, in that no American member or leader of respondent has changed any fundamental concept and the changes he relates apparently emanate from the Soviet Union. Further indication of this is in Pet. Ex. 126, p. 244, wherein respondent states an application of Leninism to the "negro question" in the United States was dictated to respondent by the Comintern.

[28] A reading of Dr. Aptheker's testimony in its entirety reveals he considers himself deeply enmeshed in the issues of this proceeding. We do not mean to infer that because one is a proponent

Respondent's witness Gates testified Marxism-Leninism is a social science. He says that the CPUSA is an independent and completely autonomous organization. Concerning the "Classics," he states that while *Problems of Leninism* has been used for teaching in the CPUSA schools, it is taught as historical writing and not as a blueprint or an order for Communists to follow all over the world and that it is not the program of the CPUSA. Witness Flynn states that the "Classics" have been and are used in the Party schools as of the date of her testimony (June 26, 1952) but as reference books for history, and for the principles of Marxism-Leninism.

The net of the pertinent testimony of petitioner's witnesses,[29] all of whom, as Party members, had some instruction in the meaning of Marxism-Leninism and some of whom were officials, writers or teachers for the Party, agrees with respondent's testimony only to the extent that one of the component parts of Marxism-Leninism is the philosophic-sociological concept that capitalism must and will inevitably be superseded by a dictatorship of the proletariat which will eventually be succeeded by a stateless class of society known as communism. This original Marxist doctrine, they state, has superimposed on it the revisions and the supplementations of Lenin, Stalin, Dimitroff [fol. 2440] and others which provide it with programs and policies to bring about the end of the present capitalistic era, designated as "imperialism," on a world-wide scale and by any means, including force and violence. The effort to bring about the dictatorship of the proletariat is an integrated effort of the working classes in all countries and the leadership thereof is in the Soviet Union, where it has succeeded.

Lautner, a former high Party official and teacher, shows that adherence to Marxism-Leninism has implicit in it com-

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of a subject his testimony on it should by virtue of this be accorded little weight. But we do state that Dr. Aptheker is an expert witness with an intense interest in the outcome of this proceeding and virtually says so. We weigh his testimony accordingly.

[29] We accept the substance of such testimony, as being the weight of the evidence.

plete subservience on the part of all Communist Party organizations, whether in the United States or elsewhere (and on the part of the individual members in all strategic and most tactical matters), to the rulers of the Soviet Union; and that respondent adheres to Marxism-Leninism and consequently its constitution is no more than a by-law to Marxism-Leninism and has no validity except insofar as it conforms thereto. He establishes that references in the Party's constitutions to upholding the Constitution of the United States are incompatible with Marxism-Leninism, are merely "self-serving." (Tr. 9732.) They have no real validity.

Lautner further testified concerning the meaning of Marxism-Leninism:

> "Marxism-Leninism taught us that monopoly capitalism or imperialism was a world-wide phenomenon, therefore there is need of a world-wide organization, an organization that has ties to successfully cope with this problem and eventually bring about the downfall of monopoly capitalism and imperialism." (Tr. 9514.)

Also, that the *Program of the Communist International* was used by him in classes in 1947, 1948 and 1949 "because the program of the Communist International lays down the strategic aims of the Communist Parties." (Tr. 9532-33.)

Petitioner's witness Budenz, a former Party member and Editor of the *Daily Worker*, testified, when asked the meaning of the first sentence of the Party's 1945 constitution (which sentence is identical with the first sentence of the 1948 constitution):[30]

> "Marxism-Leninism is a well-known and historical term in the Communist documents and discussions. It is that interpretation of so-called scientific socialism based on the writings of Marx, Engels, Lenin and Stalin, [fol. 2441] and which holds as the goal of the Communist Parties of the world the necessity for the vio-

[30] This sentence proclaims that the Communist Party is a political party "basing itself upon the principles of scientific socialism, Marxism-Leninism." (Pet. Exs. 329, 374.)

> lent shattering of the bourgeoise states in order to set up in their place a completely new state machinery, the dictatorship of the proletariat. This shall be achieved under Marxism-Leninism through the Party of the new type, the Bolshevik Party under Bolshevik discipline, which rejects the concept of class peace." (Tr. 11831.)

He goes on to state that the Communists in the United States (during his membership) regarded the American government as a bourgeois state, and that further statements in the Preamble concerning the Communist Party's defense of the United States Constitution were not reconcilable with Marxism-Leninism. He explained that:

> "The statements cannot be reconciled. The dedication of Marxism-Leninism is the dedication historically and categorically to the violent shattering of the bourgeoise state as the necessary step toward progress, and this other language in the light of that, since Marxism-Leninism principles prevail, is merely a window-dressing for legal protective purpose. It is part of the Aesopian language recommended by Lenin."[31] (Tr. 11832.)

He states further that the "Classics" were used in his work as *Daily Worker* Editor up to the time he left the Party (October 1945) and that:

> ". . . I referred to Marxism-Leninism. I referred to Stalin as the leader, teacher and guide, things of that sort, which was Aesopian to the extent that it presented Stalin as the leader, teacher, and guide, but didn't explain that he completely controlled the Communist movement, although I could have done it because Bittelman had stated in Milestones that Stalin was the leader, the Communist Party of the Soviet Union was the leader." (Tr. 12263.)

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[31] For a definition of "Aesopian," see Lenin's *Imperialism*. (Pet. Ex. 140, p. 7, n. 1.)

Another witness for petitioner, Meyer, taught Marxism-Leninism in respondent's schools and shows it to be a body of doctrine which is first a philosophy of history, and, secondly, a guide to the Communist Party on the basis of that philosophy, in carrying out its historical role of overthrowing the capitalist system and replacing it with a dictatorship of the proletariat to establish socialism and [fol. 2442] thence communism. Petitioner's witness Philbrick was taught this in Party classes and was instructed that the lessons of Marxism-Leninism were to be applied to present day affairs as a guide to action.[32]

Witness Meyer shows that the *History of the Communist Party of the Soviet Union (B)* was used as a living guide to revolutionary action based on the experience of the Bolsheviks and the writings of Lenin and Stalin. Witness Evans establishes that the "Classics" were used in the Marxist-Leninist Institute from April 1949 to June 1950. Witness Budenz was told by Trachtenberg, head of the Party's cultural commission charged with direction of Communist cultural activities and in charge of the Party's general publishing field, that he was not permitted to issue any Marxist literature, especially the "Classics," without the authorization of the Marx Institute in Moscow. The *Daily Worker* used the "Classics" in its work. Budenz shows that Party leader Dennis in 1945 recommended: "A thorough return throughout the Party to the Marxist-Leninist Classics, particularly to the writings of Stalin, the *History of the Communist Party of the Soviet Union*, *Foundations of Leninism*, and Dimitroff's *Report to the Seventh Congress*, which dealt with the true nature of how to conduct the United Front while forwarding the Communist revolutionary aims." (Tr. 11812.) Witness Lautner testified that on the basis of the "Classics," at the National Training School in 1941, he was taught how Lenin applied Marxism to the epoch of imperialism and established a party of a new type, how Stalin applied this to the party

[32] Cf. in this connection Dimitroff's statement in *The United Front* (Pet. Ex. 149) that it is necessary to combine operations of policy with "the mastery of the great teachings of Marx, Engels, Lenin and Stalin *as a guide to action*." (P. 236.) (Emphasis added.)

as a force, the leading political party of the working class; that Marxism-Leninism was a guide to action for the Party in the United States; that the aim of the Party was to gain political and economic power in this country and that this was to be accomplished, on the basis of Marxism-Leninism, by a world-wide organization.

It is the testimony of the respondent that its slogan of "Defend the Soviet Union" was only applicable when the Soviet Union was weak and struggling; now that it is strong, such action on her behalf is not necessary. This testimony leaves the inference that the test is whether the Soviet Union needs respondent's aid.

Consideration has been given to the mass of exhibits which shed light on the application of Marxism-Leninism by respondent. From them it further appears that respondent, its leaders and its members, taught, studied, discussed, [fol. 2443] used and applied the "Classics" in the manner enunciated by the authors of these "Classics" and to an extent incompatible with any claim that the "Classics" are not considered binding upon them in all fundamentals.

Moreover petitioner's witnesses establish without dispute that until 1939 or early 1940 the fundamental text books used by the Party around which its course on Marxism-Leninism was organized were the *Communist Manifesto* (Pet. Ex. 31) and *Foundations of Leninism* by Stalin (Pet. Ex. 121), and that widely used in conjunction therewith were compilations of Lenin's and Stalin's writings such as *Strategy and Tactics* (Pet. Ex. 343) *Theory of the Proletarian Revolution* and *Dictatorship of the Proletariat.* After the appearance in late 1939 or early 1940 of *The History of the Communist Party of the Soviet Union* (Pet. Ex. 330) it became the central text book for the Party's teaching of Marxism-Leninism. This work, clearly not designed for Russian use, was widely acclaimed as intended for use in capitalist countries as is shown by a resolution, adopted August 10, 1939, signed by the Communist Parties of France, Great Britain, the United States, Germany and Italy (Pet. Ex. 296), which states, *inter alia* (p. 73):

> "The appearance of the *History of the Communist Party of the Soviet Union (Bolsheviks)* is one of the greatest events in the life of the Communist world movement and of the international labor movement,

in the struggle of the working people of all countries for emancipation. Written with the immediate participation of Comrade Stalin and authorized by the Central Committee of the C.P.S.U. (B.), the *History* occupies an extraordinary place among the classic works of Marxism-Leninism. The *History* is intended to play—and will undoubtedly play—a very important role in the successful mastering of Bolshevism by the Communists of the capitalist countries, in the consolidation of the Sections of the Communist International, and in raising their ideological and political level."

As indicated by the discussion of the evidence in this section, issue was joined principally on two questions relating to Marxism-Leninism: (a) whether Soviet Union domination over the various Communist Parties is integrated into the doctrine; and (b) whether Marxism-Leninism calls for force and violence if necessary in overthrowing existing non-Communist governments.

We conclude that Marxism-Leninism is a body of doctrine, with strategy and tactics to effectuate it, containing the goal of a socialist state under a dictatorship of the proletariat which will eventually evolve into a classless society. [fol. 2444] It postulates an international class struggle of proletariat against bourgeoisie, of communism against capitalism, characterized since 1916 as in its last historical epoch of decay, called "imperialism." The Bolshevik-led "Russian Revolution" in 1917, bringing Communists into control of Russia, is considered in Marxism-Leninism as the first breakthrough of the capitalist world front; thus it placed the Soviet Union and its Communist leaders in a pre-eminent position among the Marxists of the world. The Soviet leader Lenin immediately set about to organize the world Communist movement and to construct an apparatus, the Third Communist International, with which to more effectively wage the class struggle on an international plane (see *infra*). The most significant contributions to Marxism, the writings of Lenin, increased in volume and stature and upon Lenin's death Stalin succeeded him as the "greatest living Marxist-Leninist," its foremost protagonist. Stalin in his contributions to the corpus of Marxism-

Leninism placed emphasis upon the practical implementation of the strategies and tactics of the basic class struggle.

The organizer and leader of this struggle in each country, a Communist party, such as respondent, which has both political and non-political aspects, is required. Lenin and Stalin have defined in Marxism-Leninism the organizational requirements for such a party, using as the model what was found best by them for seizing power in the Bolshevik revolution. Among these requirements are that the political aspects be subservient to the revolutionary objective of seizing governmental power by any means; that the Party must have an official organ and adhere without deviation to Marxist-Leninist concepts and their application; it must organize on the principle of democratic centralism which in reality results in submission to control from above, and instill and abide by an iron discipline both in adherence to concepts, obedience to directives, and in waging a relentless struggle against the class enemy.

The primary objective of Marxism-Leninism is destruction of all "imperialist" states, to be supplanted by socialist states under dictatorships of the proletariat (working class), which we find is a dictatorship of a Communist party.

In furtherance of this objective, Marxism-Leninism, primarily as a result of Lenin's and Stalin's contributions, provides "rules and principles" (Pet. Ex. 343, p. 8) which are to be flexibly applied. These include concentration upon labor unions, the youth, minorities and colonies, and the use of slogans, such as variations on "anti-imperialism" and "peace." Temporary alliances, known as united fronts, must be entered into but always with the ultimate revolutionary goals in view. Where lawful methods are effective these should be used and, where not, unlawful methods [fol. 2445] should be utilized, or a combination of both. Secrecy should be employed where necessary. Allegiance to and support of the Soviet Union as the leader of the World Communist movement inheres. The United States, as the leading "imperialist" nation, and the Government, viewed as a dictatorship of the capitalist class, are the most important targets of the movement.

We find that it is a tenet of Marxism-Leninism that capitalist (imperialist) governments must be overthrown

by force and violence, if necessary,[33] and that in Marxism-Leninism the Soviet Union is given the role of leader of the world Communist movement and, hence, of the various Communist parties in the movement.

We conclude that fulfilling the role of the vanguard Communist Party called for in Marxism-Leninism and the adherence to and practice by an organization of Marxism-Leninism is evidence, and strong evidence, that it is substantially under the domination and control of the Soviet Union, the leader of the world Communist movement and that it operates primarily to advance the objectives of the world Communist movement.

We proceed to examine the record further as to respondent's basic policies and activities to determine the extent to which they are formulated and carried out pursuant to Marxism-Leninism as hereinbefore defined; and the extent to which such policies and activities effectuate programs and policies originated by the Soviet Union and have as their purpose the furtherance of the policies of the Soviet Union and the advancement of the objectives of the world Communist movement. We treat first with the voluminous evidence relating to the world Communist movement.

[fol. 2446] 2. World Communist Movement

Although in section 2 of the Act Congress has found the existence of a world Communist movement and has described its characteristics, the nature of the issues in this proceeding are such that in addressing evidence to them the existence of a world Communist movement and its characteristics have emerged. For a full understanding of the evidence, therefore, we now set forth the salient portions thereof, principally documentary, which establish the existence of the world Communist movement, its characteristics and its leadership.[34] The subsequent findings in this

[33] To be sure, if for some reason a government should voluntarily accede to socialism under a "dictatorship of the proletariat," or if it should not choose to defend itself from lawless attacks, force would not be necessary.

[34] The definition of a Communist-action organization in section 3(3) of the Act and the provisions of several of the criteria in section 13(e), wherein reference is made to the world Communist

Report relating to the various statutory considerations in section 13(e) as well as the section on Marxism-Leninism, preceding, also evidence the existence of this movement and illuminate its nature.

Respondent in its amended answer and through the testimony of its witnesses admits that a world Communist movement presently exists in the sense that the CPUSA and other Communist Parties in countries throughout the world are guided in their activity by Marxism-Leninism, termed by respondent to be a "social science," and have as their common goal the establishment of "socialism." Respondent contends, however, that the international relationship among the Communist Parties of the world is merely a fraternal one. It denies that there exists a world Communist movement which is substantially dominated or controlled by the Soviet Union and which has as its purpose the establishment of dictatorships of the proletariat in all countries throughout the world. Party leader Gates testified that in referring to "the world Communist movement" in his writings he had in mind separate autonomous movements. Respondent's expert witness, Dr. Herbert Aptheker, offers the explanation that in Marxist-Leninist literature such terms as "international solidarity," "proletarian internationalism," "working class internationalism," etc., are used simply to indicate the fraternal relationship among the working classes of the countries of the world. Party leader Elizabeth Gurley Flynn acknowledges that there are Communist Parties in substantially [fol. 2447] all the countries of the world, and in the sense there is a common ideal, "a common principle of Marxism-Leninism" (Tr. 13861), there is respect for other Party leaders and especially for Joseph Stalin. Flynn admits that Stalin, as the leader of the senior Communist Party of the world, the Communist Party of the Soviet Union, is universally regarded by Communists as the ideological

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movement, further indicate the usefulness of a Board determination regarding the nature and existence of the movement. In view of our findings on the movement, it is unnecessary to discuss respondent's contention that no such movement was shown to exist and it is also unnecessary to discuss whether these findings are required.

leader of world communism;[35] however, she denies that either Stalin or the Communist Party of the Soviet Union exercises domination or control over respondent or any other Communist Party in the world.[36] She draws an analogy in her testimony with the international trade union movement, asserting that this movement exists but that there is no world-wide trade union; and that, similarly, a world Communist movement does exist, but that an international integrated Communist Party does not.

None of respondent's witnesses testified with any particularity or substance concerning the period when the Party was openly affiliated with the Communist International, and petitioner's evidence is substantially unrebutted in this regard. Although it could have done so, it offered no witness who had been on its National Committee for any appreciable period of time during its open affiliation with the International.[37]

We are unable to accept the characterizations or explanations of respondent's witnesses concerning the existence, character, and leadership of the world Communist movement, as they are contrary to the clear preponderance of evidence now to be discussed.

Exemplary of the Marxist-Leninist justification for Russian Communists to organize the world Communist movement are the statements set forth in *Foundations of Leninism* (Pet. Ex. 121, p. 17) and *Problems of Leninism* (Pet. Ex. 138, pp. 9, 19), by Stalin, quoting Lenin to the effect that the Russian Communists were impelled by the whole situation, domestic and foreign, to transfer the struggle to the "international arena" (Pet. Ex. 121, p. 17); that the "'greatest difficulty of the Russian Revolution, its greatest historical problem'" is "'the necessity to solve international problems, the necessity to call forth the world revolution'." (Pet. Ex. 138, p. 19.)

[fol. 2448] The requirements imposed by Lenin's analysis in 1917 of the world situation as the epoch of imperialism

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[35] Since the hearing herein Stalin died.

[36] Party leader Flynn here parallels the status of respondent with that of all other Communist Parties.

[37] Flynn commenced on the National Committee in 1938, and Gates in 1945.

and of imperialism as the "*eve of the socialist revolution*" (Pet. Ex. 121, p. 34) changed the "very approach to the question of proletarian revolution, of the character of the revolution, of its scope, of its depth, the scheme of the revolution in general." (*Ibid.*, p. 34.) Stalin, based upon Lenin's analysis, stresses in *Foundations of Leninism* that "capitalism has evolved into imperialism, and imperialism is a world system of financial enslavement and colonial oppression of the vast majority of the population of the earth by a handful of 'advanced' countries" (*ibid.*, p. 35), that: "Now we must speak of the world proletarian revolution; for the separate national fronts of capital have become links in a single chain called the world front of imperialism, which must be opposed by a common front of the revolutionary movement in all countries." (*Ibid.*, p. 35.)

### a. The Third Communist International

The present world Communist movement was first manifested organizationally by the formation in March of 1919 in Moscow, Russia, of the Third Communist International. As this event is recorded in the *History of the Communist Party of the Soviet Union (B)* (Pet. Ex. 330), it was "on the initiative of the Bolsheviks, headed by Lenin," that the first Congress of Communist Parties was called in Moscow, the work of which "was guided by Lenin"; and, "Thus was founded an international revolutionary proletarian organization of a new type—the Communist International—the Marxist-Leninist International." [38]

[38] Showing further that the Comintern was based on Marxism-Leninism both in origin and operation, the *Programme of the Communist International* (Pet. Ex. 125), issued in 1929, provided that: "the Communist International, in its theoretical and practical work, stands wholly and unreservedly upon the ground of *revolutionary Marxism* and its further development, Leninism, which is nothing else but Marxism of the epoch of imperialism and proletarian revolution. * * * Expressing the historical need for an international organization of revolutionary proletarians—the gravediggers of the capitalist order—the Communist International is the only international force that has for its programme the dictatorship of the proletariat and Communism, and that openly comes out as the *organizer of the international proletarian revolution.*" (Pet. Ex. 125, p. 8.)

### (1) Second World Congress

One year later, July 17 - August 7, 1920, the Second Congress of the Communist International adopted and promulgated its *Theses and Statutes,* setting forth its aims and purposes as later herein detailed, and described itself as [fol. 2449] *"a single universal Communist party, of which the parties operating in every country form individual sections."* [39] (Pet. Ex. 8, p. 5, emphasis added.)

A "Statute" of the Comintern insured that it would serve the interests of Russia by providing:

> "The Communist International fully and unreservedly upholds the gains of the great proletarian revolution in Russia, the first victorious socialist revolution in the world's history, and calls upon all workers to follow the same road. The Communist International makes it its duty to support with all the power at its disposal every Soviet Republic, wherever it may be formed." (Pet. Ex. 8, p. 5.)

Further the *Theses and Statutes* sets forth the basic content and orientation of the Comintern's program and policies in which subservience to the Soviet Union inheres:

> ". . . all the events of world politics are inevitably concentrating around one point, namely, the struggle of the bourgeois world against *the Russian Soviet Republic, which is grouping around itself* the Soviet movements of the vanguard of the workers of all countries, and all national liberation movements of the colonial and subject countries. . . ." (Pet. Ex. 8, p. 67, emphasis added.)

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[39] The integral organizational unity of the Comintern in action is shown in many ways in this record, as for example by witness Meyer, who transferred to respondent from the Communist Party of Britain in 1934, describing this as a transfer from one section of the Comintern or world Communist movement to another. The "Constitution and Rules of the Communist International" as contained in its *Programme* provides that it is a "World Communist Party." (Pet. Ex. 125, p. 85.)

That the Communist International was an apparatus for organizing the Communist Parties of the world into a world movement is clearly stated:

"... *The organized apparatus of the Communist International is to secure to the toilers of every country the* [fol. 2450] *possibility at any given moment of obtaining the maximum of aid from the organized workers of other countries.*

"For this purpose the Communist International confirms the following items of its statutes:

"§1. The new International Association of Workers is established *for the purpose of organizing common activity of the workers of various countries who are striving towards a single aim*: the overthrow of capitalism; the establishment of the dictatorship of the proletariat and of *the International Soviet Republic;* the complete abolition of classes, and the realization of socialism—the first step of Communist Society." (Pet. Ex. 8, p. 5, emphasis added.)

The Communist International was in fact a world Communist Party, organized and controlled as to policies and activities by the Soviet Union, consisting of the various Communist Parties of the countries throughout the world, which constituted its sections. With headquarters in Moscow, it embodied an elaborate organizational structure, related to implementing the basic strategy and tactics of Marxism-Leninism, including an Executive Committee (ECCI); departments on organization, agitation and propaganda, youth, and labor unions (RILU or Profintern) which were interlocked with similar departments in the national Communist Parties; secretariats or commissions covering sections of the world, such as the Anglo-American, Latin American, Far Eastern, and Western European Secretariats which supervised the policies of the various national Parties, and the field bureaus, such as the Caribbean, Pan-Pacific, and South American Bureaus, which directed the Communist Parties on a continental or semi-continental scale. There was no North American Bureau, but the Political Bureau of respondent acted in that capacity, su-

pervising the Communists in Canada, Cuba, Mexico, and others down to the Panama Canal.

The Soviet Union was the leader of the Communist International, exercising control over its policies and activities. The Communist Party of the Soviet Union had five votes to one each for the other larger Parties in the Executive Committee of the Comintern (ECCI), which respondent in a 1934 resolution acknowledged to be "the general staff of the world revolutionary movement giving unity and leadership to the Communist Parties of the world." (Pet. Ex. 136, p. 18.) The Government of the Soviet Union [fol. 2451] financed the Comintern. All of the heads of the Comintern who were identified in the record were leading members of the Communist Party of the Soviet Union. Respondent's official knowledge and acquiescence in the Soviet Union's domination of the Comintern is illustrated by an article by one of its present top officials, Alexander Bittelman, written in 1934, which proclaimed that:

> ". . . The leading role of the Communist Party of the Soviet Union in the Comintern needs neither explanation nor apology. A party that has opened up the epoch of the world revolution . . . is cheerfully recognized and followed as the leading party of the world communist movement. And by the same token, the leaders of that party—first Lenin and now Stalin—are proudly followed as the leaders of the proletariat and of all oppressed in every country of the world." (Pet. Ex. 126, p. 235.)

Respondent joined this international Communist organization shortly after it was constituted and admittedly until 1940 participated therein. That respondent recognized that its membership therein subordinated any national interests to the international interests is plainly shown by its "Program" (Pet. Ex. 13) for the year 1921, wherein it proclaims:

> "The Communist International subordinates the so-called national interests to the interest of the international proletarian revolution. The Communist International merges and centralizes the reciprocal aid of the proletariat of all countries. In order to accelerate

> the final collapse of the imperialist system of the world, the Communist International supports the exploited colonial peoples in their struggles against imperialism.
>
> "The Communist International is the concentrated will of the world revolutionary proletariat. Its mission is to organize the working class of the world for the overthrow of the capitalist system and the establishment of Communism. The Communist International is a fighting body and assumes the task of combining the revolutionary forces of every country.
>
> "In order to overthrow the international bourgeoisie and to create an International Soviet Republic as a transition stage to the Communist Society, the Communist International will use all means at its disposal, including force of arms." (Pet. Ex. 13, p. 11.)

[fol. 2452] Further, that complete and total allegiance and dedication was demanded in affiliation with the Comintern, and was acknowledged and in turn stressed by respondent, is also shown by its "Program":

> ". . . The Communist International is an organization for waging class warfare for the liberation of the working class; there can be no reservations in endorsement and affiliation with it. Loyalty 'with reservations' is treachery. Endorsement and defense of Soviets in Russia, with failure to advocate the Soviet form of proletarian dictatorship in the United States is hypocrisy." (Pet. Ex. 13, p. 5,)

Respondent also stated that it "accepts the principle that the class struggle for the emancipation of the working class is an international struggle" (Pet. Ex. 19, p. 85) and that for "final victory . . . against world capitalism the working class of the world must be united under one leadership." (*Ibid.*, p. 86.) Respondent openly proclaimed that it entered "the struggle against American capitalism, the most powerful of the national groups, under the inspiration of the leadership of the Communist International." (*Ibid.*, p. 86.)

### (2) 21 Conditions of Membership

Fundamental to the world Communist movement were the 21 "Conditions of Admission to the Communist International" promulgated in its *Theses and Statutes* in 1920 (Pet. Ex. 8). Uncontradicted testimony and documents establish that these "Conditions" were endorsed and accepted by respondent and were binding upon it.[40]

The scope of these "Conditions" was such as to prescribe the organizational format, the major policies, the basic activities, and general orientation of all the national Communist Parties, including respondent. Findings on current adherence to the requirements of these "Conditions" by respondent are made in subsequent sections of this Report.

[fol. 2453] Condition No. 17 required that respondent's name be altered to "Communist Party of the United States of America, section of the Third Communist International." Condition No. 12 required the party to be formed upon the basis of democratic centralism, stressing that only when possessed of an "iron discipline" (Pet. Ex. 8, p. 30) will it be able to fully and thoroughly carry out its duty as part of the world Communist movement. Condition No. 20, in order to aid control, required that two-thirds of all committee members and members of central institutions consist of comrades who have made open declarations as to their desire to join the Comintern. Condition No. 11 required an inspection of personnel and the removal of unreliable elements from parliamentary party fractions, and Condition No. 13 required a systematic check of personnel to remove petty bourgeois elements which may have in-

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[40] As to respondent's adoption of these "Conditions," cross-examination of Kornfeder brought out that he was in error on direct in identifying Petitioner's Exhibit 123 (*The Communist* for March 1, 1921) as the organ of the "then completely united Communist Party of America." (Tr. 1560.) The exhibit shows that it was the "Official Organ of the Communist Party of America" and that the organic unity with the "United Communist Party" group, which had been ordered by the Communist International, had not been completed. We find that the record justifies the consideration of the exhibit and does not require that Kornfeder be discredited on this.

filtrated a party. Condition No. 16 made binding upon the party all resolutions of the Comintern, and Condition No. 21 made liable to exclusion from the party anyone who rejected the theses and conditions of the Third Communist International.

Turning now to the party press, the *Theses and Statutes* required the creation of a Communist press, stressing that "Without a Communist press the preparation for the dictatorship of the proletariat is impossible" (Pet. Ex. 8, p. 20) and Condition No. 1 required that the party organ be controlled by devoted Communists, editorships being restricted to "reliable Communists who have proved their loyalty to the cause of the proletarian revolution." (*Ibid.*, p. 27.) Condition No. 18 required that the Party organ publish important documents of the Comintern and it was mandatory that such official organ consistently "denounce the bourgeoisie . . . its assistants and agents—reformists of every color and shade" (*ibid.*, p. 27) and that its propaganda and agitation follow the line of the Comintern.

As to specific policies and programs, Condition No. 15 required the maintenance of a program in accordance with the resolutions of the Comintern.[41] Condition No. 8 required, concerning "the Colonial question and that of oppressed nationalities," an "especially distinct and clear line of conduct" (*ibid.*, p. 29) binding a party "to denounce without any reserve all the methods of 'its own' Imperialists in the colonies, supporting not only in words but practically a movement of liberation in the colonies." (*Ibid.*, p. 29.)

[fol. 2454] Condition No. 9 binds a party of the Comintern to carry on "systematic and persistent Communist work in the labor unions, co-operatives and other labor organizations of the masses" for the purpose of winning over labor unions to communism and to form Communist groups therein "completely subordinated to the party in general." (Pet. Ex. 8, p. 29.) Condition No. 2 requires the removal from labor organizations of all "reformists."

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[41] Principal Comintern resolutions which enunciated the policies and program of the world Communist movement, as controlled by the Soviet Union, are discussed in detail later herein.

Condition No. 10 requires a party to "support by all means in its power the International Unification of Red Labor Unions, adhering to the Communist International." (*Ibid.*, p. 29.) One of the "Statutes" of the Comintern provided for the International League of Communist Youth as a subordinate international organization with a basic defined relationship with the Communist Party in every country.

Another aspect of the "Conditions" was to make the allegiance of a section party and its members to the Comintern, and hence to the Soviet Union, paramount to any other. For example, Condition No. 14 obligates every member party of the Comintern "to render every possible assistance to the Soviet Republics in their struggle against all counter-revolutionary forces." (Pet. Ex. 8, p. 30.) It directs the member parties to use legal and illegal means to obstruct military efforts against the Soviet Union. Condition No. 1 requires advocacy of the dictatorship of the proletariat, Condition No. 3 the creation of a parallel illegal apparatus "which at the decisive moment should do its duty by the party, and in every way possible assist the revolution" (*ibid.*, p. 28) and Condition No. 6 requires that any party affiliating "renounce not only avowed social patriotism, but also the falsehood and hypocrisy of social pacifism" and directs that a party should systematically demonstrate the need for the "revolutionary overthrow of capitalism." (*Ibid.*, p. 28.)

These 21 "Conditions" were never changed by the Communist International and were enforced and implemented by respondent and used to educate its members. Considerable documentary material of record also established that respondent fully complied with and fulfilled the requirements of membership in the Communist International and faithfully followed and carried out its instructions and directives.[42]

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[42] We consider later herein the relationship and identity of respondent's present organizational form, policies and activities, with those required by the "Conditions" of membership in the international Communist organization.

### (3) Programs and Policies

As stated, a member party of the Comintern was required to maintain a program in accordance with the resolutions of the Comintern. In addition to the *Theses and Statutes* adopted at the Second World Congress in 1920, two major sets of Comintern resolutions are in evi- [fol. 2455] dence — those of the Sixth World Congress, held in 1928, and also embodied in Petitioner's Exhibit 125 (the *Programme of the Communist International*) and in part in Petitioner's Exhibit 130, and those of the Seventh World Congress, held in 1935, contained in Petitioner's Exhibit 137.

The basic program and policies promulgated by these resolutions and the strategy and tactics for their implementation are of major significance in that they show the existence, leadership, programs and objectives of a world Communist movent. These resolutions cover a myriad of policies and tactics. We shall specifically treat with these matters and their implementation throughout the Communist movement primarily as they relate to respondent herein.

The *Theses and Statutes* sets forth, under the headings "Fundamental Tasks of the Communist International," "Conditions of Admission to the Communist International" (discussed above), "Role of the Communist Party in the Proletarian Revolution," "The Communist Party and Parliamentarism," "The Trade Union Movement," and "Thesis on the National and Colonial Questions," the policy, program and tactics of the world Communist movement in each of these areas.[43]

As one of "The Fundamental Tasks of the Communist International" it was decreed that "the principal duty of the Communist Parties, from the point of view of an international proletarian movement, is at the present moment the uniting of dispersed Communist forces, the formation

[43] Though not geared to the international field nor of sufficient materiality to respondent to warrant discussion here, there were also included policies and programs concerning "When and Under What Conditions Soviets of Workers' Deputies Should Be Formed" and the "Agrarian Question."

in each country of a single Communist Party." (Pet. Ex. 8, p. 13.) Specific statements are made relative to this task in France, Germany, England, the United States,[11] Switzerland, and Italy. (*Ibid.*, pp. 21-23.)

In defining "The Role of the Communist Party in the Proletarian Revolution," the *Theses and Statutes* proclaimed:

> "The Communist International emphatically rejects the opinion that the workers could carry out a revolution without having an independent political party of their own. Every class struggle is a political strug- [fol. 2456] gle. The object of this struggle, which inevitably turns into a civil war, is the obtaining of political power. However, this power cannot be acquired, organized and directed otherwise than by means of a political party. Only in case the workers have for their leader an organized and experienced party, with strictly defined objects, and *a practically drawn up program* of immediate action, both in internal and foreign policy—then only will the acquisition of political power cease to be a causal episode, but will serve as a starting point." (Pet. Ex. 8, p. 35, emphasis added.)

The various organizational requirements for a party, such as strict discipline and democratic centralism, are also set out. (*Ibid.*, p. 40.)

Concerning the "Communist Party and Parliamentarism," the Comintern stresses that it is "the immediate historical task of the working class to tear this apparatus out of the hands of the ruling classes, to break and destroy it, and to create in its place a new proletarian apparatus. At the same time, however, the revolutionary general staff of the working class is vitally concerned in *having its scouting parties in the parliamentary institu-*

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[11] As shown in another section of this Report, pursuant to this organizational task of the Comintern and at its direction various factions and elements of respondent were united into a single Communist Party in the United States.

*tions of the bourgeoisie, in order to facilitate this task of destruction.*" (*Ibid.*, pp. 44-45, emphasis added.)

The purpose of "political" activity is shown by setting forth the strategy and tactics for the "Utilization of the Bourgeois Parliament" (*ibid.*, p. 45) in the struggle for the dictatorship of the proletariat. It is stressed that "*it is only possible to speak of utilizing the bourgeois State organizations with the object of destroying them. The question can be discussed only and exclusively on such a plane.*" (*Ibid.*, p. 46, emphasis added.)

The Comintern instructs its Parties that:

> "The elementary means of the struggle of the proletariat against the rule of the bourgeoisie is, first of all, the method of mass demonstrations . . . carried out . . . under the direction of a united, disciplined, centralized Communist Party. * * * and logically leading to an uprising against the capitalist order of government. * * * work within the parliaments . . . must be fully subordinated to the objects and tasks of the mass struggle outside the parliaments." (Pet. Ex. 8, p. 47.)

[fol. 2457] If Communists are able to obtain the majority in a local government, the Comintern directs that: "The whole activity of the Communists in the communal administration . . . must be a part of the general work of destruction of the capitalistic system." (Pet. Ex. 8, p. 48.) Communist participation in election campaigns is to be used as a rehearsal for revolutionary mobilization, as shown by Comintern instruction that: "*The elective campaign must be carried on not in the sense of obtaining a maximum of votes, but in that of a revolutionary mobilization of the masses around the mottoes of the proletarian revolution.*" (*Ibid.*, p. 48, emphasis added.)

It is further provided that a Party's Central Committee must sanction the candidacy of only men who have proved their unwavering loyalty to the working class; that it must have a permanent representative in the parliamentary faction with the right of veto; that it be entitled to appoint or reject the orator of the faction, to demand that he submit previously the thesis of his speech, or the text, for confirmation. Further, that:

"... Each candidate ... must sign a paper to the effect that at the first request of the Central Committee of the Party he shall be bound to give up his mandate, in order that in a given situation the act of leaving the parliament may be executed in unison. * * * A Communist delegate, by decision of the Central Committee, is bound to combine lawful work with unlawful work. In countries where the Communist delegate enjoys a certain inviolability, this must be utilized by way of rendering assistance to illegal organizations and for the propaganda of the party. (Pet. Ex. 8, p. 51.)

"The Communist members shall make all their parliamentary work dependent on the work of the Party outside the parliament. * * * Each Communist member must remember that he is not a 'legislator' ... but an agitator of the Party, detailed into the enemy's camp in order to carry out the orders of the Party there. *The Communist member is answerable not to the wide mass of his constituents, but to his own Communist Party*—whether lawful or unlawful." (*Ibid.*, pp. 51-52, emphasis added.)

[fol. 2458] Concerning "The Trade Union Movement," the Comintern's *Theses and Statutes* stresses that during World War I the trade union movement was in the main allied with "Social Democracy" (Pet. Ex. 8, p. 53) and proved to be a part of the apparatus of the bourgeoisie. It directs that "Communists must join such unions in all countries, in order to make them efficient organs of the struggle for the suppression of capitalism and for Communism." (*Ibid.*, p. 55.) Concerning the United States, the Comintern directs that:

"... In America, alongside the opportunist trade unions there are unions with revolutionary tendencies—although not Communist ones—there the Communists are bound to support such revolutionary unions, to persuade them to abandon Syndicalist prejudices and to place themselves on the platform of Communism ..." (Pet. Ex. 8, pp. 56-57.)

The strategic duty of Communists concerning trade unions is clearly defined:

> "... Consequently, the Communists must strive to create as far as possible complete unity between the trade unions and the Communist party, and to subordinate the unions to the practical leadership of the Party, as the advance guard of the workers' revolutions. For this purpose the Communists should have Communist factions in all the trade unions and factory committees, and acquire by their means an influence over the labor movement and direct it." (*Ibid.*, p. 57.)

Concerning labor unions generally, a Party in the world Communist movement is directed that:

> "The duty of the Communists consists in inspiring the labor unions . . . with . . . the spirit of Communism. In execution of this duty the *Communist must practically subordinate* the factory committees and *the unions to the Communist Party, and thus create* a proletarian mass organ, *a basis for a powerful centralized party of the proletariat*, embracing all the organizations of the proletarian struggle, leading them all to one aim, to the victory of the working class, through the dictatorship of the proletariat to Communism. ." (*Ibid.*, p. 60, emphasis added.)

[fol. 2459] This activity in labor unions is also required to be international in its orientation:

> "The Communist workers who are members of the labor unions in all countries must . . . strive to create an international battle front of labor unions. . . . when the danger is threatening the working class of one country, the labor unions of the others, being organizations of the larger masses, should all come to its defense . . . the labor unions must consciously use their forces for the support of all revolutionary struggles in their own and in other countries. For this purpose . . . they must do so on an international scale by joining the Communist International. . . ." (Pet. Ex. 8, p. 61.)

Concerning "The National and Colonial Questions," the Comintern dealt with this matter in "the epoch of financial capital and imperialism" (*ibid.*, p. 66) and by way of a thesis it proclaimed the program of the world Communist movement:

> "... *the policy of the Communist International on the National and Colonial questions must be chiefly to bring about a union of the proletarian and working masses of all nations and countries for a joint revolutionary struggle leading to the overthrow of capitalism* ..." (Pet. Ex. 8, p. 67, emphasis added.)

And it is emphasized that it is:

> "... necessary, first, to explain constantly that only the Soviet regime is able to give the nations real equality, by uniting the proletariat and all the masses of the workers in the struggle against the bourgeoisie; second, to support the revolutionary movement among the subject nations (for example, Ireland, American negroes, etc.) and in the colonies." (*Ibid.*, p. 69.)

This thesis makes clear that the struggle against:

> "... petty bourgeois nationalism and pacifism .... must be brought to the foreground the more vigorously because of the urgent *necessity of transforming the dictatorship of the proletariat and changing it from a national basis* (*i.e., existing in one country* [the Soviet Union] *and incapable of exercising an influence* [fol. 2460] *over world politics*), *into an international dictatorship* (*i.e., a dictatorship of the proletariat of at least several advanced countries capable of exercising a determined influence upon world politics*). . . . "[45] (Pet. Ex. 8, p. 69, emphasis added.)

[45] It is pertinent to say at this juncture that this uncontradicted evidence now being discussed formed the bedrock upon which the world Communist movement was formed and continues to operate. The relevancy and materiality of this evidence is manifest when it is considered with that later set forth showing that this movement has never substantially changed in program or activities. Respondent's contention that this evidence is irrelevant is accordingly without merit.

It further sets forth the characteristics of the internationalism required by the Comintern, namely, "proletarian internationalism,"[46] which it states demands: "(1) the subordination of the interests of the proletarian struggle in one nation to the interests of that struggle on an international scale; (2) the capability and the readiness on the part of one nation which has gained a victory over the bourgeoisie, of making the greatest national sacrifices for the overthrow of international capitalism." (*Ibid.*, pp. 69-70.)

That the Comintern's program and policy calling for international coordination between Communist Parties in the colonial countries and those in the capitalist states is regarded as necessary for a Communist victory in the world struggle against capitalism is plain in the *Theses*:

> "The breaking up of the colonial empire, together with the proletarian revolution in the home country, will overthrow the capitalist system in Europe. Consequently, the Communist International must widen the sphere of its activities. It must establish relations with those revolutionary forces that are working for the overthrow of imperialism in the countries subjected politically and economically. These two factors must be co-ordinated if the final success of the world revolution is to be guaranteed." (Pet. Ex. 8, p. 73.)

[fol. 2461] (4) SIXTH WORLD CONGRESS

These basic policies and programs were perpetuated for the world Communist movement by the Comintern's Sixth World Congress in 1928, and, together with the "Statutes" of the Comintern, were issued as its *Programme*[47] and self-styled "the *programme of struggle for the world pro-*

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[46] As will appear by evidence set forth throughout this Report, the term "proletarian internationalism" connotes the elements which the Comintern prescribes and not merely the innocuous fraternalism which respondent's witnesses ascribe to it.

[47] The *Programme* was considered fundamental by respondent and was never repudiated during witness Kornfeder's membership, which lasted until 1934.

*letarian dictatorship, the programme of struggle for world communism.*" (Pet. Ex. 125, p. 7.) "The Strategy and Tactics of the Communist International in the Struggle for the Dictatorship of the Proletariat" (*ibid.*, p. 67) were also embodied in the *Programme*, which took into account the development and consolidation of the world movement which had occurred in the intervening years since 1920, and the developing "revolutionary crises" (*ibid.*, p. 7) of capitalism during this period in the epoch of imperialism. The scope and purpose of the Comintern's world-wide revolutionary activities and the conceptualization of their connection to the Russian Revolution are shown by the Comintern's analysis of this period as "The General Crisis of Capitalism and the First Phase of World Revolution":

> "The powerful shock to which the whole of world capitalism was subjected, the sharpening of the class struggle and the direct influence of the October proletarian revolution gave rise to a series of revolutions and revolutionary actions on the Continent of Europe as well as in the colonial and semi-colonial countries: January, 1918, the proletarian revolution in Finland; August, 1918, the so-called 'rice-riots' in Japan; November, 1918, the revolutions in Austria and Germany, which overthrew the semi-feudal monarchist regime; March, 1919, the proletarian revolution in Hungary and the uprising in Korea; April, 1919, the Soviet Government in Bavaria; January, 1920, the bourgeois-national revolution in Turkey; September, 1920, the seizure of the factories by the workers in Italy; March, 1921, the rising of the advanced workers of Germany; September, 1923, the uprising in Bulgaria; Autumn, 1923, the revolutionary crisis in Germany; December, 1924, the uprising in Esthonia; April, 1925, the uprising in Morocco; August, 1925, uprising in Syria; May, 1926, the general strike in England; July, 1927, [fol. 2462] the proletarian uprising in Vienna. These events, as well as events like the uprising in Indonesia, the deep ferment in India, the great Chinese revolution, which shook the whole Asiatic continent, are links in one and the same international revolutionary

chain, constituent parts of the profound general crisis of capitalism. This international revolutionary process embraced the immediate struggle for the dictatorship of the proletariat, as well as national wars of liberation and colonial uprisings against imperialism, which inseparably go together with the agrarian mass movement of millions of peasants. Thus, an enormous mass of humanity was swept into the revolutionary torrent. World history entered a new phase of development—a phase of prolonged general crisis of the capitalist system. . . ." (Pet. Ex. 125, pp. 18-19.)

The *Programme* proclaimed that "world economy has been split into two fundamentally hostile camps: the camp of the imperialist States and the camp of the dictatorship of the proletariat in the U.S.S.R." (*Ibid.*, p. 24.) This concept became the touchstone for respondent as well as other national Parties in orienting their policies to those of the world Communist movement.

It emphasized the struggle was being waged on an international scale using the Soviet Union as a base:

". . . The class struggle, which hitherto was conducted in circumstances when the proletariat was not in possession of State power, is now being conducted on an enormous and really world scale; *the working class of the world has now its own State—the one and only fatherland of the international proletariat. . . .*" (*Ibid.*, pp. 24-25, emphasis added.)

Concerning "The Significance of the U.S.S.R. and Her World Revolutionary Duties," the *Programme* provides:

". . . the U.S.S.R. is an extremely important factor in the general crisis of capitalism . . . because she plays an exceptionally great revolutionary role generally; she is the international driving force of proletarian revolution that impels the proletariat of all countries to seize power; she is the living example proving that the working class is not only capable of destroying capitalism, but of building up Socialism as well, she [fol. 2463] is the prototype of the fraternity of na-

tionalities in all lands united in the World Union of Socialist Republics and of the economic unity of the toilers of all countries in a single world Socialist economic system that the world proletariat must establish when it has captured political power." (Pet. Ex. 125, p. 63.)

The *Programme* devotes an entire section to "The Strategy and Tactics of the Communist International in the Struggle for the Dictatorship of the Proletariat." (Pet. Ex. 125, pp. 67-84.) Here is emphasized the necessity to counteract "ideologies among the working class inimical to communism" (*ibid.*, p. 67) which are characterized variously as "reformism" (*ibid.*, p. 70),[48] "opportunism" (*ibid.*, p. 71) and "petty-bourgeois." (*Ibid.*, p. 74.) Sun Yat Senism in China, Gandhiism in India, and Garveyism in America are also attacked as ideologies inimical to communism and counter-revolutionary.

After nine years of organizational activity the Comintern proclaimed that the "successful struggle of the Communist International for the dictatorship of the proletariat presupposes the existence in every country of a compact Communist Party." (*Ibid.*, p. 75.) It set as "fundamental *strategic* aims" (*ibid.*, p. 76) for each national Party the extension of its "influence over the *majority of the members of its own class*, including working women and the working youth (*ibid.*, p. 76) and emphasized that: "It is particularly important for the purpose of winning over the majority of the proletariat, to capture the *trade unions*." (*Ibid.*, p. 76.)

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[48] Illustrative of this is "Social Democracy" which the Comintern flays as having "betrayed Marxism, having traversed the road from revisionism to complete liberal bourgeois reformism" because "it has exchanged the theory of the revolutionary downfall of capitalism for the *counterfeit coinage of 'sound' capitalism transforming itself peacefully into Socialism; it has replaced revolution by evolution*, the destruction of the bourgeois State by its active upbuilding, the theory of proletarian dictatorship by the theory of coalition with the bourgeoisie, the doctrine of international proletarian solidarity—by preaching defense of the imperialist fatherland." (Pet. Ex. 125, p. 69, emphasis added.)

Concerning "The National and Colonial Questions" it is provided: "The tasks of the Communist International connected with the revolutionary struggle in *colonies, semi-colonies and dependencies* are extremely important strategical tasks in the world proletarian struggle." (*Ibid.*, p. 77.) The more detailed "Theses and Resolutions of the [fol. 2464] Sixth World Congress" on this question (Pet. Ex. 130) shows most clearly the machinations of the world Communist movement, and we shall therefore treat at some length herein this major aspect of the world Communist program. The Sixth Congress declared that:

> "... the 'Theses on the National and Colonial Questions' drawn up by Lenin and adopted at the II. Congress still have full validity, and should serve as a guiding line for the further work of the Communist Parties...." (Pet. Ex. 130, p. 1659.)

The alignment of the Communist movements in the capitalist countries into a fighting front with the Soviet Union is emphasized in this connection:

> "The establishment of a fighting front between the active forces of the Socialist world revolution (the Soviet Union and the revolutionary labour movement in the capitalist countries) on the one side, and between the forces of imperialism on the other side, is of fundamental decisive importance in the present epoch of world history...." (*Ibid.*, p. 1661.)

The importance of the colonial masses as "a most powerful auxiliary force of the Socialist world revolution" (*ibid.*, p. 1661) and of colonial countries as the weak spot of world imperialism, and of the necessity to unite the colonial movements with the international Communist movemen in defense of the Soviet Union is also emphasized:

> "... The colonial countries at the present time constitute for world imperialism the most dangerous sector of their front. * * * Thus, all the basic questions of the revolutionary movement in the colonies and semi-colonies are found to have an immediate connec-

tion with the great epoch-making struggle between the capitalist and socialist systems,—a struggle which at present is being conducted on a world scale by imperialism against the U.S.S.R., *and inside each separate capitalist country between bourgeois class rule and the Communist movement.*

"In this struggle, the co-operation of the revolutionary proletariat of the whole world and of the toiling masses of the colonies represents the surest guarantee of victory over imperialism, in this struggle, [fol. 2465] *every war conflict between two imperialist States, as also war of the imperialists against the U.S.S.R., must be utilised in the colonies for the mobilisation of the masses and for drawing them into a decisive struggle against imperialism,* for national emancipation and for the victory of the workers and peasants." (Pet. Ex. 130, p. 1661, emphasis added.)

Speaking of tactics, the Comintern instructs:

"*The Communists must learn how to utilise each and every conflict, to develop such conflicts and to broaden their significance,* to connect them with the agitation for revolutionary slogans, to spread the news of these conflicts among the wide masses, to arouse these masses to independent, open manifestations in support of their own demands, etc." (*Ibid.*, p. 1668, emphasis added.)

"The building up and development of the Communist Parties in the colonies and semi-colonies" is set forth as "one of the most important and primary tasks of the Communist International" (*ibid.*, p. 1670) and it is added that: "An especially great responsibility in this connection lies with the Communist Parties of the imperialist countries." (*Ibid.*, p. 1670.)

Further showing the international strategy and tactics, the "Theses and Resolutions" directs that: "Alongside of these general tasks, the Communist Parties in the various colonies have a series of special tasks, resulting from the particular social-economic structure and political situation in each country" (*ibid.*, p. 1672); and it instructs:

"In China, the future growth of the revolution will place before the Party as an immediate practical task the preparation for and carrying through of armed insurrection . . . to the overthrow of the power of the imperialists, landlords and national bourgeoisie—the power of the Kuomintang. (Pet. Ex. 130, p. 1672.)

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"The basic tasks of the Indian Communists consist in struggle against British imperialism . . . for establishment of the dictatorship of the proletariat and [fol. 2466] peasantry in the form of a Soviet Republic. These tasks can be successfully carried out only when there will be created a powerful Communist Party which will be able to place itself at the head of the wide masses of the working class . . . and to lead them in the armed insurrection against the feudal-imperialist bloc. • • • The union of all Communist groups and individual Communists scattered throughout the country into a single, illegal, independent and centralised party represents the first task of Indian Communists.

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"In Indonesia . . . rebuilding the destroyed Party organisation demands from the Party new methods of work, corresponding to the illegal conditions created by the police regime of Dutch imperialism. . . .

"In Korea, the Communists must strengthen their work in the ranks of the proletariat . . . secure the reorganisation of the trade unions . . . combine economic struggle with political demands . . . they must associate in the closest possible fashion the demands for the national emancipation of the country with the slogan of the agrarian revolution, which is acquiring ever-more pressing importance . . . (*Ibid.*, p. 1672.)

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"In Egypt . . . the strengthening of the class struggle, and leadership in the class struggle are, consequently, the first and most important tasks of the Communist Party . . . Special attention needs to be devoted to the building up of the Party itself, which is still very weak.

"In the French colonies of North Africa, the Communists must carry on work in all the already existing national-revolutionary mass organisations in order to unite through them the genuine revolutionary elements on a consistent and clear platform of a fighting bloc of workers and peasants. . . ." (Pet. Ex. 130, p. 1674.)

[fol. 2467] Specific instructions are also given to the Communist Parties involved, including respondent, concerning the world Communist movement's policy on the Negro as a part of its national liberation program, including its application to the United States (discussed at fols. 2549-2553, *infra*), South America, Union of South Africa, "Negro States" of Liberia, Haiti, San Domingo, and the colonies and mandated territories in Central Africa of various "imperialist" powers—Great Britain, France, Portugal, etc.

The Comintern also specified "immediate tasks of the Communist Parties of the imperialist countries" (Pet. Ex. 130, p. 1675) (thus including respondent) which have constituted the basis for the colonial and national liberation policy of respondent and the world Communist movement for many years.[48a] The first task is "the establishment of regular connections between the Communist Parties and the revolutionary trade union organisations of the impe-

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[48a] Generally illustrative of respondent's complete dedication and support of the Comintern as an organization of the world Communist movement is the statement in 1934 of one of its present leaders, Alexander Bittelman, published in *The Communist*: "In the fifteen years of its existence the Comintern has grown into a true World Party. It has reached the high stage where all 'Communist Parties are carrying out one single line of the Comintern,' a stage where all 'Communist Parties are united . . . into a single centralized World Party' * * * In this lies the main strength of the world revolution and the guarantee of its inevitable victory. *It is this that makes possible, for the first time in the history of the world, the effective carrying out of a world revolutionary strategy, the only road to victory over capitalism.* And it is in Comrade Stalin, since Lenin's death, that this strategy has found the greatest formulator, interpreter, and organizer . . . *by building the revolutionary movement in the United States we are also building the world power of the proletariat for the victory of the world revolution.*". (Pet. Ex. 126, p. 248, emphasis added.)

rialist centres, on the one hand, and the corresponding revolutionary organisations of the colonies, on the other hand" and the rendering of "practical assistance to the revolutionary movement in the colonies." (*Ibid.*, p. 1675.)

It is urged that only insofar as the help given by the Communist Parties in an imperialist country "actually facilitates the struggle of the corresponding colonial countries against imperialism, can their position in the colonial question be recognised as a genuinely Bolshevik one," that: "In this lies the criterion of the revolutionary activity in general." (*Ibid.*, p. 1675.) The second series of tasks "consists in genuine support of the struggle of the colonial [fol. 2468] peoples against imperialism through the organisation of mass demonstrations and other effective activities of the proletariat" (*ibid.*, p. 1675) and the third task is to "expose the colonial policy of the socialists before the native masses and in this way to direct against the social democratic leaders—servants of imperialism—the same well-deserved hatred which the oppressed colonial peoples bear against the imperialists." (Pet. Ex. 130, p. 1676.)

### (5) Seventh World Congress

The Seventh World Congress of the Comintern,[49] held in Moscow in August 1935, perpetuated and extended the basic policies, programs, and strategy of the world Communist movement in the various aspects set out above, but, as proclaimed in its *Resolutions* (Pet. Ex. 137), it was principally "a Congress of a *new tactical orientation for the Communist International*" which, "Standing firmly on the impregnable position of Marxism-Leninism" and "acting in the spirit and guided by the method of *living Marxism-Leninism*, has reshaped the tactical lines of the Communist International to meet the changed world situation." (Pet. Ex. 137, p. 11.)

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[49] Respondent, by way of a resolution of a plenum of its Central Committee, endorsed "Fully and wholeheartedly the decisions of the Seventh World Congress of the Communist International" (Pet. Ex. 185, p. 1182) and instructed its members that: "Our chief task at present is to reorientate the work of the Party in accord with the tactical line of the Seventh World Congress." (*Ibid.*, p. 1183.)

The Seventh World Congress in a resolution on the report of Georgi Dimitroff[50] defined the alignment of class forces in the international struggle and set the basic content of world Communist policy:

> "The Seventh Congress of the Communist International declares that the alignment of class forces in the international arena and the tasks facing the labor movement of the world are determined by the following basic changes in the world situation:
>
> [fol. 2469] "(a) *The final and irrevocable victory of socialism in the Land of the Soviets,* a victory of world importance, which has enormously enhanced the power and role of the U.S.S.R. . . . and is inspiring the toilers to struggle against capitalist exploitation, bourgeois reaction and fascism, for peace, and for the freedom and independence of the peoples. * * * (b) *The most profound economic crisis in the history of capitalism* * * * (c) *The offensive of fascism, the advent to power of the fascists in Germany, the growth of the threat of a new imperialist world war and of an attack on the U. S. S. R.* * * * (d) *The political crisis,* expressed in the armed struggle of the workers in Austria and Spain against the fascists * * * (e) *The revolutionization of the toiling masses* throughout the whole capitalist world which is taking place under the influence of the victory of socialism in the U.S.S.R. and of the world economic crisis . . . The revolutionary movement in the *colonial countries* and the Soviet revolution in *China* are extending. The relationship of class forces on a world scale is changing more and more in the direction of *a growth of the forces of revolution.*" (Pet. Ex. 137, pp. 21-22.)

Based on this analysis the Comintern instructed by a report of Dimitroff that "the united front tactics must be applied *in a new way*" (*ibid.*, p. 12) by the national Com-

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[50] Dimitroff is author of *The United Front* (Pet. Ex. 149), discussed in Marxism-Leninism, at fols. 2432 2433, *supra*, and in the section of this Report concerning respondent's utilization of the united front tactics, fols. 2530-2533, *infra*.

munist Parties throughout the world, and it enjoined "the Communist Parties to be guided by the following instructions when carrying out the united front tactics." (*Ibid.*, p. 26.) The *Resolutions* then directs that "*The defense of the immediate economic and political interests of the working class, the defense of the latter against fascism,* must be the starting point and form the main content of the workers' united front in all capitalist countries" (*ibid.*, p. 26); that "Without for a moment giving up their independent work . . . Communists . . . must *strive to secure joint action with the Social-Democratic Parties, reformist trade unions and other organizations of the toilers against the class enemies of the proletariat, on the basis of short- or long-term agreements*" (*ibid.*, p. 27); that "The forms in which the united proletarian front is realized . . . must be varied in character" and "may include . . . action agreed upon on a *local, district, national or international scale;* action agreed upon in the organization of the *economic struggle* of the workers, in defense of the interests of the unemployed, in carrying out mass *political* activity, in the organization of joint *self-defense* against fascist attacks; action agreed upon to render *aid to political prisoners and their families,* in the field of struggle against *social* reaction; joint action in defense of the *interests of youth and women,* in the sphere of the *cooperative movement, cultural activity and sports* . . ." (Pet. Ex. 137, p. 27.)

[fol. 2470] Dimitroff's instructions concerning the united front tactics were incorporated into a pamphlet entitled "Working Class Unity—Bulwark Against Fascism" (1935) and here, too, it was stressed by the world Communist movement that: "We want our Parties in the capitalist countries to come out and act as *real political parties of the working class,* to become in actual fact *a political factor* in the life of their countries, to pursue at all times *an active Bolshevik mass policy.*" (Pet. Ex. 141, p. 69.)

In accordance with basic existing policy the Parties are instructed, however, to continue the ideological struggle against "reformism" and "Social-Democracy as the ideology and practice of class collaboration with the bourgeoisie," (Pet. Ex. 137, p. 29) even while ostensibly "united" with the "Social-Democratic" parties and organizations.

Further instructions in united front tactics are that: "*Election campaigns* must be utilized for the further development and strengthening of the united fighting front of the proletariat" (*ibid.*, p. 29); and that: "Communists must seek to bring about the establishment of a wide *anti-fascist people's front* on the basis of the proletarian united front, supporting all those specific demands of those sections of the toilers which are in line with the fundamental interests of the proletariat.[51] * * * In the circumstances of a *political crisis* . . . the Communists must advance *fundamental* revolutionary slogans . . . directed toward still further shaking the economic and political power of the bourgeoisie . . . and which lead the working masses right up to the point of the revolutionary seizure of power."[52] (*Ibid.*, p. 30.) The Comintern also makes clear that Com-
[fol. 2471] munists are to support any established united

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[51] Concurrent with the Seventh Congress, *Pravda*, on August 6, 1935, speaking for the Soviet Communist Party, proclaimed "The Program of the Struggle for the Unity of the Working Class," stating: "Unity—that is the command of the moment' The Communists are the motor which moves ahead the cause of unification of all anti-Fascist forces . . . toward unity of international proletarian action. * * * The Communists cannot be alien to anything that agitates the popular masses." (Pet. Ex. 183, pp. 1, 4.)

[52] Illustrative of current evidence of the continuation of these tactics of the world Communist movement is the article "The General Elections in India," by Ajoy Ghosh, general secretary, Communist Party of India in *Political Affairs*, March 1952 (Pet. Ex. 491), wherein it is stated: "th elections grew into something far more than mere casting of votes in the ballot box. They grew into a mighty mass movement for the agrarian reform, for adequate rations, for a living wage, for civil liberties, for the formation of national States * * * the flags which waved over the vast gatherings were the Red Flag and flags of parties in the United Front * * * Never were the slogans of the Party and the United Front so popular * * * Learning from the example of the immortal Party of Lenin and Stalin, learning from the history of the great Communist Party of China, we must . . . redouble our efforts to develop the movement which will sweep away the present Government and ensure a life of happiness and prosperity for our people. Such are the lessons our Party has learned from the elections and the recent events in India." (Pet. Ex. 491, pp. 37-38, 44.)

front government only to the extent it leaves them free to pursue the conquest of power:[53]

> "In so far as the united front government will really undertake decisive measures against the counter-revolutionary financial magnates and their fascist agents, and will in no way restrict the activity of the Communist Party and the struggle of the working class, the Communist Party will support such a government in every way. The participation of the Communists in a united front government will be decided separately in each particular case as the concrete situation may warrant." (Pet. Ex 137, p. 31.)

Concerning world Communist policy in "the colonial and semi-colonial countries," it is directed that "the most important task facing the Communists consists in working to establish *an anti-imperialist people's front.* For this purpose it is necessary to draw the widest masses into the national liberation movement . . . for the driving out of the imperialists, for the independence of the country." (*Ibid.*, p. 35.)

The "main tasks" of all Communist Parties of the world, formulated on the basis of Marxism-Leninism, are set forth and constitute with minor exceptions (e.g., the emphasis on anti-fascism) the basic policy and program of the world Communist movement to this day, as will be later shown. The *Resolutions* (Pet. Ex. 137) provides in this regard:

> ". . . *The Seventh World Congress of the Communist International, confirming the decision of the Sixth Congress on the struggle against imperialist war,* sets the following main tasks before the Communist Parties, revolutionary workers, toilers, peasants and oppressed peoples of the whole world:

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[53] See utilization of this tactic in Central and Eastern European countries after World War II, *infra.*

[54] That this "peace" policy is basically designed for "defense" of the Soviet Union and is based on "proletarian internationalism" is shown by the statement in the *Resolutions* that: "The peace

[fol. 2472] "1. *The struggle for peace*" *and for the defense of the U.S.S.R.* . . .

"2. *The united people's front in the struggle for peace and against the instigators of war.* . . . (Pet. Ex. 137, p. 44.)

• • • • • • •

"3. *The combination of the struggle against imperialist war with the struggle against fascism.* The anti-war struggle . . . must be very closely combined with the struggle against fascism and the fascist movement. . . . (*Ibid.*, p. 45.)

"4. *The struggle against militarism and armaments.* The Communist Parties of all capitalist countries must fight: against military expenditures (war budgets), for the recall of military forces from the colonies and mandated territories, against militarization measures taken by capitalist governments, especially the militarization of the youth, women and the unemployed . . . (*Ibid.*, pp. 45-46.)

"5. *The struggle against chauvinism.* In the struggle against chauvinism the task of the Communists consists in educating the workers and the whole of the toiling population in the spirit of *proletarian internationalism* . . .

"6. *The national liberation struggle and the support of wars of national liberation.* . . . " (*Ibid.*, p. 46.)

[fol. 2473] Special emphasis is placed upon support for the Chinese Communists by the Comintern:

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policy of the U.S.S.R., putting forward proletarian internationalism as against national and racial dissension, is not only directed towards defense of the Soviet country, towards ensuring the safety of socialist construction; it also protects the lives of the workers of all countries • • • At the time when a new war between the imperialist states is approaching ever more closely, the might of the Workers' and Peasants' Red Army of the U.S.S.R. is constantly gaining in importance in the struggle for peace . . . *all those who are striving to preserve peace are vitally interested in strengthening and actively supporting the Red Army.*" (Pet. Ex. 137, p. 43, emphasis added.)

"It is the duty of the Communists actively to support the national liberation struggle of the oppressed peoples of the colonial and semi-colonial countries, especially the Red Army of the Chinese Soviets in their struggle against the Japanese and other imperialists and the Kuomintang. . . ." (Pet. Ex. 137, p. 47.)

In the event of a war against the Soviet Union, the Comintern instructs, in accordance with the Marxist-Leninist concept of just and unjust wars (discussed at fol. 2423, *supra*), as follows:

"If the commencement of a counter-revolutionary war forces the Soviet Union to set the Workers' and Peasants' Red Army in motion for the defense of socialism, the Communists will call upon all toilers *to work, with all means at their disposal and at any price, for the victory of the Red Army over the armies of the imperialists.*" (Pet. Ex. 137, p. 48.)

The period commencing in the late 1930's is considered in the world Communist movement as "the second round of wars and revolutions," and the basic orientation of world Communist policy, imposing as a "primary duty" upon national Communist Parties support and aid to the Soviet Union, is openly proclaimed:

"From the historic balance of achievements secured since the Sixth Congress of the Communist International, with which the world proletarian movement is approaching the second round of wars and revolutions and which *determines the basic tasks of the world proletarian revolution,* follows the primary duty of the working class and the toilers of the world and of all Sections of the C.I.:

"*To help with all their might and by all means to strengthen the U.S.S.R. and to fight against the enemies of the U.S.S.R. Both under peace conditions and in the circumstances of war directed against the U.S.S.R. the interests of strengthening the U.S.S.R.,*

*of increasing its power, of ensuring its victory in all spheres and in every sector of the struggle, coincide* [fol. 2474] *fully and inseparably with the interests of the toilers of the whole world in their struggle against the exploiters with the interests of the colonial and oppressed peoples fighting against imperialism; they are the conditions for, and they contribute to, the triumph of the world proletarian revolution, the victory of socialism throughout the world. Assistance to the U.S.S.R., its defense, and cooperation in bringing about its victory over all its enemies must therefore determine the actions of every revolutionary organization of the proletariat, of every genuine revolutionary, of every Socialist, Communist . . .*" (Pet. Ex. 137, p. 56.)

### (6) Dissolution of Comintern

The Communist International was formally dissolved as such in 1943, at which time the United States and the Soviet Union were military allies. One reason given for this formal dissolution by Stalin was that it would remove the foundation for "fascist" charges that the Soviet Union was meddling in the internal affairs of other nations. Respondent, having a few years earlier ostensibly disaffiliated from the Communist International (discussed at fols. 2498-2501, *infra*), announced it was not "called upon to participate in the decision" (Pet. Ex. 207, p. 657) but it did, however, express its approval and support of the dissolution. (Pet. Ex. 206.) The basic factors behind dissolving this apparatus of the world Communist movement are set forth in subsequent reports by leaders of the Soviet Union, such as Zhdanov (Pet. Ex. 214-A) and Malenkov (Pet. Ex. 367), and in articles appearing at the time in the *Daily Worker*, reprinting the resolution of the Comintern's Presidium. Petitioner's Exhibit 205, the *Daily Worker* of May 26, 1943, shows that the dissolution was considered by the Presidium and respondent to be in the interest of furthering the world Communist movement:

"... The statement of the Comintern Presidium proposes, in view of the developments of the last decade,

to dissolve the Comintern because it has become outmoded and has outgrown its role as 'the guiding center of the international labor movement.'" (Pet. Ex. 205.)

Respondent emphasizes that what is dissolved is simply the particular outmoded organizational form, not the international movement:

[fol. 2475] ". . . the Presidium does not propose to dissolve the Comintern center because the need to unite the workers on a world scale has disappeared. It proposes to do so because that particular organizational form for international proletarian unity, which was established at the First Congress of the Comintern in 1919

"'and which corresponded to the needs of the initial period of the rebirth of the labor movement, more and more outlived itself in proportion to the growth of this movement and to the increasing complexity of problems in each country; *and that this form even became a hindrance to the further strengthening of the national workers' 'parties.'*" (Pet. Ex. 205, emphasis added.)

It is stressed that the world Communist movement, no longer requiring the organizational apparatus of the Comintern, is stronger than ever:

"That the leading body of an international working-class organization frankly recognizes that it has outlived its useful function *and has even become a hindrance to the growth of workers' parties in various lands*[55] *must not be mistaken as a sign of weakness or of helpless collapse.*

"*On the contrary, it is a token of the present strength, vitality and basic Marxist-Leninist approach of all those forces* throughout the world which for a quarter century maintained and sought to extend

[55] We infer that by this is meant that the open avowed foreign orientation by Communist Parties in the various countries through membership in the Comintern was a hindrance to them in acquiring support.

workers' unity through the medium of the Comintern." (Pet. Ex. 205, emphasis added.)

The *Daily Worker* of May 31, 1943 (Pet. Ex. 206) shows clearly that new forms for the world Communist movement are contemplated:

"... The working class and the peoples must seek to change old forms and create new forms of organization to encompass the mass upsurge and give direction to the popular endeavour, in accordance with the widely divergent situations and problems prevailing in different groups of nations. * * * Old forms must change and expand to meet the new needs. New forms of combination and effective organization arise.

[fol. 2476] "Just as the labor movement and the working class must respond to this need on a national scale, they will also seek to find the best medium and manner to advance solidarity of the working classes and peoples on an international scale." (Pet. Ex. 206, p. 2.)

b. Formation of Communist Information Bureau

The world Communist movement, under the hegemony of the Soviet Union, continued, notwithstanding the "dissolution" of its organizational form embodied in the Communist International. This is evidenced in many ways, as we shall see, such as continuation of policies and programs and graphically by the formation in September 1947, at a conference in Poland, of an organization composed of the Communist Parties of a number of countries under the name Information Bureau of Communist and Workers' Parties (variously called the Communist Information Bureau or the Cominform). Unlike the Comintern, the details of the Cominform's internal characteristics and administration do not appear in the record; however, the purpose of its formation and its basic characteristics are shown by two reports made at the founding conference, both by high Soviet Union leaders at the time—A. Zhdanov, member of the Politburo of the Communist Party of the Soviet Union, and Georgi M. Malenkov, member of the Central Committee of the Communist Party of the Soviet Union

and its secretary. When viewed with the Cominform's policies and programs as enunciated through its official organ, "*For a Lasting Peace, for a People's Democracy*," a number of copies of which are in evidence, these reports also show that the world Communist movement, intact in the basic orientation, policies and programs discussed above, continued via the Cominform and by Communist Parties not formally affiliated with it, such as respondent.

Turning now to this evidence, Zhdanov, in his report (Pet. Ex. 214-A), noting that World War II had recently ended, pointed out that the Communist International was formed after the first world war and under it the Communist Parties grew and were guided and strengthened and that the dissolution "conformed to the demands of the development of the labour movement in the new historical situation." (*Ibid.*, p. 4.) He declared that World War II greatly enhanced the international significance of the Soviet Union and extinguished all but two great "imperialist powers"—the United States and Great Britain, leaving the international alignment of forces in antagonistic world camps described as "the imperialist and antidemocratic camp on the one hand, and the anti-imperialist and democratic camp on the other." The United States "is the principal driving force of the imperialist camp." Britain and France are in alliance with the United States, which "is also supported by colony-owning countries, such as Belgium and Holland, by countries with reactionary anti-[fol. 2477] democratic regimes, such as Turkey and Greece, and by countries politically and economically dependent on the United States, such as the Near-Eastern and South-American countries and China." (Pet. Ex. 214-A, p. 2.)

Zhdanov proclaimed that:

> "The cardinal purpose of the imperialist camp is to strengthen imperialism, to hatch a new imperialist war, to combat Socialism and democracy, and to support reactionary and antidemocratic pro-fascist regimes and movements everywhere." (*Ibid.*, p. 2.)

The makeup of the other international camp, founded upon the Soviet Union and encompassing "the fraternal Com-

munist parties in all countries," is also specified by Zhdanov:

> "The anti-fascist forces comprise the second camp. This camp is based on the U.S.S.R. and the new democracies. It also includes countries that have broken with imperialism and have firmly set foot on the path of democratic development, such as Rumania, Hungary, and Finland. Indonesia and Viet Nam are associated with it; it has the sympathy of India, Egypt and Syria. The anti-imperialist camp is backed by the labour and democratic movement and by the fraternal Communist parties in all countries, by the fighters for national liberation in the colonies and dependencies, by all progressive and democratic forces in every country. . . ." (*Ibid.*, p. 2.)

The unity of the anti-imperialist camp on the ground of peace and on "all questions of foreign policy" with the Soviet Union is openly proclaimed by Zhdanov:

> "All the forces of the anti-imperialist and anti-fascist camp are united in the effort to secure a just and democratic peace. It is this united effort that has brought about and strengthened friendly co-operation between the U.S.S.R. and democratic countries on all questions of foreign policy. These countries, and in the first place the new democracies—Yugoslavia, Poland, Czechoslovakia and Albania . . . as well as Bulgaria, Rumania, Hungary and to some extent Finland [fol. 2478] . . . have proved themselves in the post-war period staunch defenders of peace, democracy and their own liberty and independence against all attempts on the part of the United States and Great Britain to turn them back in their course and to bring them again under the imperialist yoke." (Pet. Ex. 214-A, p. 2.)

Zhdanov reviews the function of the Comintern apparatus to the world Communist movement, and shows again that it was dissolved because it was becoming a factor "hindering" the development of Communist Parties. He emphasizes, however, that "The new stage in the develop-

ment of the Communist Parties demanded new forms of contact among the parties. It was these considerations that made it necessary to dissolve the Comintern and to devise new forms of connection between the parties." (*Ibid.*, p. 4.) He further stresses that dissolution of the Comintern did not mean "the elimination of all ties, of all contact" between Communist Parties, that "experience has shown that such mutual isolation of the Communist Parties is wrong, harmful and, in point of fact, unnatural." (*Ibid.*, p. 4.)

Zhdanov, as a leading Russian Communist, reasserts for the Cominform the programs and policies of the world Communist movement once enunciated via the Comintern and specifies the tasks for Communist Parties throughout the world, stating:

> "The chief danger to the working class at this present juncture lies in underrating its own strength and overrating the strength of the enemy. . . . concessions to the new course of the United States and the imperialist camp may encourage its inspirers to be even more insolent and aggressive. The Communist Parties must therefore head the resistance to the plans of imperialist expansion and aggression along every line —state, economic and ideological; they must rally their ranks and unite their efforts on the basis of a common anti-imperialist and democratic platform, and gather around them all the democratic and patriotic forces of the people." (*Ibid.*, p. 4.)

Malenkov, in his report to the Cominform's founding conference, adhered to the concept of two antagonistic camps as outlined by Zhdanov, and proclaimed that "all the sharpness of the class struggle, as far as the U.S.S.R. is concerned has now been shifted to the international scene." (Pet. Ex. 367, p. 144.) Malenkov openly states that: "The wise Stalin foreign policy of the Soviet Union, both prior to the war [World War II] and in the course [fol. 2479] of its conduct, enabled us correctly to utilize the contradictions existing within the imperialist camp." (*Ibid.*, p. 142.). Indicating further the Soviet Union's leadership

of the world Communist movement and its aid to the so-called "new democracies," Malenkov states:

> "With regard to countries that have proved true friends and loyal allies of the Soviet state—the new democracies—the U.S.S.R. is always prepared to come to their assistance, and actually does so by rendering them extensive aid and firmly defending their interests." (Pet. Ex. 367, p. 143.)

Further, he reaffirms the colonial and national liberation policy of world communism:

> "The U.S.S.R. and the new democracies pursue a policy of unswerving support with regard to colonial and dependent countries fighting for their national liberation from the yoke of imperialism." (*Ibid.*, p. 143.)

Showing a continuation of the general "anti-imperialist" policy of the world Communist movement, its identity with the foreign policy of the Soviet Union, and that its objective is to undermine "imperialism" and hence the United States, Malenkov states:

> ". . . The foreign policy of the Soviet Union and of the democratic countries is designed to undermine imperialism, secure a stable and democratic peace among the nations, and generally strengthen amicable cooperation among the peace-loving nations.
>
> "In following this line, our foreign policy is supported by the increased international significance of the Soviet state and the new democracies.
>
> "The other trend in international politics is headed by the ruling clique of American imperialists. . . ." (*Ibid.*, p. 142.)

Concerning the necessity for reconstituting some apparatus to help coordinate the world Communist movement, Malenkov, speaking for the Central Committee of the Russian Communist Party, stated:

> [fol. 2480] "The absence of contact between Communist Parties is a hindrance in coordinating the ac-

tions of Communists in various countries in their resistance to the plans of the imperialists, particularly now, when American monopoly capital is organizing an offensive against Communism and democracy, against the U.S.S.R. and the new democracies * * * In our opinion it is necessary to put into effect definite measures designed to eliminate the present abnormal situation in this respect.

"That is why we consider it necessary to discuss at the present conference both the international situation and the question of improving contact between Communist Parties, of establishing regular connections between them with a view to achieving mutual understanding, exchange of experience and voluntary coordination of activities of the Communist Parties whenever they consider this necessary." (Pet. Ex. 367, p. 145.)

Respondent, although never formally a member of the Cominform, has, as shown by the evidence discussed in subsequent sections of this Report, remained dedicated to "proletarian internationalism," Marxism-Leninism, and the policies and programs of the world Communist movement as continued by the Cominform.

When the foregoing statements made at the Cominform's founding conference by leaders of the Soviet Union are considered in the light of additional evidence showing the policies and programs enunciated by the Cominform during the years that followed, it is clear that the world Communist movement, intact in policy and program and under the leadership of the Soviet Union, continued to exist and that the Cominform was another apparatus serving this movement.

### (1) Programs and Policies

Turning now to an illustration of the additional evidence showing the continuation of the policies of the world Communist movement via the Cominform, its official organ for December 1949 publishes a report (Pet. Ex. 249) of M.

Suslov, a high official of the CPSU,[56] to a meeting of Communist Parties in November of that year, which we find, [fol. 2481] on the basis of its promulgation in the Cominform's official organ and viewed against other evidence of record, including issues of *For a Lasting Peace, for a People's Democracy*, expresses the views and policies of the Cominform. We shall briefly set forth the aspects of this report which show the continuation of the pre-existing policies and programs of the world Communist movement and hence evidences the continuation of that movement.

The basic concept of two antagonistic world camps and their composition is continued by the Cominform:

> "For the past two years, two lines in world policy have become even more clear and sharp—the line of the democratic, anti-imperialist camp headed by the U.S.S.R.—the camp waging a persistent and consistent struggle against imperialist reaction, for peace between peoples and for democracy, and the line of the imperialist, anti-democratic camp headed by the U.S. —the camp which has as its main object the enslavement of other countries and peoples, the forcible establishment of Anglo-American world domination, destruction of the forces of democracy and the unleashing of a new war. The struggle between these opposite camps has sharpened. . . ." (Pet. Ex. 249, p. 2.)

The national Communist Parties of the world, including those in "capitalist" countries, continue to be aligned in the world camp of peace led by the Soviet Union, and are considered as having gained in strength and influence "despite the rabid anti-Communist witch-hunt carried on by the entire camp of world reaction." (*Ibid.*, p. 3.)

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[56] Petitioner's expert witness Mosely identified M. Suslov as an authoritative spokesman for the Soviet Union, having served as an alternate member of the CPSU Politburo and as a member of the Organization and Propaganda Committees of the CPSU Central Committee. Mosely considers this report an authoritative statement of the Soviet Union's views, and we so find.

The national and colonial liberation programs and policies are also set forth and the success of this program as respects China[57] is noted:

> "The growth and consolidation of the anti-imperialist forces are further borne out by the great successes of the national liberation movements in colonial and dependent countries.
>
> "An historic victory was won by the Chinese people who overthrew the Kuomintang regime of national betrayal, colonial exploitation and feudal oppression.
>
> [fol. 2482] "The creation of the People's Republic of China strikes the most severe blow at the predatory designs of United States imperialism . . .
>
> "The inclusion of China in the family of democratic peace-loving States signifies a further change in the correlation of forces in the international arena in favour of the camp of democracy and peace and extends and consolidates the front of peace." (Pet. Ex. 249, p. 3.)

The tactic of utilizing the national independence movements by linking them with a united front shibboleth, formerly "anti-fascism" and now "peace," is also specified as the duty of national Communist Parties, particularly those in capitalist countries:

> "The duty of Communist and working class parties in capitalist countries is to merge the struggle for national independence with the struggle for peace . . . to rally and consolidate all democratic patriotic forces in each country round the slogans of eliminating the shameful U.S. bondage . . .
>
> "The Communist and Workers' parties should carry high the banner defending the national independence and sovereignty of their countries." (Pet. Ex. 249, p. 3.)

The leadership of the Soviet Union and the continuation by the Cominform of its "peace" policy are also shown:

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[57] This program concerning China is discussed in detail *infra*.

"The growth and consolidation of this camp are evident, above all, from the further growth of the might of the Soviet Union which marches at the head of the anti-imperialist camp, at the head of the struggle for a stable peace. * * * The peace-loving foreign policy of the Soviet Union, as well as the foreign policy of the People's Democracies, is a powerful factor strengthening the camp of peace and democracy. * * * The peaceful policy of the Soviet Government arises from the very essence of our Socialist society in which there are no classes interested in wars." (Pet. Ex. 249, p. 2.)

[fol. 2483] Continuation of this international "peace" program and its implementation by Communist Parties of the world, using the united front tactics,[58] to head this struggle and to "give it purposeful and effective direction" while combatting the "Right-Wing Socialist disrupters" is also directed as a central task:

". . . the cardinal task of the Communist and Workers' Parties is to draw the broadest sections of the working class into the ranks of fighters for the cause of peace; to effect firm working class unity; resolutely combat the Right-Wing Socialist disrupters and disorganisers of the working class movement; organise joint actions of various sections of the proletariat on the basis of a joint platform of struggle for peace and for the national independence of their countries." (Pet. Ex. 249, p. 3.)

. . . . . .

[58] Cf. in this connection *For a Lasting Peace* of July 15, 1948 (Pet. Ex. 345), concerning the Cominform's censure of Tito which reprints a statement of the Central Committee of the Italian Communist Party that: "Marching toward socialism, our united front employs different forms of struggle, changing according to the concrete conditions. However, the direction of the movement must be the same for each one: in the sphere of theory—Marxism-Leninism, and in the sphere of real forces—the land of socialism [the Soviet Union] which is headed by the Marxist-Leninist Party steeled in the battles of the three revolutions and two victorious wars."

". . . It is necessary to proceed from the concrete conditions in each country, skilfully combining various forms and methods of the movement with the general tasks.

* * * * * * *

". . . the Communist and Workers' Parties should daily expose the Right-Wing Socialist chiefs as the worst enemies of peace.

"At the same time, it is necessary to develop and consolidate, by all means, both co-operation and united action in the struggle for peace with the basic organisations and rank and file of the Socialist Parties . . ." (*Ibid.*, p. 3.)

[fol. 2484] Showing continuation of the program and strategy of world communism to utilize the trade unions and the youth and subordinate them to Party ends, using the "peace" issue, is the statement that: "Particular attention should be devoted to drawing into the peace movement trade unions, women's, youth . . . organisations." It is emphasized that the trade unions affiliated with the World Federation of Trade Unions are in the camp of peace but that trade unions can be made to do much more, and it is provided that:

"Peace committees at factories and offices . . . can and should become the central link in the activity of trade unions in this sphere. * * * Rallying factory and office workers, irrespective of their nationality, party or trade union affiliation, the peace committees must become centres of struggle for universal unity of the working people in defence of peace . . ." (Pet. Ex. 249, p. 3.)

The "anti-imperialism" program of the world Communist movement, now emphasizing opposition to the United States' Marshall Plan for Europe, and to an alliance of Western powers in the North Atlantic Pact and NATO,[39]

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[39] In this connection, respondent in the *Daily Worker* of June 9, 1952 (Pet. Ex. 495), protested the prosecution of French Communists for conspiring against the internal security of France, charging that this "bears the sign—'Manufactured U.S.A.'" and it went

is set forth, as well as the duties of various national Communist Parties with respect thereto:

> "Particular important tasks confront the Communist Parties of France, Italy, Britain, Western Germany and other countries whose peoples the U.S. imperialists wish to use as cannon fodder in realising their aggressive plans.
>
> "Their duty is to develop, with even greater energy, the struggle for peace to frustrate the criminal designs of the Anglo-American instigators of war.
>
> "Alongside the exposure of the imperialist warmongers and their accomplices, the Communist and Workers' Parties in the People's Democracies and the Soviet Union face the task of further consolidating the camp of peace and Socialism in defending peace and the security of peoples." (*Ibid.*, p. 3.)

[fol. 2485] Evidencing further the existence and the make-up of the world Communist movement, *For a Lasting Peace* of December 30, 1949 (Pet. Ex. 392), hailing Stalin's 70th birthday, reported that "The Communist and Workers' Parties and democratic organisations throughout the world recognise in J. V. Stalin the leader and organiser of their struggle for the interests of the working people" and that greetings were received from the Central Committees of the Communist and Workers' Parties of China, France, Italy, the United States, Britain, Germany, Spain, India, Japan, Poland, Czechoslovakia, Rumania, Hungary, Korea, Bulgaria, Albania, Mongolia, Finland, Trieste, Pakistan, Australia, Brazil, Belgium, Austria, Sweden, Israel, Columbia, New Zealand, Siam, Holland, Luxemburg, Denmark, Switzerland, South Korea, Punjab, Porto Rico, Syria, and others.

Also evidencing the continuation of the world Communist movement, and that one of its chief purposes is to defend and support the Soviet Union, is the Cominform's

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on to emphasize to the French Party: "We know your struggle is our struggle—a common fight against a common enemy—to defeat the North Atlantic war alliance, to prevent the re-nazification and remilitarization of Western Germany, to fight for a Five-Power Pact of Peace and Friendship as the only path to peace and freedom."

promulgation with approbation of the statements of the French Communist Party in *For a Lasting Peace* of March 1, 1949 (Pet. Ex. 333), that: "The Soviet Union has never been and can never be an aggressor against any country"; and that it accordingly would support the Red Army if it marched into France "defending . . . the cause of Socialism." A chain of similar responses from Communist Parties throughout the world occurred and similarly were reprinted in *For a Lasting Peace* of March 15, 1949 (Pet. Ex. 334), and described by the Cominform as voicing "their determination to frustrate the plans of the Anglo-American warmongers and to defend the bulwark of peace—the Soviet Union and the countries of People's Democracy." (Pet. Ex. 334.) The Cominform published excerpts from the statements made by the leaders of the Communist and Workers' Parties of Italy, Great Britain, Norway, Denmark, Mexico, Canada, Finland, Argentina, Australia and Columbia, and stated: "Similar statements were made by the Communist Parties of the United States,[60] Austria, Japan, Cuba, Uruguay and other countries." Under the caption "Communists of All Countries Stand as One" a statement of the Finnish Communist Party sums up the tenor of what the evidence establishes, namely, in the event of war involving the Soviet Union against the so-called imperialist powers, "the duty of all Communists and defenders of peace is to help the Soviet Union and other countries attacked." (Pet. Ex. 334.) [fol. 2486] Further in this connection, respondent at its 15th National Convention, held in December of 1950, received communications from Communist Parties throughout the world, including those in the Soviet Union, China, France, Italy, Hungary, Poland, Bulgaria, Czechoslovakia, Romania, Germany, Austria, Great Britain, Canada, Mexico, Brazil, Cuba, Spain, Norway, Denmark, The Netherlands, Northern Ireland, Eire, India, Israel, Algeria, Ceylon, Trieste, Belgium, New Zealand, Australia and Indonesia, among others. These "greetings" likewise are replete with phrases that reveal the characteristics and leadership

[60] See in this connection Petitioner's Exhibit 331, the *Daily Worker* of March 3, 1949, wherein respondent's leaders Foster and Dennis state that the statements of the French Party discussed above "*'emphatically serve the cause of peace.'*"

of the world Communist movement and that respondent has an "internationalist duty" with respect thereto. The following are illustrative:

". . . together with you, 800 million people led by the invincible Soviet Union, defend peace and liberty. . . .;

". . . Your successes are our successes.;

". . . your Party will raise still higher the immortal banner of Marxism-Leninism and will honorably fulfill its patriotic and internationalist duty . . .;

". . . the fight . . . for peace and democracy, inspired by the peace-loving Soviet Union and the great Stalin, will win.;

"Your fight, dear comrades, is our fight . . .;

". . . You have a decisive place in the camp of peace. . . .;

". . . we pursue the same aims . . . we face the same enemy, American imperialism.;

". . . Headed by the mighty Socialist Soviet Union and our friend and teacher Joseph Stalin, the world camp of peace is going forward to win . . .;

"United by proletarian internationalism under the banner of the great Stalin, we will march victoriously on the road to peace and Socialism.;

". . . we are firmly convinced that you . . . will fulfill the great task of world significance . . .;

"Long live proletarian internationalism!;

[fol. 2487] "Your invitation confirms that proletarian internationalism, in spite of hate, persecution and terror, is a living reality. . . .;

"Our fight for peace, independence and freedom is directed against the same enemy as you fight.;

". . . We pledge our maximum contribution to the peace movement headed by the Soviet Union.

"Long live the solidarity of the working people in the whole world . . . for the triumph of the ideas of Marx, Engels, Lenin and Stalin!" (Pet. Ex. 376, pp. 229-253.)

### c. Effectiveness of World Communist Movement

Illustrating that the above-discussed policies and programs of the world Communist movement as effectuated by Communist Parties throughout the world, including respondent, have resulted in the actual establishment of dictatorships of the proletariat controlled by a national Communist Party in alliance with the Soviet Union is the evidence concerning China and Eastern Europe.

The perspective of world Communist policy concerning China is stated by Malenkov in a report to a meeting of the Moscow Soviet in November 1949 (reprinted in *For a Lasting Peace*, Pet. Ex. 231), as follows:

> "In 1923 Lenin said the issue of the world struggle between capitalism and Communism depends, in the final analysis, on the fact that Russia, India, and China constitute the overwhelming majority of the population of the world and that this majority was being drawn with extraordinary rapidity into the struggle for its liberation." (Pet. Ex. 231, p. 2.)

As shown by the various Congresses of the Comintern through the years, it was constantly emphasized that practical support must be rendered the Chinese national liberation movement and the Chinese Communists by Communist Parties throughout the world.[61]

[fol. 2488] In this connection, petitioner's witness Gitlow, substantiated by official Party minutes (see, e.g., Pet. Exs. 24, 39, 55, 78, 81, 82, 90, and 91), shows that during the 1920's respondent, as an integral part of the world Communist movement and as a section of the Comintern, resolutely supported the Communist movement in China and attacked and opposed in its propaganda and agitational activities the United States and Great Britain as imperialist interventionists in China. It is established that this was to further the activity of the Communist International in China.

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[61] For example, the *Resolutions* of the Seventh World Congress of the Comintern, held in 1935, directed: "In China, the extension of the Soviet movement and the strengthening of the fighting power of the Red Army must be combined with the development of the people's anti-imperialist movement all over the country." (Pet. Ex. 137, p. 35.)

The importance of respondent's activities is indicated by the fact that in 1927 the Comintern specifically directed that respondent charge the United States and Great Britain with intervention in Chinese affairs and attack Chiang Kai-Shek, and the *Daily Worker* of September 6, 1927 (Pet. Ex. 24), reprinted a cable sent by respondent to the Comintern, wherein respondent pledged "to fight more effectively for . . . the Chinese Revolution." Earl Browder, having been assigned to Comintern activities in China, was recalled by the Comintern and installed by Stalin as leader of respondent in resolving a factional dispute in 1929. He remained respondent's principal leader until 1945.

In a resolution adopted by its Central Committee in 1935, respondent recognized the new united front tactics of the Comintern's Seventh World Congress as a means "to render the utmost assistance to the national liberation movements, especially in China." (Pet. Ex. 185, p. 1184.) In 1941 respondent had as a slogan for action: "*All aid to the Chinese people fighting for their national independence!*" (Pet. Ex. 199, p. 682.)

Petitioner's witness Mosely establishes that the Nationalist government of China was in control of certain Chinese provinces and the people's government led by the Chinese Communist Party was in control of other areas immediately following the Japanese surrender, and that they carried on negotiations for a unified government and army. The Soviet Union and the United States recognized the Nationalist government as the legal representative of all China; however, the Soviet Union and respondent urged support of the position advanced by the Chinese Communist Party. Beginning about 1948 the Chinese civil war commenced and the Soviet Union supported the Chinese Communists in this war, and afterwards immediately recognized the people's government established by the Chinese Communist Party.

Respondent's views and policies on these matters were similar to those of the Soviet Union. For example, in late 1945 the Party directed its members, as one of its "Next Tasks," to: "Press for a united and free China [fol. 2489] based upon the unity of the Communists and all other democratic and anti-Japanese forces"; and to

"Give full military aid to the Chinese guerillas led by the heroic Eighth and Fourth armies." (Pet. Ex. 210, p. 822.)

In a cablegram (Pet. Ex. 233) sent on December 6, 1948, *"To the victorious fighters and leaders of the People's Liberation Army, led by the great Communist Party of China and its helmsman Mao Tse-tung,"* respondent stated:

> "Your mighty military advances . . . are each day . . . restricting and weakening the camp of imperialism. * * * your victories mean defeats not only of the hated Chinese reactionaries but also for Wall Street imperialism, the most dangerous foe of national freedom, peace and democracy in the postwar world. * * * Be assured, dear comrades, we shall play our part in the united mass struggle for . . . stopping Wall Street's imperialist intervention in China . . . We approach all of our work and policy—strengthened by your valor and successes and imbued with the great spirit of international solidarity and co-operation—invigorated by the knowledge that you, our heroic Chinese comrades . . . playing a leading role in the world-wide anti-imperialist camp, headed by the Socialist Soviet Union, are advancing the causes of national liberation, peace, democracy and social progress." (Pet. Ex. 233, pp. 1046, 1140.)

In 1949, as part of its activities concerning China, respondent's National Education Department issued a "Discussion Outline and Material for Classes" entitled "World Significance of the Events in China," where the "International Significance of the Victories of the Chinese Revolution" are discussed as aiding "the progressive anti-imperialist forces in the United States as well as all other people who are fighting American imperialist exploitation." (Pet. Ex. 399, p. 6.) Under the heading "Program of Action," the Party instructs that: *"It is now the task of all American progressives to urge and work for the recognition and support of the emerging democratic coalition government of New China"* (*ibid.*, p. 13); and that: "Action on China must be in terms of struggle against whole U.S. imperialist program." (*Ibid.*, p. 14.)

Under the caption *"The Chinese people are helping us defeat our common enemy—American monopoly,"* the "Spe-

cial responsibilities of the Communist Party" are set forth as being "to arouse the people to render direct and determined support to the liberation movement of the oppressed [fol. 2490] peoples against the imperialism of 'their own country.'" (Pet. Ex. 399, p. 14.) Under the title "*Actions proposed,*" a number of activities and tactics are outlined for the Party, such as: "Plan an effective program of action for your club on the China issue. * * * Connect the China issue with our inflation at home and with the overwhelming military expenditures . . ." (*Ibid.*, p. 15.)

The Soviet Union, in a *Pravda* editorial of October 1949 entitled "The Historic Victory of the Chinese People" (Pet. Ex. 230), shows, as does respondent, that the program, policies and support of the world Communist movement, led by Stalin, has guided and aided the Communist Party of China to obtain power:

> "The great geniuses of humanity, Lenin and Stalin, foresaw the inevitable upsurge of revolution in China. They elaborated the doctrine of national-colonial revolution in the epoch of imperialism, which occurs under the leadership of the working class and under the banner of internationalism—a doctrine which has taken its place in the treasure house of Marxism-Leninism. In the profoundest scientific manner, Comrade Stalin analyzed the character, the features, and the conditions of the Chinese anti-imperialist, anti-feudal revolutionary victories. The Chinese Communist Party, guided by the scientific theory of communism, is the main force in the struggle for national independence and for the victory of the people's democracy in China. * * * The historic victory of the Chinese people is another tremendous blow to the entire system of imperialism . . . *This victory augments the forces . . . headed by the great Soviet Union.*" (Pet. Ex. 230, pp. 612-613, emphasis added.)

Malenkov, in reporting to the Moscow Soviet in November 1949 (Pet. Ex. 231, *supra*), also declared that: "Life has fully confirmed Comrade Stalin's prediction"; and that "equipped with the victorious Marxist-Leninist teaching,

the Communist Party of China proved equal to its historical mission." (*Ibid.*, p. 2.)

As shown by the *Daily Worker* of October 4, 1949 (Pet. Ex. 234), respondent, in a message to Mao Tse-tung, hailed "the formation of the Central Government of the People's Republic of China" as "an historic and glorious event which heralds . . . the defeat of Wall Street's criminal policy of reactionary intervention in the internal affairs of the great Chinese people."

[fol. 2491] Party leader Betty Gannett in the October 1951 issue of *Political Affairs*, in an article entitled "The Second Anniversary of the Chinese People's Republic" (Pet. Ex. 486), openly proclaims that: "The national-liberation struggle in China was victorious because it was led by . . . the Chinese Communist Party, and its helmsman Mao Tse-tung," and was "*unconquerable because it had the enthusiastic support of the peace-loving, democratic camp throughout the world, above all, the fraternal friendship and aid of the Union of Soviet Socialist Republics*, beacon of the oppressed and exploited the world over." (*Ibid.*, p. 42, emphasis added.) Stalin's "teachings" on the "character and tasks of the Chinese Revolution" (*ibid.*, p. 39) are also praised by respondent's leader Gannett as of substantial aid and she, too, shows that "proletarian internationalism" continues, as before, to signify allianee with the Soviet Union. (*Ibid.*, pp. 39-40.) Respondent also maintained the same views and policies as the Soviet Union in relation to and involving the seating of Communist China in the United Nations and its participation in the Korean War. See "Nondeviation," *infra*.

The machinations of the world Communist movement's united front tactics in calling for the formation of a coalition government including Communists in a given country and their taking control of the government by subverting the other political elements in the coalition is further graphically illustrated by the countries of Central and Eastern Europe occupied by the Red Army after World War II.[62]

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[62] See in this connection Dimitroff's *The United Front* (Pet. Ex. 149); wherein it is prophetically stated: "It may be that in a number of countries *the united front government* will prove to be *one* of the most important transitional forms . . . to the '*pro-*

Immediately following the end of World War II, coalition governments which included a Communist Party were established in Czechoslovakia, Roumania, Bulgaria, Hungary and Poland. Petitioner's expert witness Mosely and documentary evidence show that during the period from 1945 to 1947 both the Soviet Union and respondent supported these coalition governments and the role of the national Communist Parties within them, but at the same time accused the United States and Great Britain of striving to destroy democracy in these countries and to extend their so-called imperialist control over them.

[fol. 2942] Witness Mosely, substantiated by documents, further established that in Hungary in the last week of May 1947 the major change in government occurred when the Communist Party of Hungary and those ministries which it controlled, including the Ministry of Interior which controlled the police, effectively destroyed the party organizations of other parties which had been members of the coalition government.

In the case of Roumania, major changes toward completion of Communist control came in August and September of 1947, when the principal non-Communist members of the government were removed. In the case of Bulgaria, a turning point also occurred May 1947, when the non-Communist parties were forced to disband themselves. In Czechoslovakia, a coalition government existed from October 1944 to February 1948, when the Czechoslovakian Communist Party took over control of the country and other political parties were dissolved or dissolved themselves.

The attitude of the Soviet Union in relation to the political affairs of Bulgaria, Roumania, Hungary, and Czechoslovakia was to encourage the gain in power by the various national Communist Parties. The Soviet position was that

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*letarian revolution,'* i.e., to the overthrow of the bourgeois dictatorship." (*Ibid.*, p. 75.) Dimitroff makes it plain that: "Final salvation this [united front] government *cannot bring*" (*ibid.*, p. 76), and he instructs that: "If our parties are able to utilize in Bolshevik fashion the . . . formation and maintenance in power of such a government *for the revolutionary training of the masses*, this will be *the best political justification* of our policy in favor of the formation of united front governments." (*Ibid.*, pp. 76-77.)

these governments were expedients for the national Communist Parties to increase their power at the expense of other parties in such coalitions and to establish a dictatorship of the proletariat. Respondent adhered to the Soviet policy in regard to these governments and attacked the policy of the United States toward them as imperialistic.[63]

That the strategy and tactics for such activity by Communist Parties of the world were laid down by the Seventh World Congress of the Comintern and continue into the present as the policy and program of the world Communist movement is shown by respondent's leader William Z. Foster, writing in *Political Affairs* of June 1950 (Pet. Ex. 219) on "People's Front and People's Democracy." Foster sums up what the record establishes in this connection, namely, that:

> "The substance of the new tactical orientation of the Comintern was twofold: (a) to provide an anti-fascist, anti-war program and organizational form broad enough to encompass the mighty democratic masses that had been set in motion politically by the capitalist crisis and the fascist war threat; and (b) to make provisions for the Communists, under specific [fol. 2493] conditions, to participate in people's front governments that could develop out of the anti-fascist, anti-war struggle. These new tactical concepts, needless to reiterate, were in full harmony with the whole body of Marxist-Leninist principles." (Pet. Ex. 219, p. 19.)

Concerning the establishment of the "People's Democracies" in Central and Eastern Europe, Foster recognizes that "in preventing European counter-revolution from attacking the new People's Democracies, the Soviet Army played the decisive role." (*Ibid.*, p. 27.) He further clearly shows the utilization of the world Communist movement's

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[63] In the section of this Report entitled "Nondeviation," we treat with the similarity of views and policies of respondent and the Soviet Union on a wide range of matters, some pertaining specifically to a particular "People's Democracy" and others, such as the Marshall Plan and NATO, pertaining to these countries as a bloc of the Soviet-led world camp.

united front tactics and the aid of the Soviet Union in setting up these Communist dictatorships, stating:

> "... While they were forms of the proletarian dictatorship from the outset they grew and consolidated themselves in revolutionary struggle against capitalist reaction. At first the governments of the People's Democracies were made up of broad coalitions of all the parties that generally had combatted fascism during the war. ... The strong leaders of the coalition governments were the powerful Communist Parties. ... *with the assistance of the U. S. S. R.*, all went through a rapid process of strengthening and consolidating themselves. The Communist Parties grew tremendously and finally brought about an amalgamation with the Social-Democratic parties. ... The several coalition governments systematically purged the armies, police forces, state bureaus, schools, industries, etc., of reactionary leadership. *The bourgeois elements were forced out of the governments and their parties were largely dismantled.* The program for the nationalization of industry, the break-up of the big estates, etc., was pushed with great vigor. This was no mere automatic consolidation of the People's Democracies. It was the sharpest form of class struggle, reaching the point of civil war in some countries—Poland, for example. ..." (Pet. Ex. 219, p. 27, emphasis added.)

In conclusion of this phase of the evidence, we find that the present world Communist movement was first manifested organizationally by the Third Communist International and was organized and led by the leaders of the Soviet Union; that it internationally implemented basic Marxist-Leninist policies and programs designed to foster the growth and increase the strength of the Soviet Union and to establish in countries throughout the world in alli- [fol. 2494] ance with the Soviet Union so-called dictatorships of the proletariat, which constitute in reality dictatorships of the Communist Parties; that the principal international Communist policies and programs, and the strategy and tactics for implementing them to achieve these ends, involve the national liberation and the colonial

movements, national political activities, labor unions, youth, the "anti-imperialism" and "peace" programs, the adherence to Marxism-Leninism and constant struggle against ideologies considered inimical to it, and the utilization of the united front tactics, leading to the consolidation of governmental power in dictatorships of the proletariat; that the organizational form effectuated by the Comintern was abandoned by the Soviet Union in 1943, though leaving the world Communist movement intact in program, policy and strategy under the hegemony of the Soviet Union; that the Cominform, organized in 1947, was another apparatus of the world Communist movement, and perpetuated under the leadership of the Soviet Union the basic policies, programs, and strategy and the united front tactics of the world Communist movement; that, working in conjunction with national Communist Parties throughout the world, the Soviet Union has directed the strategy and tactics and has aided such Parties to acquire governmental power and establish dictatorships in the countries of Eastern and Central Europe and China; and that the objective of this movement is to establish similar dictatorships in non-Communist countries throughout the world.

What the evidence establishes concerning the continuation of the world Communist movement, intact in policy, program, strategy and leadership, is succinctly illustrated by respondent's leader William Z. Foster, writing in *Political Affairs* of June 1950 (Pet. Ex. 219), as follows:

> "Political strategy and tactics, as Marx, Lenin and Stalin taught us, are not permanent, all-enduring but must evolve to meet changing circumstances. It is not surprising, therefore, that the tactics laid down at the Seventh Congress, while continuing to be fundamentally correct, have, in the ensuing fifteen stormy years, undergone a certain change, growth and development, with the fundamental change in the world situation. It would be absurd to think that it could possibly be otherwise. *Among the later developments may be mentioned: the line of national and international unity establishment of the postwar People's Democracies of followed during the war, the new policies used in the*

*Eastern Europe, Communist participation in the coalition governments of France and Italy and the victorious* [fol. 2495] *developments of the great Chinese Revolution, the main line of which was stated by Stalin as much as 24 years back.* And no doubt other important tactical developments will take place in Communist policy as the world struggle for Socialism proceeds. *It is important to note here that all the tactical, and sometimes strategical, changes that have taken place during the past 15 years are in accord with the solid Marxist-Leninist line of the famous Seventh Congress of the Comintern.*[64] * * * But, *regardless of tactical variations* that may be necessary as *the class struggle proceeds, the road to Socialism remains the same—through the defeat of the capitalist class and the establishment of the dictatorship of the proletariat.*" (Pet. Ex. 219, pp. 19-20, emphasis added.)

As subsequent portions of this Report will establish further, respondent practically since its inception has been an active integral part of this world movement. In view of the evidence above set out, it is reasonable to conclude that respondent will, if circumstances were to permit, initially proceed toward its goal in the manner of the Communist Parties of the so-called People's Democracies of Eastern Europe. When taken in context with the rest of his article, quoted in part above, this is shown by Foster's statement that: "Although the establishment of a people's front or democratic coalition government is not yet upon the immediate political agenda in the United States, nevertheless, as Marxist-Leninists, we can already profitably understand our general tasks in such an eventuality." (Pet. Ex. 219, p. 26.)

We find (1) that there exists a world Communist movement, substantially as described in section 2 of the Act, which was organized by the Soviet Union and has as its primary objective the establishment of Communist dictatorships of the proletariat in all countries throughout the world, including the United States, and (2) that the direc-

[64] Thus, in 1950, respondent is admittedly effectuating the 1935 Seventh Congress, see fols. 2468-2474, *supra*.

tion, domination and control of this movement is vested in, and is exercised by, the Soviet Union.

[fol. 2496]

### 3. Respondent's Internal Organization

Respondent calls itself the "Communist Party of the United States of America" which conforms with the plan of Marxism-Leninism for a "National Communist Party" or "a Party of the Communists" in each country or nation, and which also conforms with a requirement of the world Communist movement, while organized under the name of the Communist International, that each member party call itself the "Communist Party" of its particular country.[65] We examine below significant organizational principles of respondent in the light of those prescribed in Marxism-Leninism and by the Communist International. First, it is pertinent to make findings concerning the organization and development of respondent throughout its existence.

#### a. Communist International and Communist Information Bureau

We have previously set forth that respondent joined the Communist International shortly after it was constituted and admittedly participated therein until 1940. Respondent offered no substantial evidence concerning this period of its activities, contending that this period is irrelevant, primarily because of an announced disaffiliation from the Communist International in 1940. The circumstances of the disaffiliation, as found later herein, show that there was no fundamental or significant change in respondent's relationship to the world Communist movement. The past activities are clearly relevant and due to their nature are material.

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[65] Our findings under the heading "Marxism-Leninism" contain a number of the characteristics for the Party. Stalin, writing in *Foundations of Leninism*, states that "Without such a party it is useless even to think of overthrowing imperialism and achieving the dictatorship of the proletariat." (Pet. Ex. 121, p. 108.) See also the "Conditions" of membership in the Communist International *supra* fols. 2452-2454.

The oral testimony and official documents of respondent and of the Comintern show that respondent was under the complete control and direction of the Comintern. Gitlow was a top official of respondent and in the late 1920's a member of the Executive Committee of the Communist International. He stated unequivocally that the Comintern controlled all major policies of respondent. Kornfeder, also a functionary of respondent and who attended the Sixth Congress of the Comintern held in Moscow, corroborated this stating that he knew of no instance during his experience, which lasted until 1934, when respondent deviated from Comintern instructions.[66] Nowell, based on per- [fol. 2497] sonal experience as a member of respondent and personal contact with the Comintern, as well as what he was instructed while attending the Lenin School in Moscow in 1932, stated that the decisions of the Comintern were binding on respondent. Honig testified to Comintern directives which were carried out by respondent.[67] We have heretofore set forth the finding that respondent accepted and became bound to the "21 Conditions" of membership in the International.

Among the specific instances of record, much of which is uncontroverted documentary material, showing the control exercised over respondent by the Comintern were: a Comintern decision in 1924 which resulted in the amalgamation of various Communist factions in the United States into the single Communist Party; a decision by Joseph Stalin in 1929, adopted by the Comintern, which expelled certain top officials of respondent and designated other individuals as leaders of respondent; advance approval by

[66] The witness Kornfeder became belligerent at times and his conduct as reflected by the record caused us to examine his testimony with commensurate caution. This scrutiny leads us to the conclusion that while upon occasion his conduct on the stand was unbecoming his testimony was strongly corroborated by documents and oral testimony, and in essence should be credited.

[67] The testimony of Honig on cross-examination resulted in our scrutinizing his entire testimony with extreme care and only where findings are based in whole or in part on his testimony is he credited. Needless to say, in such instances we feel the testimony warrants reliance.

the Comintern for the holding of Communist Party conventions in the United States; Comintern instructions in 1927 that respondent charge the United States and Great Britain with intervention in Chinese affairs and to attack Chiang Kai-Shek; Comintern decision directing respondent to work for the formation of a farmer-labor party in the United States and a subsequent change directing respondent to go into elections with the Communist Party ticket; and, advance approval by the Comintern of members of respondent who were sent to training schools in Moscow. It was stated by respondent in 1934 that "the Comintern spoke to the American Party with authority and wisdom." (Pet. Ex. 126, p. 246.) In 1929 respondent stated in an official Party document:

> "One who fights the Soviet Union and the Comintern is an agent of capitalism directed against our Party in its campaign to mobilize the workers against imperialist war and for the defense of the Soviet Union." (Pet. Ex. 108, p. 6.)

The Soviet Union formed, controlled, and dominated the Communist International (*supra*, fols. 2450-2451); the Communist International for over 20 years constituted an organizational instrumentality through which the Soviet Union dominated and controlled respondent.

[fol. 2498] Respondent makes much of the fact that it "disaffiliated" from the Communist International in 1940. There was no dispute that respondent in 1940 announced its disaffiliation for the stated purpose of avoiding registration as a foreign agent under the Voorhis Act of October 17, 1940. An issue is the effect of the disaffiliation.[68]

Meyer showed without rebuttal that the delegation from the Illinois-Indiana district of respondent to a special con-

[68] In determining whether there has in fact been any fundamental or significant change in respondent's relationship to the Soviet Union and the world Communist movement since the announced disaffiliation it is material, of course, to examine respondent's subsequent conduct and activities. It is also material, however, to determine whether the disaffiliation was intended as a break from them and disagreement with the purposes and objectives thereof.

vention of respondent held to discuss the disaffiliation reported to a State Committee meeting the disaffiliation was a matter of expediency, that it changed nothing fundamentally or significantly, and that it had to be done to preserve the legality of the Party. Lautner corroborated this. He was a delegate to the special convention and described the understanding of the convention to be that the disaffiliation was an expediency which in no way affected the Party's attitude on the question of "proletarian internationalism."

Respondent put in evidence a copy of the report made by its then general secretary, Earl Browder, at the special convention. The Browder report makes clear that the disaffiliation was but an expediency to avoid registration under the Voorhis Act and contains nothing which negatives an intent to continue as before the principle of "proletarian internationalism."[69] Various passages of Browder's report indicate an intent to end only the "formal" and "organizational" connection with the Communist International but not to alter the preexisting fundamental relationship. Illustrative of this is that the report states the disaffiliation would not even be considered if it were thought that it would cause the Party to "waiver" or "vacillate" in carrying out "the internationalism founded by Marx and Engels, and brought to its great, historically decisive victories under the leadership of Lenin and Stalin," and to which "the life of every Communist is unconditionally consecrated." (C. P. Ex. 13.) Also, the Browder report, by characterizing the Voorhis Act as "an extreme example of the most vicious and oppressive *Exceptional Laws*" (*ibid.*, p. 10, emphasis added) indicates that the *organizational* disaffiliation was in accord with a Comintern "Condition" that "In every country where, in consequence of martial law or of other *exceptional laws*, the Communists are unable [fol. 2499] to carry on their work lawfully, a combination of lawful and unlawful work is absolutely necessary." (Pet. Ex. 8, p. 28, emphasis added.)

Earlier in the same year the disaffiliation was announced, respondent set forth in its official organ a resolution adopted

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[69] See fol. 2460, footnote, re "proletarian internationalism."

by respondent together with the Communist Parties of various other countries relative to the distribution and study of the Soviet Union publication the *History of the Communist Party of the Soviet Union*. This resolution dealt with the importance of the *History* for "the Communist world movement" and stated the *History* "is intended to play—and will undoubtedly play—a very important role . . . in the consolidation of the Sections of the Communist International." (Pet. Ex. 296, p. 73.) ~~We note in this connection that in August 1951 respondent quoted with approval in *Political Affairs* a statement by the leader of the Communist Party of China that the *History of the Communist Party of the Soviet Union* "is the highest synthesis, the highest generalization of the world Communist movement." (Pet. Ex. 484, p. 35.)~~ In April 1940, only a few months before the announced disaffiliation, respondent again affirmed its role as a part of the Communist International and its avowed loyalty "to the cause of proletarian internationalism" as evidenced by an article in *The Communist* which stated, among other things:

> "... our Party, on the whole, is ... from top to bottom united around its national leadership and the Communist International more solidly and staunchly than ever before." (Pet. Ex. 436, p. 406.)

Moreover, respondent's constitution as amended in 1942 included the Communist International, together with Marx, Engels, Lenin, and Stalin as the enunciators of the principles under which respondent seeks to establish "socialism." (Pet. Ex. 328, pp. 5-6.) There is the further consideration that the Communist International was Marxism-Leninism in action and respondent indicates no break with Marxism-Leninism, in fact quite to the contrary. (See "Marxism-Leninism," *supra*.) Also, as will become apparent, respondent's policies and activities continued to accord with those laid down and accepted in the "21 Conditions" of membership in the International.

Flynn, testifying for respondent, was a member of respondent's National Committee when the disaffiliation was discussed. She in effect agreed on cross-examination that the goals and aims of the Party passed unchanged through the disaffiliation and stated:

". . . we were not disaffiliating in anger, or disaffiliating to fight the Communist Internationale. It was, you might say, a friendly divorce." (Tr. 14002.)

[fol. 2500] It is clear from the foregoing and respondent's subsequent conduct as it unfolds that respondent's announced disaffiliation from the Communist International was for the expediency of avoiding a federal law which the Communists considered an oppressive one, and was done to preserve rather than to end or change substantially respondent's rôle as a part of the international Communist movement.

Upon the dissolution of the Communist International in 1943 in the interest of furthering the world Communist movement, respondent expressed its approval and support of the decision and publicized in the United States the line given by Stalin and other Soviet officials as well as pointing out that the dissolution "must not be mistaken as a sign of weakness or of helpless collapse." (Pet. Ex. 205, *supra*, page 70.) Upon the formation of the Communist Information Bureau in 1947 (*supra*) respondent hailed it as "of great significance" for coördinating activity of the Communist Parties and "making more effective their resistance to the program of imperialist expansion." While pledging to continue to promote the international solidarity of all "anti-fascists and anti-imperialists" and to advance the cooperation "of all peace-loving peoples," respondent concluded that because of "the present political situation in the United States" it would not affiliate with the Cominform. (Pet. Ex. 368, pp. 2, 10.)

The record shows that the Zhdanov report to the formation meeting of the Cominform, reasserting the programs and policies of the world Communist movement earlier enumerated by the Comintern (*supra*), was studied in respondent as "the key to the whole movement" and was used in respondent's schools as a major document stating and explaining the strategic aims of the world Communist movement. (Tr. 6113.) Malenkov's report on that occasion, also dealing with the world Communist movement (*supra*), was printed by respondent in *Political Affairs* and was similarly studied and discussed. The official organ to the Cominform,

published under the name *For a Lasting Peace, for a People's Democracy,* has been made available to functionaries of respondent and to meetings of respondent's members. Philbrick, based on nine years of active membership in respondent, stated that a member could not disagree with a "directive or a position taken by the Cominform" and still remain a member. (Tr. 6178.) We later make additional findings regarding respondent's use of the Cominform official organ.

Gates and Flynn, members of respondent's National Committee, stated that all they know about the Cominform is what they read in the "capitalist" press and the journal of the Cominform; that it never issued directives to respondent; and, that respondent's use of the Cominform organ is to see what is going on in various Communist Parties throughout the world with whom respondent shares common [fol. 2501] interests. Gates was asked on cross-examination whether respondent or the *Daily Worker* or *Political Affairs* ever deviated from the expressed views and policies of the Cominform. He answered to the effect that the Party never deviated from what it considered the best interests of the American people and said "if we have not expressed any disagreement with any views that have been put forward in For a Lasting Peace, that is because we believe those views have not been in contradiction to the interests of the American people." [70] (Tr. 13226-13227.)

Although there was no showing that respondent affiliated organizationally with the Cominform, the favorable recognition given by respondent to its formation and the use and reliance made by respondent of important Cominform documents is consistent with the record as a whole in showing that respondent has never repudiated either the policy or program of the world Communist movement and, in fact, continues to follow and apply such program and policy.

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[70] His answers to subsequent questions on cross-examination revealed arrogance and evasiveness. (See for example, Tr. 13227-13228.) The sum of his testimony is contrary to the great weight of the evidence, however, without this and other credibility considerations noted.

Reverting to respondent's organizational form and characteristics, we have heretofore summarized that in 1924 and 1929 respondent was reorganized pursuant to directives of the Communist International. The 1924 reorganization united various Communist factions in the United States into "The Communist Party" thereby fulfilling the "Condition" of the Comintern calling for only one Communist Party in any country. (See *supra* and Pet. Ex. 12.)

The 1929 reorganization followed a solution dictated by Stalin, which was adopted by the Comintern, and accepted by respondent. Lovestone, Gitlow, and others were deposed as leaders of respondent and the leadership placed in a group which included William Z. Foster, present national chairman. The reorganization of respondent was due to a factional dispute which was a reflection of a struggle in the Communist Party of the Soviet Union and in the Communist International between forces led by Stalin and those led by Bukharin. The Foster faction in respondent, representing a minority of only about 10 per cent, supported Stalin whereas the Lovestone-Gitlow faction, representing about 90 per cent, sided with Bukharin. Notwithstanding this, respondent complied with the Stalin-dictated solution. [fol. 2502] The record contains no evidence of subsequent material organizational changes until May of 1944 when respondent's name was changed to the Communist Political Association then changed back in 1945 to the name Communist Party. The change to "CPA" was in the year following the dissolution of the Comintern and, like the announcements on that dissolution, the change was assertedly to promote a peaceful co-existence of the United States and the Soviet Union. While operating under the name "Communist Political Association" there was a de-emphasis on the more militant principles of Marxism-Leninism and the current publications of the Party put forward the so-called "Teheran line."[70a] No evidence was presented by respondent to show a break with the basic principles of the inter-

[70a] Foster opposed the change on the ground it was not in line with the revolutionary position of Marxism-Leninism. His opposition was contained in a letter to the National Committee which was suppressed from the membership at the time and not made known until shortly before the change back to CPUSA.

national Communist movement. The leadership of respondent remained the same.

Relevant to the reconstitution of respondent under the name Communist Party, the record shows that in April of 1945 Jacques Duclos, a spokesman for the world Communist movement, issued a statement the substance and effect of which was that it was a mistake to dissolve the Communist Party of the United States.[70b] Duclos said that: "In truth, nothing justifies the dissolution of the American Communist Party, in our opinion"; a "powerful Communist Party" in the United States is necessary "in the struggle taking place between the progressive forces of the earth and fascist barbarism." (Pet. Ex. 208, pp. 671-672.) The Duclos statement further declared that Browder [as leader of the Communist Political Association] and his supporters were notoriously revising Marxism in the concept of a long-term class peace in the United States and harmony between labor and capital.

Following the release of the Duclos statement, it was discussed and studied throughout respondent at meetings called for that purpose. At a State Committee meeting in Ohio, several of the delegates expressed appreciation that [fol. 2503] Duclos had called attention to the Party's deviation from the line. At a meeting attended by Baldwin, Carl Winter, a top leader, told the members that the statement was not Duclos' view alone but that of the European Communists. Blanc was present at a County Committee meeting where Party official Arnold Johnson highly praised the Duclos statement and a resolution was passed to adopt the Duclos statement and revert back to revolutionary tactics. Meyer, at the time a Party official, attended a meeting that had been called following the publication of the Duclos statement. At the meeting Meyer expressed the position that the Duclos "letter" was a policy of war between the United

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[70b] The Duclos statement was issued through the official theoretical organ of the French Communist Party, *Cahiers du Communisme*, and reissued in respondent's organ, *Political Affairs* of July 1945. Duclos at the time was a leader of the Communist Party of France and until the dissolution of the Communist International, a member of the Executive Committee of the International. In the world movement he was a significant international figure.

States and the Soviet Union whereupon Meyer was condemned by Party leader Jack Stachel as provocative, revisionist, and liquidationist. Respondent's Executive Board passed a resolution supporting the Duclos statement.

Budenz, as managing editor of the *Daily Worker*, was instructed to print the Duclos statement in the *Daily Worker* and to be very careful on its publication because of its importance. A discussion period was ordered and carried on in the staff of the *Daily Worker* on the Duclos statement which included the evils of revisionism and opportunism that had been condemned by Duclos and how the Party could carry out better their assigned tasks as a result of the necessity of getting rid of revisionism. At one of the staff meetings, the Party functionary serving as advisor on foreign affairs to the *Daily Worker* stated that the Duclos statement on revisionism and for rejection of class peace should be interpreted to mean that socialism could be obtained with the help of the Red Army; Party leader Stachel opposed that position as not specifically in line with the Duclos statement and said it would expose the Party.

~~Budenz testified that while at the *Daily Worker* office he read part of a letter from Starobin, the *Daily Worker* correspondent attending the United Nations Conference on Organization in San Francisco, which was to the effect that Manuilsky [a leading Soviet Union Communist and Ukranian representative to the United Nations Conference] had expressed indignation that the American Communist Party had not criticized the American Government leaders more severely, and stated the American Party should observe more carefully the guidance and counsel of the French Communists.~~[70c]

After preparation throughout the Party, respondent was reconstituted as the Communist Party of the United States of America. Earl Browder, for departing from the ortho-

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[70c] ~~Respondent contends that cross-examination showed that Budenz made inconsistent statements regarding this matter in a book he had previously written and in prior testimony before the House Un-American Activities Committee. We do not read those prior statements as substantially inconsistent and the essence of his testimony on this is credited.~~

[fol. 2504] doxy of Marxism-Leninism, was branded a "revisionist" and "deviationist" and deposed as the leader. Foster took over as national chairman. Otherwise those who had been officials and leaders of the CPA and the Party before that, with a few minor exceptions, remained the officers and leaders of the reconstituted Communist Party. Upon taking over as national chairman, Foster pointed out the necessity for reemphasizing the revolutionary line of Marxism-Leninism. In a report to the reconstitution convention, subsequently published in *Political Affairs*, Foster declared "Our Party has suddenly reverted to its basic Communist principles" and "As never before, we must train our Party in the fundamentals of Marxism-Leninism." (Pet. Ex. 372, p. 788.)

A subsequent issue of *Political Affairs* (September 1945, Pet. Ex. 210), devoted to the "Present Situation and the Next Tasks, Resolution of the National Convention of the Communist Party, U.S.A., Adopted July 28, 1945," states that the operations of the Party as the Communist Political Association "resulted in a general weakening of Communist activities and in adversely affecting the role and policies of other Marxist parties in the Western Hemisphere"; that "we can appreciate the basic correctness of the sound fraternal, Marxist opinions expressed in the recent article of Jacques Duclos, one of the foremost leaders of the Communist Party of France." (*Ibid.*, pp. 829, 831-832.)

Moreover, the resumption of the name Communist Party of the United States of America in conjunction with the return to revolutionary Marxism-Leninism was a matter of decisive importance just as in 1921 when the naming of the Party was considered "a political question of great importance" since it distinguished respondent as an organization which "has declared a decisive war against the entire bourgeoise world." (Pet. Ex. 8, p. 31.) This is borne out by Party leader Williamson's report to the reconstitution convention (reprinted in *Political Affairs* for September 1945) concerning the change of name when he stated that:

> "... The question of re-establishing the name and form of Communist Party is a question of principle connected with the proper role and functioning of the

Party. The necessary political and organizational corrections that we must accomplish will definitely be aided by resuming the name *Communist Party;*

". . . It is necessary to resume the name *Communist Party* to restore the correct Marxist concept and role of a vanguard party of the working class; . . ." (Pet. Ex. 209, p. 801.)

[fol. 2505] Respondent did not rebut petitioner's evidence on the 1924 and 1929 reorganizations, *supra*. On the 1945 reconstitution, the testimony of respondent's witness Flynn was to the effect that prior to the Duclos statement membership was falling off and the Browder position was being questioned; that no one on the National Committee said the Duclos statement was a directive or an order; and, that the Duclos statement was of interest as what the leader of a sister Party had to say.

This fails to rebut or explain the importance given to the Duclos statement, the official actions in connection with it, and the speed with which the Duclos criticisms were acted upon—respondent did not produce any of the Party functionaries to contradict or explain the statements attributed to them by petitioner's witnesses, *supra*, nor was any showing made as to why they were not produced. The evidence shows that in this brief period it was the Duclos article that was the foundation of the discussions rather than a self-impelled domestic analysis.

Lautner testified that after the 1945 reorganization, the Party continued to attack Browder, that "Browderism" was considered a danger to the "Marxist-Leninist purity" of the Party. (Tr. 9273.) In January 1950 Lautner called the attention of the National treasurer of respondent to a published statement by Browder asserting that during the 15 years of his leadership in respondent all major policies put into effect had the previous knowledge, consent and active support of the decisive international Communist leadership. The Party treasurer's comment was that "'If this is not stool pigeon work on the part of Browder, then nothing is.'" (Tr. 9278.) Gates, although denying the truthfulness of the statement, conceded on cross-examina-

tion that subsequent to Browder's expulsion, Browder wrote that during the 15 years of the Browder leadership, all major policies put into effect by respondent had the previous knowledge, consent and active support of the decisive international Communist leadership.

We find that twice, in 1924 and 1929, respondent was reorganized pursuant to directives of the Soviet Union; that in 1944 respondent modified its line in conformance with the then line of the Soviet Union as understood by respondent's leader Earl Browder; and, that in 1945 respondent reverted to "its basic Communist principles" (*supra*) and reemphasized Marxism-Leninism upon the issuance of a statement to the effect that it should do so by a leading foreign spokesman of the world Communist movement.

[fol. 2506] b. Officials of Respondent

As previously found, Foster became a leading officer in respondent in 1929 as a result of a Soviet Union directive. He has been national chairman since the 1945 reconstitution. A prior letter of his to respondent's National Committee in which he opposed Browder's policies had been suppressed from respondent's membership but his position set forth in the letter was approved in the Duclos statement while Browder's policies were condemned.[71] For a number of years prior to respondent's announced disaffiliation from the Communist International, Foster was an an official of the International. He has been to the Soviet Union on numerous occasions on Party business. Foster is recognized throughout respondent as an authority on Marxism-Leninism. In 1951 respondent's organ, *Political Affairs*, rendered homage to Foster, noting his "half-century of battle years," his "abiding loyalty and devotion . . . to the cause of Marxism-Leninism, to the cause of Communism," and his "unshakable confidence in ultimate

[71] Foster told Budenz that he did not push his objections to the formation of respondent as the Communist Political Association but rather refrained from deviating for fear of being expelled. The record does not reveal how Duclos obtained a copy of the Foster letter.

victory." (Pet. Ex. 479, pp. 1, 6.) This evidences the continuity of policy and program throughout the many years that Foster has been a functionary of respondent.

It appears that Foster fits the requirement of leadership Stalin referred to in his 1929 speeches concerning the American Communist Party and the settlement of the factional dispute therein. Among Stalin's statements were:

> "The struggle for the winning of the millions of the working masses to the side of Communism must be intensified. The fight must be intensified for the forging of real revolutionary Party cadres and for the selection . . . of individuals capable of entering the fight and bringing the proletariat with them, individuals who will not run before the . . . storm and will not fall into panic, but will sail into the face of the storm. . . ." (Pet. Ex. 145, p. 111.)

Also, referring to the development of the revolutionary crisis in America, Stalin declared:

> "'. . . For that end we must work in order to forge real revolutionary cadres and a real revolutionary leadership of the proletariat, . . .'" (Pet. Ex. 126, p. 247.)

[fol. 2507] In addition to Foster, a number of respondent's other present leaders have been functionaries of respondent since the time of the Communist International, have been to the Soviet Union on Party business, and have been indoctrinated and trained in the Soviet Union on Communist strategy and policies. These leaders have taught in Party schools, written for the Party press, and spoken at Party meetings, on various phases of Marxism-Leninism, including the leading position of the Soviet Union, proletarian internationalism, and the necessity of revolutionary overthrow of imperialist nations, particularly the United States. Among such persons identified in the record are Peters, Stachel, Bittelman, Green, Winter, and Williamson.

Peters was a long-time functionary of respondent in its underground and security work until he left the country

in 1949 after a period of hiding from federal immigration authorities. Among his activities Peters performed liaison between Communist International representatives in the United States and Soviet police operating in the United States. He also was a representative of respondent to the Communist International headquarters in Moscow. In the United States he dealt with Comintern representatives. He used various aliases in the United States. In 1935 Peters told Budenz that the Communist Party was merely "the periscope of a submerged submarine, the submerged party being the conspiratorial part of the Party or the underground Party, which was the most important, that that was the real decisive Communist Party." (Tr. 11878-11879.) Peters has conducted Party classes and prepared study outlines and other material. He is the author of respondent's *Manual on Organization* (Pet. Ex. 145), referred to herein in connection with various issues.[72] In 1949, just prior to Peters' leaving the country, respondent's National Secretariat told him they felt sure he would make his contribution no matter where he worked as a Party leader.

Bittelman authored various Party pamphlets recognizing, explaining, and advancing the policies and programs of the Comintern. The same policies and programs are still the subject of various articles which he writes for use in official Party organs. (See for instance his 1934 and 1951 writings set forth *infra*, fol. 2549, under the subheading [fol. 2508] "National Liberation.") Stachel, Green, Winter, and Williamson are currently members of respondent's National Committee and continue to author articles for the official Party organs on Party policy and programs.

The continuance in office of Moscow-trained leaders of respondent who were functionaries during the period that

[72] The *Manual* and other Party pamphlets such as *The Communist Party in Action* (Pet. Ex. 144) and *Why Every Worker Should Join the Communist Party* (Pet. Ex. 143) are accepted as reliable evidence of Party program and policy when issued, generally in the 1930's, and during the subsequent years that the evidence shows their continued use in the Party. Other evidence, both oral and documentary, establishes current Party policy and program. It is pertinent to consider, as we do herein, the extent to which present Party policy and program conforms with that set forth in these earlier issued documents.

respondent was an open member of the open, formal organization of the world Communist movement, and the absence of any substantial evidence showing a repudiation by respondent's leaders of the program and policy of the world Communist movement, as well as the fact that Marxism-Leninism continues to be basic to respondent, are all probative of the issues herein. While considering the matter of respondent's leadership, it is pertinent to examine the evidence on foreign Communist representatives who have been in the United States to supervise respondent.

c. Foreign Representatives in the United States

The reorganization of respondent's leadership pursuant to Stalin's solution for the 1929 factional dispute, *supra*, was supervised by a Soviet Union representative sent to the United States for that purpose. A number of individuals were identified as having in the past been in the United States as representatives from the Soviet Union to supervise the carrying out of various policies, programs, and activities by respondent. Respondent's acceptance of the authority of these foreign representatives was required by the rule of the Communist International that:

> "The E.C.C.I. [executive committee] and its Presidium have the right to send their representatives to the various Sections of the Communist International. Such representatives receive their instructions from the E.C.C.I. or from its Presidium, and are responsible to them for their activities. Representatives of the E.C.C.I. have the right to participate in meetings of the central Party bodies as well as of the local organizations of the Sections to which they are sent. . . . Representatives of the E.C.C.I. are especially obliged to supervise the carrying out of the decisions of the World Congresses and of the Executive Committee of the Communist International." (Pet. Ex. 125, pp. 89-90.)

Among the foreign representatives specifically identified are Gerhardt Eisler (sometimes known as Edwards and Hans Berger), Pogany (John Pepper), Golos, Peterson,

Frank Miller, P. Green or Gussev, Yusefovich, Merker or Wagner, Walettsky, and Allen. Minutes of respondent's governing bodies during the 1920's show a number of occasions where one or more of these identified foreign representatives participated in the meetings. (See, for example, Pet. Exs. 67, 88, 95, 98.)

[fol. 2509] Lautner's experience was that no one in respondent questioned decisions of Comintern representatives; that when such a representative spoke at Party meetings it was accepted as the Party line. Kornfeder's experience was similar. Gitlow stated that Comintern representatives had "extraordinary powers" over respondent and became voting members of all of respondent's leading committees. (Tr. 93.) The foreign representatives have at times used various names and aliases.

Eisler was the subject of considerable testimony and, on this record, the most prominent of the foreign representatives. Kornfeder originally met Eisler in Moscow and knew him as a representative in the United States in 1933 with whom he discussed respondent's infiltration of the American Federation of Labor and the Railroad Brotherhoods. Eisler warned Kornfeder of serious consequences if he spoke against a new trade union policy at a national convention of the Party in 1934. Kornfeder disregarded Eisler's warning and was told to repudiate in the Party press within 60 days what he had said. He was later expelled from the Party for not repudiating.

Meyer met in Party meetings with Eisler as a Comintern representative in this country in the 1930's and met Eisler again in 1944. Lautner attended Party meetings in the 1930's at which Eisler was present as a Comintern representative. To Lautner's knowledge, Eisler undertook to influence respondent's activities subsequent to 1945 and was seen by Lautner at the Party headquarters in 1949. Budenz testified that Stachel, a high Party leader, received orders from Eisler in 1943 and 1944. Stachel, convicted in 1949 of violating the Smith Act, see *infra*, fol. 2602, was not called to deny this. Dennis, also a high Party official, told Budenz in the latter part of 1942 that Eisler was "the equivalent to the representative of the Commu-

nist International." [73] (Tr. 11858.) Eisler was in the United States in 1949 and fled the country while on bail pending the appeal of a conviction for false swearing. Eisler now holds a high leadership position in the East German Government.

[fol. 2510] Flynn and Gates testified to the effect that to their knowledge while functionaries of respondent, the Party has not received any directives or instructions from any representative of the Communist Party of the Soviet Union or the Communist International. Gates, although asserting that Eisler never gave him any directives or instructions and denying that he ever knew Eisler as a Comintern representative, admitted that he met Eisler in the United States in 1946, that they lived only a few blocks from each other, that he had a number of meetings with Eisler, and that Eisler sometimes came to respondent's headquarters. Flynn, likewise denying that Eisler was a Comintern representative, saw him rather frequently after his arrest in 1949 explaining this was because of the "coincidence" that Eisler lived close to her in Manhattan for a while. She spoke and wrote in defense of Eisler and

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[73] Respondent argues that this Budenz testimony should not be believed because cross-examination brought out that Budenz testified in the 1947 trial of Eisler (for making false statements in an application for a passport) but did not there state that Eisler was a Comintern representative. Budenz stated, however, that he did not then know an issue at the trial was that Eisler had been such a representative. Further, the indictment contained no such charge and the opinion of the trial court states:

> ". . . All evidence of the so-called Communist International which came into the case, and much was excluded, was simply explanatory of and incidental to testimony and evidence properly admitted. Repeatedly throughout the trial it was emphasized by the court, and I am confident understood by by the jury, that the existence or nonexistence of the Communist International was in no sense an issue in the case. . . ." (75 F.Supp. 640 at 642.)

While the Court of Appeals took note of evidence that Eisler was a Communist International representative in affirming his conviction (176 F.2d 21), the speculation respondent would have us engage in is too tenuous to support disregarding such testimony. The quoted statement of the trial court illustrates, without more, the pitfalls.

participated in a Madison Square Garden meeting arranged after his arrest.

The evidence preponderates to establish the presence in the United States of Communist International representatives prior to the early 1940's who acted with authority in respondent. Further, the particularity and personal character of the credited testimony of petitioner's witnesses preponderates over the testimony of respondent's witnesses that they did not know Eisler as a foreign representative. We find that as of 1945 Eisler was shown to be acting as an authoritative foreign Communist representative to respondent.

Eisler is the only foreign representative shown by the record to have been in the United States subsequent to the announced dissolution of the Communist International. Respondent ceased open affiliation with the Comintern to avoid identification as a foreign representative in the United States and the Comintern as an open organization was dissolved in 1943 for Soviet tactical reasons. The absence of further showing as to foreign representatives does not itself, in the context of the record, indicate any change in respondent's nature or character.

d. Discipline and Democratic Centralism

Having found that the requirement of iron discipline and the practice of "democratic centralism" are among the basic principles of the world Communist movement (*supra* [fol. 2511] fols. 2427-2429, and fol. 2456), we consider at this point the evidence on their application to respondent.[74]

[74] Section 13(e)(6) of the Act provides that there shall be considered the extent to which the leaders and members of an organization alleged to be Communist-action are subject to or recognize the disciplinary power of the foreign government or organization controlling the world Communist movement. The petition alleges that respondent's leaders have been and are subject to the disciplinary power of the Soviet Union, the Communist Party of the Soviet Union, the Communist International, the Communist Information Bureau and other spokesmen of the world Communist movement, and that this power has been exercised principally through the doctrine of "democratic centralism," which binds all Communists to execute the decisions of the leaders of the world Communist movement.

The iron discipline existing throughout the world Communist movement is applicable on an international as well as a national scale and borders on military discipline; it requires unquestioned devotion to the program laid down by the Soviet Union; it requires, through the doctrine of "democratic centralism" that authority flow from the top of the international movement and the local Communist Party, respectively; it requires absolute unity of will and the constant elimination from the Party and the movement of all "deviationists," "factionalists," "opportunists," and others who for any reason do not fully accept and follow the Communist leadership and the Communist line, or who depart from basic Communist principles. These are contained in Marxism-Leninism and the "Conditions" and rules of the Communist International and are held to be necessary in order to establish the dictatorship of the proletariat and to protect and defend the Soviet Union. (See "Marxism-Leninism" and "World Communist Movement," *supra*.)

Respondent's organizational form and its declared policies and positions reflect compliance with the disciplinary requirements of the world Communist movement. It is established without dispute that respondent applies the principle of democratic centralism. We have heretofore made the finding that under Marxism-Leninism and the rules of the Communist International the principle includes the requirement that authority flow only from the top of the movement with limited right of discussion in the lower echelons of local tactics. Lautner related the democratic centralism practiced during his period in the Party to that defined in the "Classics," such as the *Programme of the Communist International* and *History of the Communist Party of the Soviet Union (B)*. (See Marxism-Leninism," *supra* fols. 2428-2429.) During Nowell's membership, authority in actual practice descended upon the membership from the top. During Gitlow's membership, respondent was a "Centralized Organization, ruled from the [fol. 2512] top down, and not from the bottom up." (Tr. 49.) As appears from Appendix A hereto, the experiences of these three witnesses spans the period from the inception

of respondent in the United States in 1919 until the year 1950.

Documentary material in the form of reliable expressions of policy and positions by respondent also shows the nature and a consistent following and recognition by respondent of the disciplinary requirements of the world Communist movement. Alexander Bittelman, then and now a top leader of respondent, in his pamphlet *The Communist Party in Action*, published in 1932, repeats Stalin on the role of the Party and the need for discipline:

> "Stalin compares the Party to the general staff of an army. The Party is the general staff of the working class revolutionary army, leading the war against capitalism. As such the Party must be built as a centralized organization, each member belonging to a Party unit and carrying on daily active work among the masses under the direction of this unit, and fulfilling faithfully, consciously and loyally the Party policies and Party decisions." (Pet. Ex. 144, p. 23.)

Bittelman also stressed that international discipline is a "basic principle" of the world Communist movement:

> "International discipline is of course a basic principle in the organization of the Communist International. Without it no working class revolutionary International is possible. It is noteworthy that every opportunist tendency that arises in our midst seeks to attack, first of all, the discipline of the Communist International, because in this way, the revolutionary Leninist policy of the Communist International would be weakened and opportunism would meet with less resistance. This can be seen very clearly in the attacks of the Trotskyite opposition and of the right wing renegades, prior to their expulsion from the Communist International, upon the discipline of our World Party, and their advocacy of the right to organize fractions and groups within the Communist International and its various sections. But our world Communist movement always presented an iron front against any such weakening of international discipline,

fighting for the Leninist principle that the Communist Party is a monolithic and homogenious body of revolutionary workers functioning as the vanguard of the working class." (*Ibid.*, pp. 34-35.)

[fol. 2513] Speaking of deviations from theory and policy as well as in the daily practical work, the article observes:

"... We observe however, among certain Party members, a tendency to be easy going, tolerant and conciliatory towards opportunist deviations. This is a dangerous attitude which is very harmful to the interests of the working class and to the growth of our Party. It is this attitude that Comrade Stalin attacked so sharply, branding it as 'rotten liberalism' and calling upon every communist to demonstrate in practice in his everyday revolutionary work true Bolshevik intolerance of and irreconcilability with all opportunist deviations from the Leninist line." (*Ibid.*, p. 48.)

The purpose of discipline in the Party was made clear in respondent's "Discussion Outline for Lenin Campaign," published in 1929, wherein it is stated that there must be discipline because "'The Dictatorship of the Proletariat on a national and *international scale* cannot be prepared without a strictly centralized, disciplined Party.'" (Pet. Ex. 108, p. 2, emphasis added; see also *Why Every Worker Should Join the Communist Party*, Pet. Ex. 143.) [75]

Supporting the oral testimony that basic principles and the correct line cannot be questioned; respondent's *Manual on Organization*, issued in 1935, states that without discipline there can be no unity of action and carries the following instructions to the membership:

"It is clear, however, that basic principles and decision, such, as for example, the Program of the Com-

[75] When Nowell joined respondent, the application for membership required acceptance of the following:

"'The undersigned declares adherence to the program and statutes of the Communist International and the Communist Party of the U.S.A., and agrees to submit to the discipline of the Party and to engage actively in its work.'" (Pet. Ex. 143.)

munist International, cannot be questioned in the Party. (Pet. Ex. 145, p. 26.)

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". . . We do not question the correctness of the revolutionary theory of the class struggle laid down by Marx, Engels, Lenin and Stalin. . . . (*Ibid.*, pp. 26-27.) [fol. 2514]

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"Self-criticism is a natural part of the life of the Party. . . . Without self-criticism there can be no Communist Party. But this criticism must never depart from the line of the Party, from the principles of Marxism-Leninism. . . . . destructive criticism . . . if tolerated . . . leads to factionalism." (*Ibid.*, pp. 32-33.)

Evidencing the continued application of discipline as required in the world Communist movement are the following statements of Henry Winston, a present top leader of respondent, made at the 14th Convention of the Party in 1948 and published in *Political Affairs*:

". . . We do not shrink from the hammer blows of reaction. Under them we will steel our Party in Communist discipline, loyalty, and unity, develop its Marxist-Leninist understanding, and temper our cadres and leadership. . . ." (Pet. Ex. 418, p. 856.)

More recently, *Political Affairs* for January 1951, covering the main resolutions of respondent's 15th National Convention, notes that self-criticism is a law of Party development and calls upon the whole membership to guard the monolithic character and unity of the Party "based on democratic centralism" and the highest discipline arising out of "conscious understanding of the Party's theory and political line"; that tendencies toward factionalism are "totally impermissible and must be sharply dealt with." (Pet. Ex. 378, pp. 34-35.)

Specific instances of disciplinary action furnishes further evidence on the issue. Included are these events, which are discussed elsewhere herein: in 1929 respondent was purged of those individual leaders deemed to be factional

elements and opportunists, pursuant to Stalin's direction; Nowell, while a student in the Lenin School in Moscow, was disciplined by the Communist International for disagreeing with Comintern policy on the approach to the Negroes in America; Kornfeder was expelled from the Party in 1934 for failing to heed the instructions of a Soviet Union representative in the United States; Earl Browder and a number of his followers were expelled in the 1945 reorganization, which followed the Duclos criticisms, for deviating from the true line of Marxism-Leninism.

Other instances of record include the expulsion of a number of Party functionaries who refused to accept the sudden reversal of Party policy to conform with the Soviet Union's position in signing the Hitler-Stalin Pact in 1939. [fol. 2515] Among those expelled were one Wischnak, business manager of the *Daily Worker* and one Casey, its city editor. Max Bedacht, a former member of the Party Central Committee, was also expelled for political differences with the Party. During the period following the 1945 expulsion of Browder, Francis Franklin was expelled for disagreeing with Party policies. In 1950 Lautner, without advance warning, was subjected to a severe inquisition by officials of respondent and forced to sign a statement that he was a "spy and agent" in the ranks of the Communist Party and had received a fair hearing. He was not, and had not been, a "spy or agent." His efforts to get a review by respondent's National Review Commission were ignored. His only notice on his expulsion came from an article in the *Daily Worker* stating that he was expelled as a "traitor and enemy of the working class." (Pet. Ex. 361.) Indicative of the disciplinary program in the world Communist movement is the fact that the notice of Lautner's expulsion from the CPUSA was printed in the Cominform journal *For a Lasting Peace, for a People's Democracy,* and that the same issue contained a similar notice as to the expulsion of a member from the Communist Party of Italy, both under the heading "Rooting Out Traitors from the Ranks of the Communist Parties." (Pet. Ex. 362.)

It is also significant that, as previously noted, the Communist Parties in various countries joined in 1948 in approving a resolution of the Communist Information Bureau condemning Tito and the Yugoslavia Communist Party for having an anti-Soviet attitude and failing to accept criticism and measures set forth by the Communist Party of the Soviet Union. (*Supra*, fol. 2483, and Pet. Ex. 344.) The Cominform resolution was printed by respondent in *Political Affairs*, brought up at meetings of respondent's groups, and supported by respondent's officers Foster and Dennis. In 1949 the Cominform adopted another resolution concerning Tito and other leaders of the Yugoslav Party which brands them as "enemies of the working class" for becoming agents of Anglo-American "imperialism," conducting a "campaign of slander and provocation against the Soviet Union," and being disloyal to the principles of Marxism-Leninism. This resolution states the struggle against the Tito clique is the international duty of all Communist and Workers' Parties. (Pet. Ex. 258.) As shown in the section of this Report entitled "Nondeviation," respondent adopted this position and opposed Tito and this, too, resulted in members being lost to the Party. In 1951 one Warwick Thompkins was expelled by respondent for trying to organize Communist members to distribute leaflets containing "slanderous" remarks about the Soviet Union. (Tr. 11273.)

Stalin's speeches before the Comintern on the settlement of the 1929 factional dispute (subsequently published in respondent's official organ) refer to the conduct of respondent's members who questioned the decisions of the [fol. 2516] Executive Committee of the Communist International as "insubordination" and apply the term "enemies of the working class" to the factional group. (Pet. Ex. 109.) This expression covers so-called renegades, revisionists, reformers, opportunists, etc., which terms respondent frequently employs to describe present or past members not following the "correct revolutionary line."

Trotsky, who was expelled from the Communist Party of the Soviet Union, and Lovestone, who was expelled from respondent became descriptive examples of "enemies of

the working class" who must be purged.[76] Significantly, respondent's constitution as amended in 1942 provided:

> "No Party member shall have personal or political relationship with confirmed Trotskyites, Lovestoneites, or other known enemies of the Party and of the working class." (Pet. Ex. 328, p. 13.)

And the present constitution provides:

> ". . . Personal or political relations with enemies of the working class and nation are incompatible with membership in the Communist Party." (Pet. Ex. 374, p. 20.).

That "renegades" or "deviationists" etc., who must be expelled includes those who do not support the Soviet Union and its policies is indicated, in addition to the foregoing, from a 1934 publication of respondent covering its 8th Convention (*The Way Out*) and from a 1950 statement by respondent's officer John Gates made to respondent's 15th Convention, published in *Political Affairs*. The 1934 expression includes:

> "*Renegades* are those who were formerly members of the Communist Party but were expelled from it for failure to follow the correct revolutionary line and who now fight against the revolutionary movement and against the Soviet Union. . . ." (Pet. Ex. 136, p. 17.)

[fol. 2517] The Gates statement in 1950 includes the point that:

> "[The struggle] of the renegades from Marxism against the Communist Party inevitably and logically leads to struggle against the Soviet Union and to becoming outright agents of the imperialist bourgeoisie. . . ." (Pet. Ex. 376, p. 79.)

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[76] Respondent's official declaration on the expulsion of Lovestone, Gitlow, and others who had refused to be bound by certain demands of the Comintern in 1929, calls their conduct "unprecedented warfare against the Party" and states that "Any association with the expelled, any support given them is incompatible with the duties of membership in the Party." (Pet. Ex. 117, p. 2.)

Testifying as a witness for respondent in this proceeding, Gates says the leaders of the Party do not recognize and do not consider themselves subject to the disciplinary power of the Soviet Government, the CPSU, the Comintern, the Cominform or any agencies of these organizations; that respondent's leaders are subject only to the discipline of the Party; and that leaders of respondent do not recognize any disciplinary power over them by the Soviet Union any more than the fact that he loves his wife indicates that she has disciplinary power over him. Flynn testified to the same effect as Gates.

Further indication of the recognition by a top leader of respondent of disciplinary power is that Foster himself admitted after becoming national chairman in 1945 that the only way he could have gotten before the membership an earlier letter of his in which he opposed respondent's formation as the Communist Political Association, which resulted in deemphasizing some aspects of Marxism-Leninism, was by facing expulsion and that since his letter would have caused disunity, any member who attempted to discuss it would have been denounced by Browder as a Trotskyite. After Foster became national chairman, those members who had supported Browder's policies engaged in "self-criticism" by declaring the Party to have been wrong in adhering to the deemphasis of Marxism-Leninism and in committing the other errors pointed out by Duclos, a spokesman for the world Communist movement.

When viewed in the light of the foregoing evidence on respondent's policies, positions, and activities, other circumstances are pertinent for consideration in resolving the issue of discipline. Respondent has in the past accepted the exercise of authority over it by foreign representatives. (See our findings under "Foreign Representatives.") Respondent has in the past maintained liaison with members of the Soviet secret police apparatus who were in the United States doing underground work and collecting intelligence data for the Soviet Union. Gitlow and later Budenz both knew and dealt with Jacob Golos as a resident agent of the Soviet secret police. Elizabeth Bentley, as a member of respondent, was designated by Golos as a [fol. 2518] trusted go-between in his contacts with Budenz.

Further, the record shows that members who took the three-year training course in Moscow, and were considered qualified, were sent as representatives or instructors into other countries. Kornfeder, after completing training in Moscow as a member of respondent, was sent in 1930 to South America to reorganize the badly functioning Party in Colombia and to organize an underground Party in Venezuela. Kornfeder identifies Charles Crumbein and Rudolph Baker as other United States functionaries who were sent as representatives outside of the United States. While in Moscow before going to South America, Kornfeder had daily meetings with Palmiro Togliatti,[77] who briefed him on South American policies. Earl Browder came back to the United States as an official of respondent in 1929 as part of the settlement of the factional dispute. He was first summoned to Moscow from a position as a Communist International representative in Shanghai, China, and after being instructed as to what was required of him, was assigned as general secretary of respondent. Other members of respondent are identified in the record as receiving foreign assignments on instructions of the Communist International. (See, e.g., Tr. 1459-1461.)

Also with respect to other circumstances, in 1950 when Lautner was expelled from respondent, the Party's organizational structure included a New York State Review Commission and a National Review Commission which were maintained for the purpose of discipline, to safeguard adherence to Marxism-Leninism, and to find and treat with renegades and deviationists within the Party. Finally, we have taken into consideration, in the light of respondent's adherence to the requirements that Communists strictly "follow the line," our finding *infra* under the heading "Nondeviation" that respondent has not deviated from the positions and programs of the world Communist movement.

Summarizing, we find that the Soviet Union has established a requirement of iron discipline throughout the

[77] Presently leader of the Italian Communist Party and, at the time he instructed Kornfeder, head of the Latin American Secretariat of the Communist International.

world Communist movement which imposes upon the Communist Parties and their members in the various countries the duty of following with unquestioned devotion the line laid down by the Soviet Union; that respondent has recognized and accepted the requirement of iron discipline, and practices "democratic centralism" as enunciated by the Soviet Union; that respondent has not repudiated either and has acted in accordance with both; that officers and members of respondent have been expelled by respondent upon instructions from the Soviet Union; that respondent has subjected itself to Soviet discipline by expelling officers and members for failure to follow the line laid down by the Soviet Union, or for conduct of the type proscribed [fol. 2519] by the Soviet Union, such as so-called "revisionism" and "opportunism"; and that respondent maintains an organizational form prescribed by the world Communist movement to insure discipline and has followed policies and activities designed to carry out the disciplinary policies of the Soviet Union.

We find that respondent's principal leaders and a substantial number of its members are subject to and recognize the disciplinary power of the Soviet Union and its representatives. This evidences domination and control over respondent by the Soviet Union, and a purpose to advance the objectives of the world Communist movement.

### e. Communist Press

As part of respondent's internal organizational policies and activities it is pertinent to consider its maintenance and use of official organs. We have previously set forth the finding that respondent's official organs are the *Daily Worker* and *Political Affairs*. In the Soviet Union an official organ of its Communist Party is the publication *Pravda*, which was founded in 1912 with the rise of the Communist revolutionary movement in Russia and which helped to organize the "mass actions of the proletariat . . . towards one definite aim—preparation for revolution." (Pet. Ex. 330, pp. 151, 153.) The publication *For a Lasting Peace, for a People's Democracy* has been the organ of the Communist Information Bureau.

The oral testimony and documentary material, including copies of the *Daily Worker* which fairly represent the entire period since respondent's early years, show that the nature and character of the *Daily Worker* have not changed throughout the period. Thus, it is pertinent to consider the requirements of the Communist International and of Marxism-Leninism regarding the Communist press, as well as other evidence, on respondent's official organs.

The Communist International required the member parties to "create a new type of periodical press . . . in which the Communists . . . learn to utilize the slightest liberty allowed by the laws" and without which press "the preparation for the dictatorship of the proletariat is impossible." (*Theses and Statutes*, Pet. Ex. 8, p. 20.) One of the "Conditions" of membership in the International provided:

> "The general propaganda and agitation should bear a really Communist character, . . . The entire party press should be edited by reliable Communists who have proved their loyalty to the cause of the proletarian revolution. . . .
> [fol. 2520]
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> "All . . . party publications and editions, are subject to the control of the presidium of the party, independently of whether the party is legal or illegal. The editors should in no way be given an opportunity to abuse their autonomy and carry on a policy not fully corresponding to the policy of the party." (Pet. Ex. 8, p. 27.)

Budenz was labor editor of the *Daily Worker* in 1936-1937, and managing editor in 1941-1945. His duties on the *Daily Worker* were "very definitely" supervised by the Party officials. (Tr. 11777.) There was a liaison overseer or representative of the Political Bureau who met as a rule every day with the editorial board of the *Daily Worker* and there was a direct internal telephone by which Budenz consulted frequently each day with the Political Bureau headquarters in connection with carrying out the Party line and the particular slant to be taken on indi-

viduals, committees, or movements. The complete tone of the paper, its political attitudes, and even the leading articles were under the full control of the Political Bureau. The entire staff of the *Daily Worker* had to be Communists and could only be assigned to the staff after clearance by the Party Control Commission.

The record contains instances in the earlier years of the *Daily Worker* of the receipt of financial aid from Moscow, and instances until about 1944 of information and services received by the *Daily Worker* free or at nominal cost from a Soviet Union news service. (See "Financial Aid," *infra.*) The record also contains various directives concerning the *Daily Worker* which were issued to respondent by the Communist International, and were followed. While Budenz was managing editor of the *Daily Worker* (1941-1945), staff meetings were held for political education—to keep the staff on their toes regarding Party theory and thinking—at which meetings the *History of the Communist Party of the Soviet Union* was used.[78] It is stated in the *History* that, "A powerful instrument used by the Bolshevik Party to strengthen its organizations and to spread its influence among the masses was the Bolshevik daily newspaper *Pravda* . . . founded, according to Lenin's instructions, on the initiative of Stalin, Olminsky and Poletayev." (Pet. Ex. 330, p. 149.) The *History* also states that *Pravda* "directed the working-class movement towards one definite aim—preparation for revolution" (*ibid.*, p. 153) and that a legally published newspaper "could not call openly for the overthrow of tsardom" and "had to resort to hints, which, however, the class-conscious workers [fol. 2521] understood very well." (*Ibid.*, p. 150.) Examples are given of "modest" sounding words which were understood by the workers as a "call." (*Ibid.*, p. 151.) Respondent's official concept of the *Daily Worker* in the 1930's which the record shows still persists, is that the paper is "One of the main and most important instruments of agitation and propaganda . . . for reaching and winning the masses." (Pet. Ex. 145, pp. 78-79.) This is pertinent for

[78] It has previously been found that the *History* is an important source for the rules and guides applied by respondent.

comparison with the afore-quoted concept of *Pravda* as "A powerful instrument used by the Bolshevik Party to . . . spread its influence among the masses." The record is clear that the *Daily Worker* and *Political Affairs* are used as means to inform respondent's membership on the "correct" views and policies, as well as to spread propaganda in behalf of the positions and policies of the Party, including those positions designed to win over the working class.

We note from the foregoing that the bulk of Budenz' tenure as managing editor of the *Daily Worker* came after respondent's announced disaffiliation from the Communist International and extended for almost two full years after the formal dissolution of the International. Yet, during these years the nature and character of the *Daily Worker* insofar as this record reveals, continued completely to conform with the requirements of the Communist International without change or repudiation. We also note a significant functional similarity between the *Daily Worker* and *Pravda*, the organ of the Communist Party of the Soviet Union.

Lautner knows of no instance during his Party membership when the *Daily Worker* took positions in opposition to the Soviet Union. The experience of Budenz was that praise of the Soviet Union was a "'must'" rule for the *Daily Worker* and *Political Affairs* and there was never any criticism of the Soviet Union; that when the policies of the United States differed from those of the Soviet Union, the *Daily Worker* always took the side of the Soviet Union. (Tr. 11852.) Our review of the record showed that these policies of the *Daily Worker* and *Political Affairs* have not changed and remain the same up to the time of the hearing.[79]

Gates, testifying for respondent, stated that the similarity between respondent's views and those of the Soviet Union is only the coincidence of the common application of Marxism-Leninism. He denied that any foreign publication contains directives to respondent, and respondent's other two witnesses testified to the same effect.

[fol. 2522] On the other hand, while Budenz was managing editor of the *Daily Worker*, "the Communists looked

[79] See "Nondeviation," *infra*.

in these articles from Moscow for the directives and the line that was to be pursued, the attitude that should be taken." (Tr. 11886.) It is not seriously disputed that the *Daily Worker* receives political news from abroad, particularly from Moscow, which includes translations from the Soviet press, and that a correspondent of the *Daily Worker* is stationed in Moscow.

Moreover, the record contains evidence which establishes that the Cominform organ, *For a Lasting Peace*, is distributed to functionaries of respondent and is available at meetings of respondent's committees and groups. This Cominform organ was regularly provided to the professional group in respondent of which Philbrick was a member. A specific instance of its use which he recalls was in connection with the resolution of the Cominform on Tito and the Yugoslav Communist Party. Lautner, Markward, and Janowitz also showed that the Cominform organ was studied in Party meetings they attended. The Cominform resolution on Tito was used by Lautner in the latter part of 1949 when he lectured to the members of one of respondent's sections pursuant to assignment from respondent's State Educational Department.

A number of officially issued statements by respondent quote and rely on articles from *Pravda* and *For a Lasting Peace* in a manner evidencing they were considered by respondent as authoritative. An example is given by the May 1950 issue of *Political Affairs* in an article entitled "For Communist Vigilance" which refers to the way in which the Polish and Bulgarian Parties dealt with opportunism in their Parties, and which quotes from both *Pravda* and *For a Lasting Peace* on the need for Bolshevik criticism and self-criticism. (Pet. Ex. 363.) Copies of *Pravda* which were put in evidence contain specific reference to the United States and the line thus given has been followed and advanced by respondent in this country.[50]

We find that respondent has continuously maintained a Communist press in the United States of the same nature and type provided for under the program and "Conditions" of the Communist International and the rules of Marxism-

[50] See "Anti-Imperialism," below.

Leninism. We also find that respondent's organs constitute media through which the correct Communist line, from authoritative foreign Communist organs, is transmitted.

[fol. 2523] 4. ANTI-IMPERIALISM

Examining respondent's policies and activities in the light of the policies and activities of the world Communist movement, we consider first the "struggle against imperialism." In so doing, we examine respondent's policies to the extent they have relation to the issues herein. Whether such policies have objective merit is not an issue in this proceeding.

The findings heretofore made under the headings "Marxism-Leninism" and "World Communist Movement" show that the world Communist movement advances and follows the proposition that the capitalist system has evolved into "imperialism," which is described as a "world system of financial enslavement and colonial oppression of the vast majority of the population of the earth by a handful of 'advanced' countries" (Pet. Ex. 121, p. 35); and that the Soviet Union as the land of "socialism" and the leader of the world working class must be protected against the outside "imperialists." The countries specifically said to come within the designation of "imperialist" include Great Britain, France, Germany, Italy, Japan, and the United States.

Our previous findings also show that the primary objective of the world Communist movement is waging a struggle for a revolution to overthrow the "imperialist governments" for the purposes of protecting the Soviet Union and establishing a Communist dictatorship of the proletariat in place of the existing governments in the so-called "imperialist" countries. In this connection, the United States is given special importance as the mightiest of the "imperialist" countries and the arch enemy of the world Communist movement.

We consider first the general nature and aspects of the "struggle against imperialism" as waged by respondent, and the manifestations thereof such as advancing the concept of the alignment of forces throughout the world into the so-called camps of "peace and democracy" and "im-

perialism," the following of the doctrine of "just and unjust wars," and the use of the united front approach in the struggle.

It is not disputed that respondent takes the position that the United States is imperialistic under the definition of imperialism given in Marxism-Leninism, and is the leading imperialist nation in the world. Also, respondent's witness Aptheker conceded and the record shows that the provision in respondent's present constitution for the establishment of "socialism" means the establishment of the dictatorship of the proletariat as enunciated in Marxism-Leninism. In substance and effect, the testimony of respondent's witnesses is that respondent's struggle against imperialism and to achieve the dictatorship of the pro- [fol. 2524] letariat (socialism) is based on independently following a peaceful and constitutional road. We proceed to examine the evidence on respondent's policies and aims in the struggle against imperialism to determine their relationship to the policies of the Soviet Union and the world Communist movement, and the implications thereof.[81]

Respondent in 1929 set forth in its official organ, *The Communist,* Stalin's statement that:

> "... the American Communist Party is one of those few Communist Parties in the world upon which history has laid tasks of a decisive character from the point of view of the world revolutionary movement. . . . when a revolutionary crisis develops in America, that will be the beginning of the end of world capitalism as a whole." (Pet. Ex. 109, pp. 19-20.)

While openly operating as the United States section of the Communist International, respondent proclaimed that it had entered "the struggle against American capitalism" and that for "final victory . . . against world capitalism the

[81] Determining the nature of respondent's struggle against imperialism involves other considerations. Thus, the findings under "Nondeviation" and the evidence of respondent's aid and support of international Communist movement accomplishments in other countries, such as China, as set forth under the preceding heading "World Communist Movement," are pertinent to consider in conjunction with this section.

working class of the world must be united under one leadership." (*Supra*, Pet. Ex. 19, p. 86.) Respondent was bound by the "Condition" of the Comintern to renounce "not only avowed social patriotism, but also the falsehood and the hypocrisy of social pacifism" and to "systematically demonstrate to the workers that without a revolutionary overthrow of capitalism" nothing can save mankind "from new Imperialist wars." (Pet. Ex. 8, pp. 28-29.) Respondent's *Manual on Organization*, first issued in 1935, states:

> "... the Communist Party of the U.S.A. leads the working class in the fight for the revolutionary overthrow of capitalism, for the establishment of the dictatorship of the proletariat, ..." (Pet. Ex. 145, p. 8.)

Party statements and pronouncements throughout its existence in its official organs and other publications show a consistent policy of respondent with respect to the "struggle [fol. 2525] against imperialism." In addition to the provision in the *Manual* that respondent fights for the "revolutionary overthrow of capitalism" (*supra*) this Party document states that respondent rallies the masses for "international solidarity with the struggle of the workers in other capitalist countries ... [and] for the defense of the Soviet Union." (Pet. Ex. 145, p. 16.) Similar statement of respondent's policy appears in the 1930 pamphlet *Why Every Worker Should Join the Communist Party*, which expressed the Party struggle as being "for the overthrow of capitalism," to "defeat the imperialists," and to "defend the Soviet Union." (Pet. Ex. 143, pp. 13, 30.) Another pamphlet issued in the 1930's, *The Communist Party in Action*, declares respondent is "organizing the American proletariat to follow the example of the working class of Russia led by the Communist (Bolshevik) Party." (Pet. Ex. 144, p. 4.) In this connection, it is pertinent to note that the *History of the Communist Party of the Soviet Union* is one of the most important of the "Classics" of Marxism-Leninism setting forth the policy and program of the world Communist movement, and that the record establishes continuous use of this text by respondent. (See "Marxism-Leninism," *supra*.)

An expression of Party policy in the late 1950's appearing in *Political Affairs* is that in "country after country, the masses have made it known in various ways that never, never will they fight against the Soviet Union," (Pet. Ex. 477, p. 1) and:

> "... The Soviet Union is the embodiment and leader of the forces of proletarian internationalism. * * * the Communist Party of the Soviet Union ... is the leading Communist Party of the world. ... It is leading the fight for Socialism. * * * Communists [recognize] the leading role of the Communist Party of the Soviet Union." (*Ibid.*, pp. 18 and 19.)

~~Speaking through *Political Affairs* for August 1951, respondent took the position that "The scales are weighed in favor of the people's peace forces, headed by the Soviet Union" and there is quoted with obvious approval the statement of Comrade Mao Tse-Tung, "the tested leader of the Communist Party of China" that the *History of the Communist Party of the Soviet Union* "is the highest synthesis, the highest generalization of *the world Communist movement*." (Pet. Ex. 484, pp. 11, 35, emphasis added.)~~ In March 1952 respondent published in *Political Affairs* an article written by the general secretary, Communist Party of India, which favorably refers to the Soviet Union while being critical of "Anglo-American imperialists" and, speaking of successes of the Communists in the India general elections, states the efforts must be redoubled "to develop the movement which will sweep away the present Government." (Pet. Ex. 491, p. 44.)

[fol. 2526] *Political Affairs* for February 1951, a special issue devoted to respondent's 15th National Convention held December 28-31, 1950, is further revealing as to respondent's struggle against imperialism as shown from the following quotations:

> "Our Constitution is the product of thirty-one years of struggle and experience of American Communists, and was given its present form by the struggle against Browder-revisionism, which restored our Party to the path of revolutionary class struggle, at the National

Convention of 1945. It applies the fundamental principles developed by the great Lenin, founder of the Party of a new type, which have proven to be universally applicable wherever the working class wages struggle to end exploitation and to usher in Socialist society. (Pet. Ex. 376, p. 74.)

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"Our responsibility of proletarian internationalism demands an unrelenting struggle against the intensified poison of imperialist chauvinism and white chauvinism, that racist weapon of ruling-class ideology, which aims to prevent the unity of the working class with the Negro people at home, and with the colonial-liberation movements. (*Ibid.*, p. 189.)

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"While our Party has conducted a constant struggle on the role of the Soviet Union as the Socialist bulwark for peace, colonial liberation and human progress, we must admit that we have not made this a central feature of our ideological work, to combat the anti-Soviet fabrications in a vigorous and consistent manner. This weakness in our work is also seen in the fact that in a very meager sense only have we made available the facts on the great economic and social achievements within the Soviet Union and the countries of People's Democracy." (*Ibid.*, p. 189.)

This exhibit (*Political Affairs*, February 1951, Pet. Ex. 376) contains the communication received by respondent on the occasion of its 15th Convention from Communist Parties throughout the world expressing their support of respondent in the fight against "American imperialism" [fol. 2527] and their solidarity and unity with respondent under "proletarian internationalism" headed by the Soviet Union. (See "World Communist Movement," *supra.*) Included among the communications was a message from the Central Committee of the Communist Party of the Soviet Union supporting respondent and stating, among other things, the desire that the "international solidarity of the

toilers in the struggle for peace, democracy and Socialism gather strength." [82] (*Ibid.*, p. 229.)

The foregoing expressions of position as revealed by respondent's official organs is illustrative of considerable documentary evidence on the subject, all of which establishes that respondent's policies and activities opposing "imperialism" conform with the positions of the Soviet Union and the world Communist movement as summarized at the beginning of this section of our Report and set forth in detail under the preceding sections, "Marxism-Leninism" and "World Communist Movement." [83] That respondent's policies and activities in the struggle against imperialism are those of the Soviet Union and the world Communist movement, as revealed by the exhibits, is corroborated and illuminated by the witnesses for petitioner who were at one time functionaries of respondent.

While Gitlow was a high officer of respondent, until 1929, his understanding of the aims and purposes of the Party were to defend the Soviet Union, to carry out the orders of the Communist International, and to work for undermining the foundations of the American Government in order to make it possible for respondent to overthrow our form of government and establish a dictatorship as in the Soviet Union. Kornfeder taught in a school at Party headquarters in 1932 that the main doctrine of Lenin called for the complete and total overthrow of the Government, the elimination of the present state structure and its replacement by a dictatorship led by respondent. Nowell's Party experiences were similar. He was taught at the Lenin School in Moscow in 1932 and then himself taught in respondent's schools in 1933 and 1934 that the Government of the United States was the executive committee of the capitalist class in the United States; that the pro- [fol. 2528] letarian revolution and the dictatorship of the

[82] We consider later under this heading the meaning of "peace" and "democracy" as used by respondent and in the world Communist movement.

[83] Respondent's policies and activities regarding the division of the world into two camps and "just and unjust wars," which we consider later under this heading, are part of the full picture on the so-called "struggle against imperialism."

proletariat were necessary and equally as inevitable in the United States as in other capitalist countries; that it was the duty of the Communists to work for the overthrow of the Government of the United States and the establishment of the dictatorship of the proletariat; and that it was the necessary duty of respondent, as a part of world communism, to work for the overthrow of the other "imperial nations." (Tr. 2436.)[84]

Meyer, while teaching in respondent's schools until the end of 1945 (several years subsequent to the announced disaffiliation from the Communist International), instructed the members of respondent that Marxism-Leninism is a guide to respondent in carrying out its *historical role or mission* to overthrow the capitalist system and political states founded on the capitalist system, to destroy the economic organization on which that society is founded and its political system, and to replace it with the dictatorship of the proletariat and establish the kind of socialism that will lead to communism. Lautner, whose Party membership extended to 1950, was taught as a Party functionary that the basic objective of the world Communist movement was to bring about the downfall of imperialism. the United States being the leading imperialist country, and that under Marxism-Leninism there is need of a world-wide organization that has "ties" to successfully cope with monopoly capitalism or imperialism and eventually bring about its downfall. (Tr. 9514.) Lautner identified the leadership of the world Communist movement as the rulers of the Soviet Union.

Before considering respondent's policies and activities which relate to the policy of the world Communist movement on the division of the world into the "camp of peace and democracy" and the "camp of imperialism," we determine the meaning of "peace" and "democracy" as used in the world Communist movement. Both words as so used connote the overthrow of "imperialism" and presup-

[84] Relevant to this issue petitioner's witness Scarletto testified concerning a meeting of a Party club where sabotage of United States efforts in the Korean War was discussed, however, this testimony was rendered questionable on cross-examination and is not credited.

pose the dictatorship of the proletariat. Dimitroff's *The United Front*, an important document in the world Communist movement, defines "democracy" as follows:

> ". . . We Communists are unswerving upholders of Soviet *democracy, the great example of which is the proletarian dictatorship in the Soviet Union.* . . . This Soviet *democracy* presupposes the victory of the proletarian revolution, the conversion of private property in the means of production into public property, the adoption by the overwhelming majority of the people of the road to socialism. . . ." (Pet. Ex. 149, p. 109, emphasis added.)

[fol. 2529] The *History of the Communist Party of the Soviet Union* teaches the necessity of overthrowing imperialism in order to have "peace," stating:

> "The Bolsheviks were not mere pacifists who sighed for peace and confined themselves to the propaganda of peace, as the majority of the Left Social-Democrats did. The Bolsheviks advocated an active revolutionary struggle for peace, to the point of overthrowing the rule of the bellicose imperialist bourgeoisie. The Bolsheviks linked up the cause of peace with the cause of the victory of the proletarian revolution, holding that the surest way of ending the war and securing a just peace, a peace without annexations and indemnities, was to overthrow the rule of the imperialist bourgeoisie." (Pet. Ex. 330, p. 167.)

The record shows that respondent makes the same use of these words as will appear later under this heading and as illustrated by a Party statement in the *Daily Worker* for November 7, 1950, that:

> "Today the Soviet Union is indestructible. • • • The work of Lenin and Stalin is immortal. The Socialist state has become the leader of a new force in modern history—the great camp of peace. This new alliance of hundreds of millions of people in China and the People's Democracies, together with the vast millions in the colonial and capitalist countries, can pre-

vent war. This is the new achievement of the Soviet Union, the glorious vision that the people can make a reality." (Pet. Ex. 468.)

Regarding the alignment of the forces of the world into two camps, respondent's policy was shown to be the same as that of the Soviet Union and the world Communist movement.

To illustrate, the educational department of respondent's Michigan State Committee in April 1949 issued a "Discussion Outline" on "The Marxist Position Toward War," which says in part:

". . . The post-war world was split by the U.S. and Britain into two camps—the camp of imperialism and fascism under the leadership of American imperialism and the camp of democracy, national freedom and peace, headed by the USSR." (Pet. Ex. 400, p. 4.)

[fol. 2530] In 1950 respondent's official organ set forth the position that "American imperialism is today the gendarme of the world, the crusher and violator of . . . peace and democracy. And, this is not something temporary, something that will change again tomorrow." Also, that the "more Wall Street imperialism loses its world positions, the more frantic and desperate it will become, and the sharper will become the struggle here at home—not the other way around." (Pet. Ex. 363, p. 119.)

The testimonial evidence shows that respondent's policy includes active efforts in behalf of the "camp of peace" and its leader, the Soviet Union. A Party group in Boston, Massachusetts, at a meeting in 1948 attended by Philbrick took the position that the United States led the "camp of Imperialism" and the Soviet Union led the "camp of the people's democracies," that "it was quite clear" to which camp Party members owed their basic loyalties, that no Party member could place himself in the "camp of the imperialist warmongers." (Tr. 6136.) When Lautner left respondent in early 1950, the Party line was that the United States headed imperialist forces of the world and the Soviet Union led the anti-imperialist forces, that everything should

be done to aid the Soviet Union and to disconcert the United States.

As found *supra*, the united front tactic is an important procedure set forth in Marxism-Leninism for attaining its objectives, and in 1935 the Communist International, with respondent represented, mapped out the "tactical line" of forming united fronts with other organizations in order to achieve unity in the fight against "imperialism."

Respondent adopted a resolution "fully and wholeheartedly" endorsing those decisions of the Comintern and declaring the chief task of the Party to be reorienting the work of the Party in accord with the tactical line laid down by the Comintern as part of the Party's "revolutionary aims" and "revolutionary principles and program." (Pet. Ex. 185, pp. 1182-1185.) Respondent's resolution noted the "coming forward of the C.P.U.S.A. as a major party in the world organization of Communists" (*ibid.*, pp. 1182-1183) and stated in part:

> "Every Party member must realize that in fighting for the realization of the united front of the working class we are fighting for the establishment of 'the decisive link in the preparation of the toilers for the forthcoming great battles of the second round of proletarian revolutions'. This is the link that will fuse the proletariat into a single mass political power [fol. 2531] and 'will ensure its victory in the struggle against fascism, against the power of capital, for the dictatorship of the proletariat and the power of the Soviets'. This gives us the line and methods to infuse the masses with the ideas of Communism, the principles of Marxism-Leninism, in the present period. This gives us the true weapon for the building and strengthening of the Communist Party, for the realization of the political unity of the American proletariat —one party—and for building the transition to the revolutionary struggle for a Soviet America." (*Ibid.*, p. 1184.)

Nowell, as a Party member, was instructed by his Party superiors to proceed to set up organizations in accordance with the new united front policy and the new type of re-

orientation directed by the Comintern. He carried out these instructions by forming factions in various organizations for the purpose of influencing the policies of the organizations and to guide them along the lines of the Party in setting up the united front movement.

When the tactical change in emphasis in the world Communist movement occurred after World War II and the new link for exerting influence and gaining adherents became the "struggle for peace,"[85] respondent's policy reflected the new emphasis. That respondent is actively applying the tactic of the united front in the "struggle for peace" is evidenced by statements appearing in a number of issues of both the *Daily Worker* and *Political Affairs*.[86] Lautner attributed respondent's emphasis on the "struggle for peace" to the fact that this was the emphasis of the world Communist movement. This is also evidenced from a study outline issued by respondent in 1949 which includes the study of the tactics of the Seventh Congress of the Communist International and points out that in the present period the strategic objective remains the same but the tactical line of the united front and people's coalition has developed still further. The outline lists Dimitroff's report to the Comintern as required reading and the *History of the CPSU* as supplemental reading. (Pet. Ex. 427, pp. 1-3 of Session 9.) A separate discussion outline, also issued by respondent in 1949, devotes considerable space to the "peace" line and lists works by Lenin and Stalin as well as the *History* as reading material.

[fol. 2532] Demonstrating further that the "struggle for peace" is the current application of the "struggle against imperialism" and is linked to the Soviet Union, is respondent's statement in the March 1951 issue of *Political Affairs* that:

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[85] See "World Communist Movement" *supra*, particularly fols. 2482-2484.

[86] See for example the *Daily Worker* for March 3, 1949, June 9, 1950, July 13, 1950, September 18, 1950, February 19, 1951, April 1, 1951, October 19, 1951, November 7, 1951, and June 9, 1952, (Pet. Exs. 331, 269, 270, 440, 451, 455, 467, 468, 495), and *Political Affairs* for November 1950, February 1951, April 1951, December 1951, and January 1952. (Pet. Exs. 477, 376, 480, 488, 489.)

". . . We are firmly convinced that peace can be won because of the strength of the world camp of peace, democracy and Socialism, led by the Soviet Union, and the growing weaknesses and differences in the world camp of war, led by United States capital. . . . " (Pet. Ex. 479, p. 20.)

Speaking of the "cause" to which its top official Foster "has dedicated and devoted his entire life," this same issue of *Political Affairs* defined it as the cause of "democracy," the cause "of world peace" and of "the final establishment of Socialism." (*Ibid.*)

Another program of the world Communist movement set forth in Marxism-Leninism and by the Communist International is the duty to aid and support "just" wars—those of liberation from foreign attack, or from "capitalist slavery," or to "liberate colonies and dependent countries from the yoke of imperialism" (Pet. Ex. 330, p. 168)—while opposing "unjust" wars—those engaged in by the "imperialist" countries and including any war against the Soviet Union (*supra*, fol. 2395). Explicit and inherent in this program are the protection and support of the Soviet Union and the overthrow of imperialism (*supra*, fols. 2395-2396). The program includes the activity of converting "imperialist" war into civil war and defeating one's own government in an "imperialist" war (*supra*, fol. 2396).

Respondent's application of the program with respect to "just" and "unjust" wars has been consistent throughout its existence as shown by the findings set forth below which are an illustrative part of considerable evidence.

The pamphlet on *Why Every Worker Should Join the Communist Party*, issued by respondent in the 1930's shows respondent's position as being that the first danger to the working class of all countries is imperialist war against the Soviet Union, that:

". . . Workers of all countries must fight with all possible measures and weapons to defeat the imperialists and defend the Soviet Union. . . .

* * * * * * * *

[fol. 2533] ". . . when war comes in spite of working-class opposition, the workers must prepare to turn such

war into a war to destroy imperialism itself, to overthrow the power of the capitalist class, and to establish a Workers' Government in the United States." (Pet. Ex. 143, pp. 30-31.)

This illustrates a quantity of evidence expressing respondent's policy at that time and is pertinent for comparison with the policy of the world Communist movement, *supra*, particularly the 1935 resolution of the Comintern which included the exhortation that in waging "the struggle against imperialist war before and after the outbreak of hostilities, the defense of the Soviet Union must be considered paramount." (Pet. Ex. 137, p. 48.)

In the years between 1945 and 1950, Cummings, Hidalgo, Blanc, Markward, and Baldwin were taught as members of respondent the concept of the division of the world into two camps and that wars of the imperialists were unjust wars whereas wars of the anti-imperialists were just wars; that in a war between imperialists and anti-imperialists, the members of respondent must aid the anti-imperialists; and that this would hold true in the case of a war between the Soviet Union and the United States.

Evans, a member of respondent from 1948 to 1952, was taught in respondent that in a war between the Soviet Union and the United States all members of respondent should help defeat the predatory aims of imperialism. Lautner was instructed as a functionary of respondent that in the case of a war between an imperialist country and a socialist country, Communists would support the socialist against the imperialist, specifically, they would support the Soviet Union against the United States.

In 1949 respondent's leaders Foster and Dennis wrote in the *Daily Worker* that respondent would oppose a "Wall Street" war as "unjust, aggressive, and imperialist." (Pet. Ex. 331.) The article was used in discussions at respondent's school in Boston while Philbrick was present. The instructor stated that the true patriot is the one who fights on the side of the working class and who fights against capitalism, he said Foster and Dennis were completely correct in boldly stating unequivocally that in the case of an imperialist war on the part of the United States, all Com-

munists, not only in this country but in the world, would oppose the war in every possible way and do everything they could to defeat the military operations of the capitalist Government of the United States.

Our findings under preceding subheadings show that after the successful October 1917 Revolution the objective of the Soviet Union was to consolidate, extend, and assure the continuation of its victory by using the Soviet Union [fol. 2534] "as a base for the overthrow of imperialism in all countries" (Pet. Ex. 121, p. 91); that the Communist International, under the control of the Soviet Union, was established on the initiative of Lenin as the "leader and organizer of the world revolutionary movement" (Pet. Ex. 125, p. 85); and, that after World War II the Communist Information Bureau was formed to coordinate "the actions of Communists in various countries" and align forces in the struggle against imperialism. (Pet. Ex. 367, p. 145.) Accordingly, and in view of the finding that respondent looks to the foreign Communist press for the current line, it is pertinent to consider the statements set forth in recent issues of the organ of the Communist Party of the Soviet Union relative to the struggle against imperialism.

*Pravda* in January 1949 stated that while imperialism exists there also exists the danger of new aggression but the Soviet Union "with its growing power and its international authority" constitutes an "insurmountable barrier" to the establishment of world domination by one power or another. (Pet. Ex. 251, p. 19.) *Pravda* in March 1950 declared that the "victory of the national liberation movement in China" was the most powerful blow at world imperialism since the October Revolution of the Soviet Communists and that now the Soviet Union is "the center of the powerful international democratic camp," with millions of active friends in the capitalist countries, which is opposed by "the camp of the imperialist powers headed by the ruling circles of the United States of America." (Pet. Ex. 217, pp. 4, 5, 6.)

The November 1949 report of Malenkov to a meeting of the Moscow Soviet (*supra*), which was published in the organ of the Cominform, contains a substantial portion under the heading "The Soviet Union Stands for Peace and

Defends the Cause of Peace." He points out that there is not a single country in which the movement uniting the supporters of peace does not possess a "base" and that the successes of "the camp of peace" drives the "enemies of peace," "by means of violence and new wars," to attempt the creation of an American world empire designed to turn the whole world into a "colony of the American imperialists, of reducing sovereign peoples to a state of slavery." (Pet. Ex. 231, pp. 1, 2.) Additional evidence of the Soviet Union position, as well as evidence that respondent accepts and supports it, is given by a condensed translation from the Soviet journal *Voprosi Filosofie*, which respondent published in *Political Affairs*. It approves an early Soviet statement to the effect that "the peoples" are taking the fate of their states in their own hands and establishing "democratic regimes" and "carrying on an active struggle against the forces of reaction, against the incendiaries of a new war." (Pet. Ex. 488, p. 20.)

[fol. 2535] Further in this connection, we have previously set forth the fact that in 1949 Communist Party leaders and organizations, including those in France, Italy, Australia, Belgium, Argentina, and Canada, affirmed that the Communist Parties in those countries would not bear arms in a war against the Soviet Union. The Cominform organ *For a Lasting Peace* declared in 1950 that:

> ". . . At the present time the great and noble aim is to defend peace from the threat of the new war being prepared by the Anglo-American Imperialists. . . . Awareness of the need to wage the struggle for peace ever more resolutely, vigorously and selflessly is becoming a determining feature of the peace movement.
>
> * * * * * * *
>
> "The whole world knows of the warmth with which the great Chinese people welcomed the news of the signing of the Treaty of Alliance between the U.S.S.R. and the Chinese People's Republic, a treaty which strengthens the camp of peace the world over.
>
> * * * * * * *

> "In the present situation a great historic responsibility rests with the Communist and Workers' Parties. Marching in the vanguard . . . and regarding the struggle for peace as their main task, the Communist and Workers' parties must double and treble their efforts to rally the broad masses for vigorous and concrete action . . ." (Pet. Ex. 405.)

Finally in connection with the "struggle against imperialism" we have taken into consideration our findings under the later heading "Allegiance," including that a number of respondent's leaders, many of whom have been in leadership positions since the period of the Communist International, were recently convicted of violating the Smith Act.

We find that respondent continuously throughout its existence has advanced the policy of the Soviet Union and the world Communist movement for the overthrow of the governments of countries designated as "imperialist," particularly the United States, in order to establish in place of such governments a Communist dictatorship of the proletariat, and to defend the Soviet Union.

[fol. 2536] We now examine further evidence on respondent's major programs.

### 5. Major Programs

#### a. General

The scheme of the world Communist movement as set forth in Marxism-Leninism, by the Communist International, by the Communist Information Bureau, and in separate pronouncements of the Soviet Union, contains rules and programs of activity deemed necessary to achieve the ultimate objectives of the movement; the more important areas of activity are trade union, youth, and colonials or national minority groups. The theory of the world Communist movement is that trade unions and youth are the "belts" and "levers" without whose aid the Communist dictatorship of the proletariat cannot be realized, while the Communist Party is the directing force; that trade unions are "a school of Communism," youth are "young reserves," and national minorities have "latent revolu-

tionary capacities." The aims of the world Communist movement are for "winning over" and "utilizing" trade unions, for "organizing the Marxist-Leninist training of youth," and for "utilizing" the latent revolutionary capacities of the minority groups, all in order to "overthrow imperialism."[87]

The evidence discloses, and as we read the record it is not disputed, that respondent likewise attaches extreme importance to work among labor unions, the youth, and minority groups, particularly the Negroes. The objectives of the policies advanced by respondent and the activities pursued in these important areas are material.

The article "Milestones of Comintern Leadership" (Pet. Ex. 126), written in 1934 by Bittelman, then and now one of respondent's top officials, evidences that respondent's programs in trade union work and among the American Negroes were formulated under direction of the Communist International. Bittelman wrote in pertinent part as to respondent's trade union work:

> [fol. 2537] "The next milestone in the Comintern leadership for the American party we find on the question of trade union work. . . . The Comintern brought the American militants and lefts closer to the world labor movement and to the basic problems of the American labor movement. The trade union question was one of them. . . . Even the best and most experienced among the left and militant leaders of the American workers, . . . such as the late Charles E. Ruthenberg, as well as the present leader of our Party, William Z. Foster, were able to rid themselves and

[87] These quotations are from excerpts heretofore set forth including the "Classics" of Marxism-Leninism and the *Programme* and *Theses and Statutes* of the Communist International. The repetition of these policies and programs by the Cominform is shown from the Suslov report printed in the December 2, 1949, issue of *For a Lasting Peace* (Pet. Ex. 249, p. 3, *supra*), which emphasizes the necessity of drawing trade unions into the "camp of the fighters for peace, against the warmongers," points out the help that can be furnished by youth, and says the duty of the Communist and working class parties in the capitalist countries is to merge the struggle for national independence of minorities with the struggle for peace.

our movement of the old bankrupt of opportunism only by coming closer to Leninism and into the Comintern. . . ." (Pet. Ex. 126, pp. 239-240.)

It was Comintern advice and guidance that helped the American Communists to turn full face to the building of a left-wing in the reformist unions beginning with 1920; it was the advice of the Comintern that helped formulate a correct solution to one of the basic problems of the American proletariat—the organization of the unorganized into trade unions; it was the advice of the Comintern on independent leadership of the economic struggles by the revolutionary elements that helped formulate strike policies and tactics; . . . (*Ibid.*, p. 240.)

"Comintern influence on the development of revolutionary trade union policies in the United States has especial significance. . . . It is significant, therefore, that the first question which Comrade Stalin put to the American trade union delegation was: 'How do you account for the small percentage of American workers organized in trade unions?' . . . the intent of Stalin's question is clear: Why don't you organize the workers in trade unions? Why don't you strengthen them against the capitalists? And it was in this direction that *the Comintern threw the full weight of its influence and advice in the American labor movement.* . . . Tactics and methods of work might vary, depending upon the state of the class struggle. . . . *But the strategic aim always remained the same*, and for this aim the Communist Party fights bravely and persistently and with increasing effectiveness. . . . So, we ask again: can any American worker, who is alive to the needs of his class and is willing to fight for them, find anything to object to in this 'interference' of the Communist International in American affairs? And will he object to the Communist Party of the U.S. accepting and taking deep satisfaction in such 'interference'? No, he will not. . . ." (*Ibid.*, pp. 240-241, emphasis added.)

[fol. 2538] Concerning the matter of national liberation, the Bittelman article says:

> "... Once more came the 'outside' influence of the Comintern, and what did it say? It said that the struggle against discrimination and for Negro rights is a revolutionary struggle for the national liberation of the Negroes, that we must fight for complete Negro equality, and that in the Black Belt the full realization of this demand requires the fight for the national self-determination of the Negroes, including the right to separation from the United States and the organization of an independent state. Furthermore, it was the interpretation of Leninism and its application to the United States as made by the Comintern that showed the American Communists that the agrarian revolution in the Black Belt, ... is the basis of the national-liberation movement *and that this movement is one of the allies of the American proletariat in the struggle for the dictatorship of the proletariat*.... Will the Negro workers, farmers, and city poor consider the Comintern advice on the Negro question as 'outside dictation'? No: They will, as they actually do, receive this advice with outstretched arms and will continue in ever-larger masses to rally around the Communist Party as the leader of the liberation fight. ..." (*Ibid.*, p. 244, emphasis added.)

A review of respondent's early documents and the testimony of witnesses who were officials of respondent during its formative years, establish that respondent gave to trade unions, youth, and minorities as prominent a place in its structure as did the founders of the dictatorship of the proletariat in the Soviet Union. Respondent's articles, publications, and other documents, together with the testimony of witnesses, show that throughout its existence and up to the time of this proceeding, respondent has continued to give extreme importance to trade union work, the mass organization and training of youth, and the struggle for national liberation of the Negroes. It is not necessary to review herein the considerable quantity of evidence that

shows the extent of respondent's policies and activities in furtherance of the world Communist policy on trade union, youth, and national liberation movements, nor to review the large quantity of evidence from which we find that these policies and activities of respondent represent to a substantial degree the continued adherence by respondent to unrebutted directives given by the Soviet Union. We limit this Report to some of the more significant indications. For clarity, we treat the subjects separately. The evidence hereinafter set forth is in addition to the fact that respondent's policies and activities on trade unions, youth, and the struggle for national liberation are based upon Marxism-Leninism.

[fol. 2539] b. Trade Union Work

One of the "Conditions" for membership in the Communist International, to which respondent became bound, was:

> "Every party desirous of belonging to the Communist International should be bound to carry on systematic and persistent Communist work in the labor unions, co-operatives and other labor organizations of the masses. It is necessary to form Communist groups within the organizations, which by persistent and lasting work should win over labor unions to Communism. . . . These Communist groups should be completely subordinated to the party in general." (Pet. Ex. 8, p. 29.)

In 1927 Benjamin Gitlow, at the time a member of the Politburo of respondent and its Central Committee, was sent by respondent to the Soviet Union at the special request of the Communist International to attend the Plenary sessions of the Executive Committee of the Communist International. While there, Gitlow, and other leaders of respondent met with Joseph Stalin. Stalin directed the Communist Party to make a serious effort to get a foothold in the trade union movement of the United States in order to attract to the Communist Party a much larger membership and to await a sharpening of the economic and social situation in the United States for future revolutionary ac-

tion. We note that Stalin's directive is in line with the policies of Marxism-Leninism and of the Comintern, set forth *supra*.

The official minutes of the proceedings of respondent's governing committees for a number of meetings during the period from late 1925 to late 1928 show action by respondent concerning trade union work pursuant to specific instructions and directives from the Communist International. (Examples are Pet. Exs. 53, 63, 65, 77, 80, 87, and 91.)

The record shows that respondent's tactics in its trade union work have been changed at least three times pursuant to directives of the Communist International and to effectuate the policies of the world Communist movement. Originally, the policy was to operate in existing unions. This was changed in 1928 to a policy of concentrating on forming new unions pursuant to a Comintern policy change applicable on a world-wide scale. In 1934 the policy reverted to one of operating in existing unions pursuant to the Comintern united front policy. The evidence establishes this policy is still in effect.

[fol. 2540] The evidence on respondent's changing tactics in trade union work includes the unrebutted testimony of Gitlow on important Soviet-directed policies of respondent while he was an official thereof. This testimony included:

> "For example, the trade union policy of the United States. The trade union policy of the United States has shifted from independent trade-unionism, outside of the American Federation of Labor, to working within the American Federation of Labor. When this policy was changed in Moscow, it shifted from that of the organization of Communist, independent unions, in this country. The political factors that were changed: the Communist support of the formation of the labor party in the United States, first approved by the Communist Internationale, and the Communist Internationale changed that policy, and that policy was changed and the Communist Party went into the organization of an independent ticket.
>
> "That later was changed again to a decision by the Communist Internationale directing the Communist

Party of the United States to work for the formation of a farmer-labor party in this country." (Tr. 120-121.)

The changes in trade union tactics and the purpose of trade union work is also shown by the experiences in respondent of the witness Nowell. In 1929 he received instructions from respondent's Central Committee to help organize industrial workers in the basic industries in a national parent organization known as the Trade Union Unity League affiliated with the Red International Labor Unions in Moscow. The purpose of respondent was to use these unions as schools of communism and for aiding and facilitating the proletarian revolution. In 1935 Nowell, along with a group who had been or were employed in the automobile industry, was instructed by respondent to work for Communist control of their local unions and to gain hegemony in the CIO (Committee of Industrial Organization, which later became the Congress of Industrial Organizations).

The Bittelman article on Comintern leadership (*supra*) further evidences that the directives of the Communist International constitute an important source of respondent's united front program in trade union work, stating:

> [fol. 2541] "... In short, at every stage in the development on the revolutionary trade union movement in the United States (T.U.U.L., class struggle unions of the T.U.U.L., the application of the united front on the trade union field, the fight for trade union unity, etc.), it was with the help of the Comintern that the American revolutionary workers were able to find the correct way, to correct their errors and, through manifold changes in tactics, to press on to the goal of building a revolutionary trade union movement in the United States." (Pet. Ex. 126, p. 240.)

Evidencing the current following of the united front tactic in trade unions, respondent resolved at its 1950 National Convention that:

> "... We must face the fact that the overwhelming bulk of the organized workers in the country are in the

A.F. of L., C.I.O. and independent Right-led unions. It is this which must determine the main direction of all of the Party's work, and especially its trade-union and industrial concentration policy." (Pet. Ex. 378, p. 13.)

And in *Political Affairs* for February 1951, respondent stated in an article entitled "Broadening the United Front for Peace in the Trade Unions":[55]

"Above all, and this is most decisive, we must organize and systematically guide and direct our industrial and shop clubs toward mastering the methods of united-front activity for peace in the shops and unions. We talk a great deal about style of work. These are the places, first of all, where the expression, 'style of work,' must assume concrete meaning. (Pet. Ex. 376, p. 170.)

. . . . . .

"Style of work, that's the thing. We must go down to each shop and industrial club, to help organize the club for united-front activities for peace on the basis of the specific problems in each shop or union. . . ." (*Ibid.*, p. 171.)

The experiences of other witnesses, while holding functionary positions in respondent, as well as additional docu-[fol. 2542]-mentary material give further evidence as to the source and purposes of respondent's trade union work. In 1932 Kornfeder taught in respondent's school at the national headquarters in New York. In a course on Leninism he covered the main doctrine calling for the complete and total overthrow of all existing social institutions, the Government, and the complete elimination of the present state structure and its substitution by a dictatorship led by the Communist Party. With respect to labor union tactics, he taught how to secretly form groups inside of labor unions

[55] The united front for peace is the present emphasis of the struggle against imperialism, i.e., for the overthrow of imperialism. See the preceding section of this Report, "Anti-Imperialism."

for the purpose of getting control of them, and how to prepare for and carry on a strike.

Under the programs of the world Communist movement, the incitement to strike is a tactic of labor union policy and activity. In the late 1920's a special committee was created by respondent in an attempt to gain control of the United Mine Workers by utilizing anthracite strikes to respondent's advantage. In 1934 the Comintern and the Red International of Labor Unions, at joint meetings in Moscow, instructed respondent to press the then current situation among the longshoremen and dock workers in San Francisco to the point of a general strike. These instructions were communicated to respondent by coded message and were carried out. Manuilsky, then secretary general of the Communist International,[89] expressed himself as anxious to have the strike since a cardinal principle of Leninism was that a general strike is a rehearsal for revolution or for a seizure of power by the Communist Party. A strike meeting was called at the Fisher Body Plant in Cleveland in the 1930's at the direction of the Communist International representative, Gerhardt Eisler. In 1940, respondent instigated a strike at Allis-Chalmers in order to slow down the production of war materials for Great Britain, then at war with the Soviet Union's then ally, Germany.

We note in connection with foreign control over respondent's trade union activities, as previously noted, that Kornfeder was warned by foreign representative Gerhardt Eisler not to speak out at respondent's convention in opposition to a change in trade union policy and was subsequently expelled for not repudiating his opposition to the changed policy. Also, Honig in the early 1930's was given instructions by a representative of the Communist International concerning his Party assignment as editor of a publication called *Labor Unity*.

Nowell, while a student of respondent at the Lenin School in Moscow in 1931, studied Soviet trade union activities and worked for the Comintern in formulating policies for respondent to carry out in its trade union work. Honig, while

[89] Manuilsky in 1945 was Soviet representative to the initial United Nations Conference on international organization held in San Francisco.

[fol. 2543] in the Soviet Union on respondent's business, sent back reports on decisions made by the Comintern or its affiliated Red International of Labor Unions on trade union tactics. He saw reports sent to Moscow by respondent that it was carrying out these directives.

In May 1940 respondent published in its magazine *The Communist* (Pet. Ex. 436) an article by Dennis, then and now a high official of respondent, entitled "The Bolshevization of the Communist Party of the United States in the Struggle Against the Imperialist War," which states it is particularly urgent, in accordance with certain conditions outlined by Stalin in *Pravda* in 1925, to conduct more consistent and effective activity among the AF of L workers.

An article by Henry Winston, then respondent's national organization secretary and now on the National Committee, appearing in *Political Affairs* for September 1948 (Pet. Ex. 418) entitled "For a Fighting Party Rooted Among the Industrial Workers!" concerns the necessity for mobilizing the workers in the factories as a main base for a successful fight against war and fascism. Cummings, a member of respondent from 1942 to 1949 was taught that an important objective of respondent was to infiltrate trade unions, Negro organizations, and other organizations in order to gain control of them and eventually change the system of the American Government. Evans attended the 1951 west coast regional convention of respondent at which considerable attention was devoted to the principle of industrial concentration, the necessity of infiltrating the trade unions. Philbrick showed that at a Party conference in 1946, the lead-off speaker stated that the basic industries were the major weapons of the "imperialists," with the Soviet Union the prime target, and that the Party should concentrate its efforts against these basic industries. Lautner and Baldwin gave evidence showing trade union activities of respondent designed to build the Party numerically and to develop cadres in the industries.

The February 1951 issue of *Political Affairs* (Pet. Ex. 376) "devoted to reports, speeches, and greetings of the 16th National Convention of the Communist Party, USA, held in New York City on December 28-31, 1950," (*ibid.*, p. 1) contains an article by John Williamson, a member of

respondent's National Committee and its labor secretary, entitled "The Main Direction of the Party's Trade-Union Work" (*ibid.*, pp. 54-73) which direction, the author says, must be "among the members of the reformist-led unions" (primarily the AFofL and CIO). (*Ibid.*, p. 66.) The article refers to the role of the Party through its 31 years existence and concludes that "in general the trade-union policies adopted by our Party were correct." (*Ibid.*, p. 72.) According to Williamson:

> [fol. 2544] "... The present situation demands from all Party trade unionists, especially in positions of leadership, closer ties with the Party, better understanding of policies, and a more vigorous fight for Party policies among the masses. (Pet. Ex. 376, pp. 72-73.)
>
> * * * * * * *
>
> "... We know ... our Party, headed by its helmsmen Foster and Dennis, will lead the working class safely to the port of Socialism." (*Ibid.*, p. 73.)

Janowitz was a member of respondent both during the period it was called the Communist Political Association and after it reverted to the name Communist Party. He held minor official positions and was active in respondent's trade union work in Ohio. He and one Fred Haug, at a meeting of Communist labor members in 1950, were assigned the duty of getting new members for the Party. Also in 1950, at a meeting of a Communist Party group of the plant where Janowitz was employed, a State official of respondent handed out copies of *New Times*, published by the newspaper *Trud* in Moscow, and of *For a Lasting Peace, for a People's Democracy*, official organ of the Cominform. The official told the labor members to study the documents and pass them on. On the basis of his experience in the Party, Janowitz learned that the Communists are to take advantage of every opportunity that arises, e.g., depression or strikes, to lead the masses, and are to be the leaders in any movement that unites the masses for the purpose of "getting rid of the capitalist system in America," and substituting communism. (Tr. 10788.)

Summarized, we find that while an open member of the Soviet-controlled Communist International respondent fully complied with and followed the policy and directives of the International in developing "revolutionary trade union policies in the United States"; that respondent currently follows and applies the same policy and program toward work in the trade unions; that respondent's work in the trade unions adheres to the program of Marxism-Leninism for utilizing trade unions as "belts" and "levers" in seeking to achieve the dictatorship of the proletariat and to effectuate the policies of the Soviet Union.

[fol. 2545] c. Youth Work

The evidence on respondent's programs and activities with respect to the youth reveals a similarity to respondent's trade union programs and activities in that the clear preponderance of the evidence establishes that while an open member of the Communist International respondent's policies on youth work were formulated and carried out and its activities among the youth performed pursuant to directives of the Comintern.[90] The evidence is also clear that respondent's youth programs and activities follow Marxism-Leninism. No useful purpose would be served in detailing the evidence establishing these facts. We limit this Report to illustrative evidence on significant points.

In its 1926 directives to respondent the Communist International stated that greater attention must be given to the building of a mass Young Communist League, that "the young will serve as a reservoir of trained Party members." (Pet. Ex. 40, p. 4.) The Comintern approved respondent's program for a unit of the League "wherever a Party unit exists." (*Ibid.*) A copy of the resolution of the Comintern containing the directives to respondent was distributed by respondent to all its District, City, Section

[90] Included in the evidence covering the period of the Comintern are the minutes of various top governing bodies of respondent in 1925-1928 (for example, Pet. Exs. 58, 71, 72, 73), the Party pamphlet issued in 1932 entitled *The Communist Party in Action* (Pet. Ex. 144), respondent's *Manual on Organization* (Pet. Ex. 145), and the Party pamphlet *The Way Out* (Pet. Ex. 136) covering resolutions adopted by respondent in 1934.

Committees, and Language Bureaus (but to be kept within the Party ranks and not published).

In respondent's 1935 resolution endorsing "fully and wholeheartedly the decisions of the Seventh World Congress of the Communist International," the Party noted the decision to "build the widest anti-fascist youth front throughout the world" and affirmed as Party policy the creation of "a genuine non-Party youth organization . . . 'which will educate all its members in the spirit of Marxism-Leninism.' "[91] (Pet. Ex. 185, pp. 1182, 1185.)

Respondent's pamphlet *The Way Out*, issued in 1934, defines the Young Communist League as the mass political organization of young workers which leads them in the struggles for their demands and acts as a training school [fol. 2546] for communism; it is organizationally independent of the Party but acknowledges the Party's political leadership and is affiliated with the Young Communist International.

Philbrick joined the Young Communist League in 1942. He attended meetings regularly and showed that a part of each meeting was devoted to studying Marxism-Leninism or some current Communist pamphlet or booklet. He was later recruited into the Communist Party by one Alice Gordon, who had been an official of the Young Communist League and at the time she recruited him was a paid functionary of the Party in charge of the Party's youth work in the State of Connecticut.

The Young Communist League in the United States was dissolved in 1943 (when the Communist International ceased to exist) and in its place the American Youth for Democracy was formed as what is known by Communists as a coalition group, being composed of both members and non-members of the Communist Party. It was technically a non-Communist organization, formed as a win-the-war organization designed to recruit and influence as many young people as possible for the respondent Party. Philbrick, a member of respondent, was State treasurer of the American Youth for Democracy and one of its leaders while continuing his duties in respondent. The meetings of the

[91] See fol. 2495, *supra*; where respondent states it is presently effectuating decisions of the Seventh Congress of the International.

American Youth for Democracy which he regularly attended were conducted along the same lines as those held by the Young Communist League, which included training in organization, discussion of current activities on the part of young Communists in the group, and educational sessions on Marxism-Leninism.

Later there was formed an organization known as the "Labor Youth League" as evidenced from *Political Affairs* for February 1951 in which, stating that the 15th National Convention of respondent, held in December 1950, "reflects real progress in our youth work and better understanding of our Party policy in this field," (Pet. Ex. 376, p. 175) reference is made to the Labor Youth League as follows:

> "The 1948 Convention of our Party gave important emphasis to the need of establishing a non-Party working-class youth organization dedicated to the training of the youth in the spirit of Socialism. . . .
>
> * * * * * * *
>
> [fol. 2547] "The recent founding Convention of the Labor Youth League . . . has made a deep impression on our whole Party. In this short time the League has proven itself to be a worthy heir of all the best traditions of the Young Communist League, its 25-year record of struggle and its training of many of the outstanding leaders of our Party today. . . . (Pet. Ex. 376, p. 175.)
>
> * * * * * * *
>
> "Experience has borne out fully the correctness of establishing L.Y.L. as an independent non-Party mass youth organization. The best answer to those comrades who two years ago thought Party youth clubs filled the need for youth work are the thousands of non-Party members of L.Y.L. who are today participating in its activities and learning in a Marxist spirit." (*Ibid.*, p. 180.)

We note that this exhibit reflects the establishment of the "Labor Youth League" as "a worthy heir of all the best traditions of the Young Communist League." The exhibit calls the new youth league a "gold mine" for training Party

forces and declares that "the fight to win the youth" requires "enlarging the core of Party members in the L.Y.L." and uniting the youth with the spirit of internationalism and the world movement for peace. (*Ibid.*, pp. 179, 180, 182.)

An article in *Political Affairs* for November 1950, entitled "A Generation of Soviet Youth," (Pet. Ex. 477, pp. 85-95) holds up Lenin and Stalin as models for youth and, after reviewing the role which youth played in bringing about the establishment of the dictatorship of the proletariat in Russia, pictures the lot of the Soviet youth under such dictatorship as one of security, free from unemployment and with the right to leisure, whereas in sharp contrast the American youth must face the constant fear of unemployment under the scourge of American capitalism. In conclusion, the article declares that solidarity with the Soviet Union and appreciation of its leading role in the struggle for peace, democracy and socialism, become the touchstones of true internationalism among young people of all countries; and that it is particularly important in the United States—the center of world imperialism—to bring this wonderful understanding to the young people who are studying Marxism-Leninism and to the Party which helps to guide their youth.

[fol. 2548] The foregoing activities and expressions of respondent's policy regarding youth work are pertinent for comparison with the principles of the world Communist movement that a matter of decisive importance in the fight against "imperialist wars" is the work among the youth who, with trade unions, represent the "belts" and "levers" without whose aid the dictatorship of the proletariat cannot be realized. Also in this connection, the resolutions of the Cominform issued in November 1949 included work in mass youth organizations as "Of extreme importance" in the "struggle against Anglo-American imperialism and reaction at home." (Pet. Ex. 258.)

The fact that respondent has republished in the United States and uses as textbooks and guides to action many of the documents and publications of the Soviet Union is pertinent to consider with respect to respondent's policy and programs regarding youth, as well as respondent's other programs. A significant action in this connection is

the fact that respondent and other Communist Parties adopted the resolution making the reading and study of the *History of the Communist Party of the Soviet Union* "a must" among Party officials and members (*supra*). The *History* gives to young Communists a prominent place and proclaims the necessity of organizing the Marxist-Leninist training of youth.

The experiences of Meyer illustrated an integration of the youth work in the world Communist movement. Before coming to the United States, Meyer was a member of the Communist Party in Great Britain where he was active in work for the Young Communist League and was associated with the secretariat of the Central Committee of the British Young Communist League. In 1934 he went to Paris in connection with setting up a world student and youth congress with counterparts in America and Great Britain. This work, while Meyer was in Paris, was under the direction of Walter Ulbricht, who at the time Meyer testified herein was Vice Prime Minister of Eastern Germany. Upon arrival in the United States in 1934, Meyer was assigned by Gil Green to youth work in the United States and during the summer of 1934 attended the convention of the Young Communist League of Canada together with Gil Green and a Max Weiss from the Young Communist League in the United States.

Respondent's witness Gates joined the Young Communist League in the depression year of 1931. His activities in the League led to his attaining a position of leadership in respondent, which he joined in 1933. He participated in League agitation for the Unemployment Insurance Act and on the Scottsboro affair. He says his duties and activities as head of the League in New York State were almost iden- [fol. 2549] tical with the general activities of Communists during the period and consisted of activities by the young people of New York State on behalf of the economic welfare, democratic rights, and peace.

As set forth *supra*, Marxism-Leninism sanctions activities calculated to achieve reforms as one of the means to cover "the preparation of the masses for the overthrow of the bourgeoisie." (Pet. Ex. 121, pp. 103-104.) This was recognized in the official Party writing of respondent's

leader Bittelman in his 1934 pamphlet *The Communist Party in Action*, stating the importance of daily struggles concerning "'small'" grievances must not be underestimated and that only by conducting every day struggles can the Party achieve a united front and lead the working class to a victorious dictatorship of the proletariat. (Pet. Ex. 144, p. 43.)

As set forth previously, the December 1950 convention of respondent noted "real progress in our youth work and better understanding of our Party policy in this field." (Pet. Ex. 376, *supra*.) A review of the record shows that the Party's youth policy has consistently and continues to conform with the requirement contained in the *Programme of the Communist International* calling for "Systematic work must also be carried on among the proletarian and peasant *youth*." (Pet. Ex. 125, p. 82.) The record likewise shows that respondent's policy of work among the youth includes training the youth in Marxism-Leninism, seeking to unite the youth in the spirit of internationalism, and building future Party cadres from among the youth. We find that respondent's policy on youth is to effectuate the policies of the Soviet Union and the world Communist movement.

### d. National Liberation

We have hereinbefore set forth the fact that Marxism-Leninism recognizes the possibilities of utilizing "the latent revolutionary capacities of the national liberation movement . . . for the purpose of overthrowing imperialism." (Pet. Ex. 121, p. 79.)

In 1931 the Communist International directed respondent that a program for the right of self-determination of the Negroes in the "Black Belt" should be the application of the national liberation movement in the United States in order to "win over to our side these millions of Negroes as active fellow-fighters in the struggle for the overthrow of bourgeois power throughout America." (Pet. Ex. 134, pp. 154, 167.) Respondent's official Bittelman in an article published in *The Communist* in March 1934 discussing this and other directives from the Comintern stated that "the national-revolutionary movement of the Negroes" in the

[fol. 2550] "Black Belt" is "one of the allies of the American proletariat in the struggle for the dictatorship of the proletariat." (Pet. Ex. 126, p. 244.) This same official in an article published in *Political Affairs* in May 1951 similarly stated:

> "Within the boundaries of our country, an oppressed nation, the Negro people in the Black Belt of the South, is fighting for full freedom . . . not only the Negro workers, but the Negro people as a whole . . . are a most important and staunch ally of the American working class, and . . . the future fate of the American working class is closely bound up with the future of the Negro nation." (Pet. Ex. 481, p. 22.)

The self-determination of the Negroes to be championed by respondent under the Comintern directive consists of unconditional autonomy-separation, or secession from the United States and the establishment of a separate Negro government in the so-called Black Belt of the South. If no proletarian revolution has occurred at the time this government is established, respondent is to support the rebellious government of the Negro republic in order to weaken the Government of the United States and thus aid in precipitating and executing the proletarian revolution. If, however, the proletariat has come to power in the United States at the time then the Communist Negroes must come out against separation of the Negro republic from federation with the proletarian government of the United States.

While a student in 1931 at the Lenin School in Moscow, Nowell was taught that the Negroes in the United States constituted part of the colonial question and that the Communists were to help colonial countries break themselves away from their mother countries since this would weaken the mother countries and thereby aid the Communist Parties in those countries in carrying through a revolution and establishing a Communist dictatorship. Nowell was disciplined while in the Soviet Union for voicing disagreement with the theory and demand for separation and secession by the Negroes from the Government of the United States and the establishment of a separate government.

During Nowell's period of membership in respondent, definite steps were taken to execute the program of the Comintern with respect to the application of the Negro self-determination movement.

There is not serious dispute that respondent has consistently advocated the right of self-determination of the Negro people in the "Black Belt" in the United States. Respondent's position in this respect is summed up by its witness, Dr. Aptheker, as follows:

> [fol. 2551] " . . . I would stick to my answer that the Negro question is a national question, it is certainly not something dictated from abroad or by the Communist International. The Negro question is a national question, is a reflection of objective reality. If it is dictated, it is dictated by life." (Tr. 14149.)

Dr. Aptheker states that although certain Negro leaders after the Civil War thought in terms of the concept of Negro nationalism, that was not known to the leaders of respondent and was not used by respondent in evolving its position on the Negro question. Also, that at the time the policy of self-determination of the Negro people and the Black Belt was enunciated by the Party, it was not the policy advocated, in the development sense at least, by the majority of the Negro people or a majority of their leaders.

The purposes of respondent's policy and activities for the "self-determination" or "national liberation" of the Negroes has significance.

Further indication of the purposes was contained in respondent's *Manual on Organization*, issued in the 1930's, which states that the Negro people are "the other important ally" in relating those that the proletariat must win to its cause, and "without whom there cannot be a successful revolution." (Pet. Ex. 145, pp. 14-15.) The *Manual* quotes the following from an "Open Letter" adopted by respondent's Central Committee in 1933:

> "'The Party must mobilize the masses for the struggle for equal rights of the Negroes and for the right of self-determination for the Negroes in the Black Belt. It must ruthlessly combat any form of

white chauvinism and Jim-Crow practices. It must not only in words, but in deeds, overcome all obstacles to the drawing in of the best elements of the Negro proletariat, who in the recent years have shown themselves to be self-sacrificing fighters in the struggle against capital. . . .'" (*Ibid.*, pp. 15-16.)

Benjamin Davis, National Committee member, in his report to respondent's 15th convention, held on December 28-31, 1950, in New York City, said an important feature of the Negro liberation movement is "the international significance of this question" (Pet. Ex. 379); that the Party's line on the Negro question is a Leninist-Stalinist principle and method of work" (*ibid.*, p. 19); and that:

[fol. 2552] "Tendencies to treat the Negro people as mere victims of oppression, without seeing their unique positive and revolutionary role in the struggle against capitalist reaction are a patronizing form of white chauvinism." (*Ibid.*, p. 19.)

John Williamson, also reporting to the 15th National Convention, pointed out that "the cause of the working class as a whole cannot advance unless a firm alliance is established with the Negro people, and unless the working class assumes its full responsibility in support of the struggle of the oppressed Negro nation for freedom." (Pet. Ex. 376, p. 69.) Jim Jackson, another of respondent's leaders puts it as follows:

"The development of higher levels of the Negro national revolutionary struggle in the Black Belt, and the broad mass movement for democratic rights in the South as a whole, is an indispensable prerequisite for insuring the victory of the working class and the American people over the menacing challenge of the ruling class forces of fascism and war *presently*, and for working class victory over capitalism *ultimately*. This is a basic fundamental in the strategy for working class victory, and a special feature of the path to the triumph of Socialism in our country." (Pet. Ex. 376, p. 119.)

An article in *Political Affairs* for January 1951, entitled "Working-Class and People's Unity for Peace! (Main Resolution of the 15th National Convention. C.P.U.S.A.)" characterizes the Negro people as a "tremendous reservoir of strength for the whole democratic movement" (Pet. Ex. 378, p. 11) and states:

> "Because U.S. imperialism is compelled to cloak with demagogic phrases about democracy and equality its drive for world conquest, particularly its military assault against the colonial liberation movement in Asia, the Negro question tears the mask off of Wall Street's real face and assumes the greatest international significance." (*Ibid.*, p. 17.)

Evans attended a regional convention of respondent in January 1950 where one of the subjects was the necessity for the establishment of a Negro nation in the South. He stated on cross-examination regarding respondent's activities in behalf of certain individual Negroes that such activities and respondent's efforts to raise the economic and social level of the Negroes were really a part of the program to rally the Negroes around causes so as to publicize the Party and obtain Negro help in achieving the Party [fol. 2553] objective of socialism. As hereinbefore found, Cummings was taught, while a member of respondent, that an objective was to infiltrate trade unions, Negro organizations, and other organizations so as to take control of them and eventually change the system of the American Government.

Our earlier findings under the heading "World Communist Movement" include respondent's support of so-called national liberation movements in other countries, e.g., in China both before and after the Communist successes there. When viewed against these findings respondent's policy of using the United States Negroes for the application in the United States of the so-called national liberation policy has added materiality. Party statements in *Political Affairs* for February 1951 evidence further the common purpose of respondent's policy on the Negroes in the United States and the national liberation and colonial programs of world Communism. These statements include:

"Since it is 'our bourgeoisie' that today strives to crush the rising colonial-liberation movements and prevent their advance to independence, it is the special responsibility of our Party to strengthen the bond of international solidarity between the American working class and the peoples in the colonies. It is our responsibility to win broad support for the independence struggles in Asia and Africa, for the freedom-struggle of the long-suffering colonial people of Puerto Rico, and to strengthen the alliance of the working class with the national liberation movement of the Negro people. (Pet. Ex. 376, p. 188.)

* * * * * * *

"It is, furthermore, necessary that our Communist cadres, in fact our entire membership, deepen their understanding of the national and colonial question, so that we fully realize the special responsibility of proletarian internationalism which rests upon the working class and its vanguard in the land which oppresses other peoples. Karl Marx long ago pointed out that 'no nation can be free if it oppresses other nations.' Marxism-Leninism emphasizes that the working class of the oppressor nation must give direct aid and support to the liberation movement of the oppressed peoples, if it itself is to achieve emancipation. We have the duty to master this fundamental principle because of the need to assure working-class solidarity for the liberation struggle of the Negro people, to free the oppressed Negro nation in the Black Belt from Wall [fol. 2554] Street-Bourbon bondage. And this responsibility becomes heightened today when U.S. imperialism has become the main force to keep the colonial world enslaved." (*Ibid.*, p. 189.)

### e. Conclusions on Respondent's Policies, Programs, and Activities

Respondent's policies, programs, and activities were originally formulated and carried out pursuant to directives of the foreign leadership of the world Communist movement. Such policies, programs, and activities of respondent have

been consistently applied throughout respondent's existence in the United States without change or repudiation. Various tactical fluctuations in emphasis have followed those laid down by the world Communist movement. An examination of respondent's current activities shows respondent is still pursuing policies enunciated by the Soviet Union through the Communist International. Respondent's policies, programs, and activities regarding trade unions, youth, and national minorities have as their fundamental purpose to effectuate the policies of the Soviet Union and to further the world Communist movement.

### 6. Nondeviation

Section 13(e)(2) of the Act provides that the Board shall take into consideration "the extent to which its [respondent's] views and policies do not deviate from those of such foreign government or foreign organization."

The petition alleges, in part, on this subject:

> "Throughout its existence the Communist Party never knowingly has deviated from the views and policies of the government and Communist Party of the Soviet Union, the Communist International, the Communist Information Bureau and other leaders of the world Communist movement. Whenever such views and policies have conflicted with the position taken by the Government of the United States, the Communist Party has opposed the position of the United States. . . . "

[fol. 2555] Dr. Philip E. Mosely, Professor of International Relations at Columbia University and Director of the University's Russian Institute, was petitioner's principal witness for the purpose of establishing that respondent's views and policies do not deviate from those of the Soviet Union. Dr. Mosely has had a distinguished and active career in the field of international relations and for more than 20 years has devoted his research primarily to Russian political and diplomatic history. While so doing he has had occasion to analyze carefully the publications and other documents issued by respondent and the Soviet

Union. He is eminently qualified to testify as an expert on evidence relative to the "nondeviation" criterion of the Act, and we so regard him.

Dr. Mosely's testimony traced the continuing stream of international questions upon which both the Soviet Union and respondent have announced a position. He enumerated some 45 international questions of major import,[92] extending over the past 30 years, with respect to which there was, as revealed by his testimony, no substantial difference between the position announced on each by the Soviet Union through its official and controlled organs and that announced by the CPUSA through its official and controlled organs. On each specific topic, several exhibits illustrating the views and policies of the Soviet Union and the CPUSA, respectively, were introduced contemporaneously with Dr. Mosely's oral testimony.

Respondent contends that the phrase "do not deviate" as used in the Act should be interpreted to mean "following a course already established" and that, since a substantial number of petitioner's exhibits illustrating the view or policy of respondent predated the exhibits expressing the Soviet view or policy, they did not show that respondent has not deviated from the Soviet Union view, but show [fol. 2556] the contrary. Assertedly this proposition is reinforced by the absence of testimony of Dr. Mosely to establish that the announcement of the Soviet view had preceded respondent's expression on the same topic.

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[92] Among these are the following: the League of Nations; Soviet Union purge trials, 1937; Russo-Finnish War, 1939; Russian invasion of Poland, 1939; Hitler-Stalin nonaggression pact, 1939; attitude toward World War II before and after German attack on Soviet Union; incorporation of Latvia, Estonia, and Lithuania into the Soviet Union, 1940; second front in Europe; dissolution of the Communist International, 1943; revision of Montreux Convention, 1946; Communist movements in Bulgaria, Roumania, Hungary, Albania, China, Czechoslovakia, and Yugoslavia; Berlin Blockade, 1948; West Germany; Italian election, 1948; North Atlantic Pact; control of atomic energy; election of Yugoslavia to the United Nations Security Council, 1949; Cardinal Mindszenty case, 1949; United Nations police action in Korea; Communist China's intervention in Korea, 1950; seating of Communist China in the United Nations; Peace Treaty with Japan, 1951; and peace in Korea.

Petitioner, on the other hand, took the position at the outset of Dr. Mosely's testimony, and in advance of the raising of this objection by respondent, that the exhibits under discussion were offered in evidence merely to illustrate and show a documentary basis for the oral testimony of Dr. Mosely on the respective international questions and were not intended to establish the date of the first announcement thereon by either the Soviet Union or the CPUSA. Petitioner further argued that in many instances the Soviet view or policy must necessarily have come first, particularly since the first announcement thereof may have taken the form of a *fait accompli*, as for example the Soviet Union's signing of the Hitler-Stalin nonaggression pact.

We have considered Dr. Mosely's testimony with other evidence of record,[93] all of which is mutually corroborative and establishes that respondent invariably follows the views and policies of the Soviet Union. We do not believe, therefore, that the date sequence of the exhibits placed in evidence through Dr. Mosely is controlling of whether respondent's views and policies have deviated from those of the Soviet Union. As we construe the "nondeviation" criterion it requires the Board to assess this vast spread of evidence to determine if respondent's views and policies ever turned aside over the years of its existence from a course of constant agreement with those of the Soviet Union.

Respondent was not permitted at the hearing to put in issue the merits of its views or policies which were placed in evidence by petitioner to establish "nondeviation," and rightly so, for in applying this criterion the Board is required to view cumulatively the spread of the evidence relating to the nondeviation of views and policies without deciding their merits. This is not to say, however, that the purpose of certain of these policies, such as those dealing with the Negro, labor, youth, imperialism, and the colonial and national liberation policies, discussed earlier herein, may not be relevant in viewing the record as a whole.

[fol. 2557] We now proceed to set forth our findings based on a preponderance of the evidence relative to this criterion.

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[93] This consists of documentary evidence, and oral testimony of witnesses Gitlow, Kornfeder, Markward, Meyer, Budenz, Lautner, Evans, and Jakowitz, among others.

The nature of the evidence adduced through Dr. Mosely is well illustrated by his testimony and documents submitted through him concerning the nonaggression pact entered into by Hitler and Stalin, known as the Hitler-Stalin Pact of August 23, 1939. He established the identity of views between the CPUSA and the Soviet Union prior to the making of this Pact; the parallel attitude of the Soviet Union and the CPUSA toward World War II while this Pact was in effect; and the simultaneous change of policy on the part of the Soviet Union and the CPUSA after June 22, 1941, the date on which the Pact was abrogated by the German attack on the Soviet Union.

To further illustrate this, it is established that prior to the Hitler-Stalin Pact, respondent, conforming to the position taken by the Soviet Union and the world Communist movement's anti-fascist united front policy, had denounced fascism in Nazi Germany as the main threat of aggression in the world and as the foremost danger to democracy and peace. Notwithstanding that the signing of the Pact by the Soviet Union on August 23, 1939, constituted a reversal of the anti-fascist line and caused considerable consternation and defection among respondent's leaders and members, respondent immediately switched to the Soviet Union's position and hailed the nonaggression agreement as an important contribution to peace. When Germany invaded Poland, respondent echoed the Soviet assertion that the Pact continued to be an important contribution to peace as it would limit the spread of war and, further, that opposition to this territorial expansion was the work of warmongers. After the defeat of Poland, the Soviet Union and respondent both took the position that England and France were guilty of prolonging the war; that the war was an "unjust" [94] and imperialistic war and that no country which hoped for peace should assist England and France. Respondent, like the Soviet Union, strongly opposed lend-lease aid by the United States to Great Britain. Immediately after the German attack on the Soviet Union on June 22, 1941, however, the latter reversed

[94] See discussion of "just" and "unjust" wars under the preceding sections, "Marxism-Leninism" and "Anti-Imperialism," *supra*.

its position and almost simultaneously respondent did the same; both suddenly concluded that the character of the war had changed; World War II became in the eyes of both a "just" war; they urged that the "Allies" should have the support of the United States and of all freedom-loving people; they advocated aid by the United States to Great Britain and to the Soviet Union and respondent branded those in the United States who opposed such aid as agents of Hitler. Soon after the German attack on the Soviet [fol. 2558] Union, respondent joined with the Soviet Union in demanding the opening of a second front "now" with the United States participating therein.

The views of the Soviet Union and respondent likewise coincided on the trials and executions in the Soviet Union in 1937, with respondent accepting Soviet positions over the criticisms of the trials contained in the "capitalist press";[95] respondent echoed the statements of the Soviet Union concerning the Russo-Finnish War; the same situation prevailed in regard to the absorption of Latvia, Estonia, and Lithuania by the Soviet Union. The Soviet Union and respondent assumed the same position in 1947-1949 with regard to the internal crisis in Greece, both supporting the actions of the so-called Greek guerillas; and they coincided in their views supporting the seizure of control of the Czech Government by the Communist Party of Czechoslovakia in 1948.

The evidence relative to this criterion further established that, prior to the Cominform resolution which attacked the Tito Government, respondent paralleled the Soviet Union in giving approval of the course of post-World War II developments in Yugoslavia and of the Tito Government. On June 28, 1948, however, the Cominform issued a resolution, initiated through an exposure by the Soviet Union, which attacked Tito and his regime in bitter terms; among other

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[95] These trials and executions in the Soviet Union were of persons designated as Trotskyite counter-revolutionists and agents of fascism. We have heretofore set forth and later note the provision in respondent's 1942 constitution prohibiting members from association with "Trotskyites" (those who deviate from the Soviet line), and the comparable provision in the current Party constitution prohibiting association with "enemies of the working-class."

charges, Tito and his leaders were derided for having entertained the hope that Yugoslavia could build "socialism" without "the support of the Soviet Union." (Pet. Ex. 344, p. 697.) One day later, on June 29, 1948, respondent also reversed its position on the Tito Government and issued a statement lauding this Cominform resolution and criticizing the Tito regime for showing hostility to the Soviet Union and for attempting to "curry favor with Anglo-American imperialism." (Pet. Ex. 260, p. 699.) This reversal, too, caused consternation among respondent's members (of Slavic origin) and some were lost to the Party.

The views and policies of the Soviet Union and the CPUSA were identical and were opposed to those of the United States on the question of the Berlin Blockade in 1948, and have likewise coincided in strong opposition to United States policies on the course of events in post-World War II Germany. The Soviet Union and the CPUSA [fol. 2559] have both maintained the same policies with regard to the Truman Doctrine, the Marshall Plan, ECA, and the North Atlantic Pact, namely, that the United States' participation and leadership in these measures are for the aggressive purpose of domination of the world; whereas, the opposition policies of the Soviet Union and respondent allegedly foster peace and democracy.

The Soviet Union and respondent maintained the same position in regard to the Stockholm Peace Petition in 1950, asserting that all true proponents of peace should support the petition, which was issued by a committee of the World Peace Congress. Respondent supported the Soviet Union's position, as opposed to that of the United States, concerning control and inspection of atomic energy. The same situation prevails regarding the seating of Yugoslavia in the United Nations Security Council, with respondent supporting the Soviet Union's opposition to the United States on this question. The Soviet Union and the United States Government have taken opposite positions with respect to the representation of China in the United Nations; the CPUSA maintains the Soviet position, which favors the seating of the representatives of the Chinese Democratic People's Republic and the exclusion of representatives of the Chinese Nationalist Government. Respondent concurred

with the views of the Soviet Union in opposition to the United States peace treaty with Japan.

The CPUSA's position in support of the conduct of the Czechoslovakian Government in the William Oatis case (American correspondent) coincides with the Soviet Union's position thereon.

The testimony and documentary evidence also established that the CPUSA and the Soviet Union expressed the same views regarding Korea; both maintain that the Syngman Rhee Government is a reactionary "puppet regime"; both vigorously condemn the hostilities in Korea as the direct result of American imperialism and aggression; both insist the United Nations police action to be illegal and aggressive toward North Korea; both maintain that this war constitutes a threat to the Chinese People's Republic which justifies the Chinese Communist intervention in the conflict; both assert that the Chinese intervention in support of North Korea aids the struggle of "peace-loving" peoples of the world, which are led by the Soviet Union, against the program of the American imperialist aggressors; both charge the United States with desiring continuation and expansion of the Korean War; both insist that the United States disrupted and delayed cease-fire negotiations and blocked peace in Korea; and both demanded acceptance of the proposals for cease-fire and "peace" made on behalf of the North Korea People's Republic. In short, respondent [fol. 2560] and the Soviet Union, regarding Korea and the Korean conflict, coincide completely in their condemnation of the policies of the United States Government in its support of the United Nations in Korea.

In addition, other witnesses established that during the existence of the Communist International respondent did not deviate from Comintern instructions in a single instance; further, that a CPUSA member could not disagree with a position taken by the Cominform and continue to remain a Party member;[96] that in those instances in which

[96] There have been instances of internal deviation within the CPUSA. Such instances usually resulted in dismissal from the Party, as in the cases of Gitlow and Browder. These instances highlight the intolerability with which any deviation is regarded by both respondent and the Soviet Union and have been con-

the policies of the United States and the Soviet Union appeared to be in conflict, respondent at no time expressed sympathy with the policy of the United States Government; that the Soviet Union was never criticized in Party circles, but, on the contrary, it was a cardinal rule to praise the Soviet Union at all times; that in 1941 and prior thereto, a Moscow news agency supplied respondent with political and other news dispatches which were distributed to respondent's leaders so that they could keep informed of the "Party line" and its interpretations; and that the aforementioned dispatches were regarded by respondent as being directives from the Soviet Union on positions to be taken, and were implemented accordingly. Also, the discipline which pervades the world Communist movement and the respondent, as set out *supra*, is such that so-called deviations from the Soviet Union's policies were not tolerated. An exemplification of this appears in respondent's 1942 constitution, which provides that no CPUSA member is permitted to have a personal or a political relationship with "Trotskyites," one of the terms used in CPUSA and Soviet Union circles in an odious sense to signify persons sympathetic to a system of deviation from the official "line" of the Soviet Union. The present Party constitution uses the phrase "enemies of the working-class" in place of "Trotskyites."

It is also shown by evidence in addition to that adduced through Dr. Mosely that throughout the entire existence of respondent, including the present, it has agreed with the view of the Soviet Union to the effect that the United States is an imperialistic nation which seeks world domination and whose Government should be overthrown, whereas the [Vol. 256] Soviet Union is a true democracy in search of peace and its aims should be fostered.[97] When the United

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sidered in assessing the probity of the evidence in this section to respondent's status as placed in issue here. It is true, of course, that during Party crises, such as these, temporarily there are factions and conflicting views. But when the Party's course solidifies retention of an opposed position is considered inconsistent with continued membership.

[97] See "Anti-Imperialism" *supra*, and "Allegiance" *infra*.

States was a potential or actual ally of the Soviet Union this chant was not sung by either the Soviet Union or the CPUSA. The evidence of basic sameness of underlying policies such as imperialism, national liberation, the Negro, youth, and labor has been discussed elsewhere in this Report; however, it, too, shows that in all facets of its basic policies respondent adheres to and implements here the same policies as the Soviet Union.

Respondent made no effort to rebut the condition clearly shown to exist by petitioner's evidence. It offered no evidence to establish a conflict or cleavage between the policies of the Soviet Union and the CPUSA at any time or on any occasion. Nor is there any evidence to show that, where the views or policies of the United States as officially announced conflicted with the views of the Soviet Union, the CPUSA in any instance took a position thereon in harmony with the views of the United States, though its witnesses were repeatedly invited on cross-examination to show such an occasion. Each of respondent's witnesses evaded a direct answer to the question and, curiously enough, each gave a similar circuitous and equivocal answer stating that respondent's policies reflect what it conceives to be the true national interest of the American people; that if the views or policies of respondent and the Soviet Union are similar or identical, this proves only that the national interests of the people of the two nations are the same; that respondent takes the view that the true national interests of all people are identical; and that respondent arrives at its views independently.

These platitudes do not negate petitioner's evidence. Respondent's witnesses were unable to cite a single instance throughout its history where, in taking a position on a question which found the views or policies of the Soviet Union and the United States Government in conflict, the CPUSA had agreed with the announced position of the United States; nor could they show a single instance when the CPUSA had disagreed with the Soviet Union on any policy question where both respondent and the Soviet Union have announced a position.

The testimony of Dr. Mosely and documents submitted through him embraced a tremendous area of international

questions on which respondent and the Soviet Union have taken positions. We have pointed out a representative por- [fol. 2562] tion of them. The uniformity is constant and on a wide variety of questions, and is corroborated by other evidence of record.

It is a material consideration in viewing the spread of this evidence spanning thirty-odd years that respondent, for the first twenty such years in this area of activity, was required by the "Conditions" for membership in the Communist International to conform to the "programme and decisions" of the Comintern in its "propaganda and agitation" (Pet. Ex. 8, p. 27); that during the years since 1943 respondent has without a single exception, as before, continued to adhere to the views and policies of the Soviet Union; and that its witnesses when asked to do so were unable to show conflict in any of these policies. This is strong evidence that the preexisting relationship between respondent and the Soviet Union continued as before, notwithstanding the formal dissolution of the Comintern by the Soviet Union.

Also, in weighing the evidence set forth herein, we have considered respondent's adherence to Marxism-Leninism,[98] which in its essence evidences acceptance by respondent, as a Marxist-Leninist organization, of any position that the Soviet Union determines will advance the world Communist movement. Further, when it is taken into account that conformity to the program and policies of the world Communist movement was prescribed for respondent as a section of the World Party of Bolsheviks (Communist International), the continuation in unison with the Soviet Union, subsequent to 1940 and until the present, of these programs and policies enhances the probity of the more recent evidence pertaining to nondeviation to show that respondent is dominated and controlled by, and operates primarily to support the objectives of, the Soviet Union, and the world Communist movement.

The record precludes the conclusion which respondent would have us draw, i.e., that the uniformity of views results from sharing a common scientific outlook and inde-

[98] See "Marxism-Leninism" *supra*.

pendent application of principles by it and the Soviet Union. The great weight of the evidence is to the contrary.

We find on the entire record that the views and policies of respondent throughout its history invariably coincide with the views and policies of the Soviet Union. Moreover, respondent conforms immediately to each reversal in the Soviet Union's views and policies.

We find that respondent's views and policies do not deviate from those of the Soviet Union.

[fol. 2563] 7. FINANCIAL AID

We are directed by the Act to consider "the extent to which it [respondent] receives financial or other aid, directly or indirectly, from or at the direction of such foreign government or foreign organization." (Section 13(e)(3).)

The petition alleges:

> "The Communist Party now receives and from time to time in the past has received financial aid, from or at the direction of the government and Communist Party of the Soviet Union, the Communist International and the Communist Information Bureau. . . ."

There is considerable evidence, both testimonial and documentary, which establishes that during the 1920's and the 1930's respondent received both directly and indirectly financial and other aid from the Communist International and the Soviet Union and organizations in foreign countries under Communist regimes. The bulk of the evidence of direct financial aid relates to respondent's early history when, in order to aid it to increase its membership and influence and to execute various decisions of the Comintern and to equip it with an official organ, the Communist International granted subsidies to the CPUSA. The indispensability of a Party press to Communist Party operations in this country, as set out *supra*, fols. 2519-2522, attests to the importance of Comintern aid to the *Daily Worker*.

The Comintern directed the establishment of the *Daily Worker* and contributed the sum of $35,000 to respondent in 1924 for this purpose.

Petitioner's witness Kornfeder establishes that the *Daily Worker* was subsidized continuously by the Comintern since its foundation, while he was in the Party.

When the Communist International announced the decision on the 1929 factional dispute within the CPUSA, it gave a substantial sum of money[59] to the chairman of the new Secretariat of the CPUSA, which had been formed [fol. 2564] by it to be used to establish a new newspaper, subservient to the Communist International, in the event that the CPUSA lost control of the *Daily Worker*.

Similarly, the Comintern subsidized *Novy Mir*, a Communist Party Russian language newspaper, and aided this paper through supplying gratis publications, books and art works, which were sold and the proceeds retained by the paper. Also subsidized was the founding of the CPUSA's newspaper *Freiheit*. In the 1920's, indirect aid was accorded by a show troupe called the "Blue Blouses," and funds realized from their tour in this country were distributed to various organizations by respondent, including itself and the *Daily Worker*. During the years 1930 to 1934, the Comintern provided subsidies for *Labor Unity*, a labor magazine operated under the direction of the CPUSA.

During the 1930's, indirect aid was rendered the *Daily Worker* by free political news dispatches from the Runag news service in Moscow, which were used by the editorial staff of the *Daily Worker* and were also distributed to the Party leadership for scrutiny and study. After the passage of the Foreign Agents Registration Act in 1938, these dispatches were sent to The Intercontinent News, a corporation which had been formed by respondent in New York City to handle the service in a manner that to all appearances would be independent of the *Daily Worker*. This medium in turn related the dispatches to the *Daily Worker*

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[59] Although Gitlow's testimony as to the exact amount of money involved in this particular transaction varied with prior statements made by him before other bodies, in the circumstances of this record, and since there is corroboration, the Board finds that substantial funds were disbursed to respondent by the Comintern for the purpose of effectuating an organ friendly to it.

at a nominal cost.[100] ~~In 1939 the treasurer of the CPUSA stated that it was impossible to put additional CPUSA funds into the *Midwest Daily Record*, a CPUSA controlled paper, because at that time communications to their sources of funds abroad, i.e., the Soviet Union, had been disrupted.~~

Respondent's witness Gates specifically denies that during his tenure as editor of the *Daily Worker*[101] it ever received any financial aid from the Government of the Soviet [fol. 2565] Union, any agency of the Soviet Government, the CPSU or any of its representatives, the CI or any of its representatives, or the Cominform or any of its representatives, and denies any financial aid to the *Daily Worker* from any source at the direction of any of these named agencies.

Accordingly, we conclude that the Communist International and the Soviet Union have both directly and indirectly rendered during the 1920's and 1930's material financial and other aid to respondent by subsidizing and otherwise aiding the founding and the operation of the *Daily Worker* and other CPUSA publications.

The evidence pertaining to respondent's trade union policies has been heretofore discussed in the section of this Report entitled "Trade Union Work," and we will not set forth evidence showing aid to respondent from the Comintern enabling it to effectuate and carry out particular phases of this work.

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[100] This news service from Moscow ceased in 1944 when the Department of Justice ordered The Intercontinent News either to label its news material as propaganda or to discontinue its service. Thereafter the *Bulletin* of the Soviet Embassy was used as a news source. Respondent argues that Budenz' testimony upon which this finding rests is not credible since CP Exhibits 70-75, consisting of *Daily Worker* and Intercontinent News Agency registration statements filed under the Foreign Agents Registration Act, show that this news service was not free. Budenz, who in fact signed one of these statements, explained they were filed to deny a status requiring registration and that they concealed rather than disclosed the facts. We have reviewed CP Exhibits 70-75, inclusive, but we do not credit them for the purpose offered in view of the testimony of petitioner's witness Budenz concerning them, which we accept.

[101] Gates became editor in 1947. Thus, his testimony rebuts none of petitioner's evidence of prior financial aid.

The Trade Union Educational League (TUEL) was formed in the early 1920's pursuant to instructions from the Communist International; the latter also furnished a subsidy for the initial financing of this newly-formed organization.

In 1928 a trade union delegation was organized in this country by the CPUSA at the direction of the Communist International, which partially financed the organization and expenses of the delegation's visit to the Soviet Union. Official Party minutes received as exhibits (Pet. Exs. 95, 98, 102) and witnesses Gitlow[102] and Kornfeder show that the Comintern granted substantial sums of money to the CPUSA for a campaign among the members of the United Mine Workers to defeat John L. Lewis for the union presidency.

After the Comintern resolution of the 1929 factional dispute in respondent, the chairman of the newly-formed Secretariat was given a substantial additional sum to finance enforcement among the members of the CPUSA of the decision reached in the Soviet Union regarding the leadership of the CPUSA.

[fol. 2566] Petitioner's witness Honig, who, as a member of respondent, was specializing in labor activities in the United States, was sent to the Soviet Union in 1934 to serve as a representative of the Trade Union Unity League at the Red International of Labor Unions at Moscow; the latter was a section of the Communist International. Funds for his trip were furnished by Jacob Golos, a representative of the Soviet Union in the United States, and his subsistence while in Moscow was borne by the Red International of Labor Unions.

Also relevant to respondent's labor activities, the record shows that in about 1929 the Communist International directed that respondent form port bureaus at leading ports

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[102] Cross-examination of Gitlow revealed variations in the amounts of money involved; however, the documentary evidence and Kornfeder's testimony, when considered with Gitlow's testimony, all of which is unrebutted, make it clear that substantial funds were supplied to respondent by the Comintern and we have accordingly credited Gitlow's testimony to this extent.

in this country for the purpose of facilitating recruiting and organizational work on the waterfront and that it facilitated the establishment of such bureaus by furnishing funds.

Another method whereby respondent has been accorded aid by the Comintern and the Soviet Union has been in connection with travel and maintenance expenses of its officials and members travelling abroad on Party or Comintern business, including training missions. The need and importance of such aid is reflected in CPUSA minutes of its Political Committee and the testimony of a number of petitioner's witnesses. For example, Petitioner's Exhibit 89, CPUSA Political Committee minutes for November 1927, show a request from the Comintern that the CPUSA send a replacement for work in its information department and that the Party expressly provided that there be no expense to it. Gitlow explains this as meaning that the Comintern was to bear all travel and living expenses and pay the person sent as a replacement a salary as an employee of its Executive Committee. Further indicative of the relationship existing between the Comintern and respondent are other Political Committee minutes such as Petitioner's Exhibit 83, which shows a cable was to be sent to the Soviet Union concerning expenses for a trade union delegation to the effect that the CPUSA was "financially hard-pressed" and needed funds. This exhibit further shows that in September 1927 the Party's Political Committee unanimously voted to wire the Comintern that it would be unable to send any students to the Lenin School in Moscow unless money was cabled in advance by the Communist International for their fares.

Petitioner's evidence establishes that a number of persons, including witnesses for petitioner herein, went to Moscow and attended the Lenin School there, having their travel and subsistence expenses borne by the Communist International.

It is further established that in the 1920's and 1930's the Communist International financed the travel of CPUSA officials and members to and from the Soviet Union and on missions to other countries for the purpose of orienta-

tion and the conduct of official business on behalf of in-
[fol. 2567] ternational communism, such as fulfilling representative functions in the Communist International; in addition to their subsistence, salaries were paid them in some instances by the Communist International.

Further, the CPUSA has received direct subsidies from the Comintern with respect to its political activities.

The Communist International contributed the sum of $50,000 to respondent for the purpose of financing the 1924 political campaigns of William Z. Foster and Benjamin Gitlow, the Communist Party candidates for President and Vice President of the United States, respectively, and the Communist International likewise contributed a substantial sum to respondent to finance the campaigns of these persons as candidates for the same offices and on the same ticket in 1928.

Other indirect aid from the Soviet Union was rendered through Amtorg, a trading corporation of the Soviet Union, organized in the United States in 1924, which from its inception until 1929 rendered financial assistance to respondent by paying excessive rates for placing advertisements in CPUSA publications, and by making it possible for the Communist Party School of Business Relations to realize money from insurance and other activities. Also, the International Red Aid, in the late 1920's, sent Russian films to the United States free of any charge and the CPUSA determined the distribution of profits realized from their showing here.

Respondent's witness Flynn says that book stores, clubs, and some Party units did occasionally order books from abroad and sell them in this country, but asserts that there never were any such materials received in this country by any Party agency free or for a nominal cost. She testified that foreign Communist Parties seem to plead their poverty on the one hand and the wealth of the American Party on the other. She and respondent's witness Gates deny, without specific rebuttal of any of the instances of aid shown by petitioner's evidence, that the CPUSA has received financial aid from or at the direction of the Soviet Union or the Communist International during

their tenure on the National Committee[103] and state that the Party's funds have been obtained from dues, assessments on its members, and fund drives.

[fol. 2568] We find a preponderance of the evidence in the record establishes that substantial financial aid flowed intermittently in various forms to respondent from and at the direction of the Communist International and the Soviet Union principally during the formative period of respondent in the United States. We view this aid in the circumstances in which it was rendered as significant in showing that the Soviet Union helped to establish respondent in the United States as a going organization. The record contains no evidence of substantial financial aid subsequent to 1940 and none after 1944. However, the disappearance, so far as this record shows, of such assistance when respondent became a going organization does not detract from the probity of this evidence to show the character of the Party during the period in which the aid was rendered. And it is a tile in the mosaic.

[fol. 2569] 8. Training and Reporting

Sections 13(e)(4) and (5) of the Act provide that in determining whether or not an organization is a "Communist-action organization" the Board shall take into consideration:

> "(4) the extent to which it [respondent] sends members or representatives to any foreign country for instruction or training in the principles, policies, strategy, or tactics of such world Communist movement; and
>
> "(5) the extent to which it [respondent] reports to such foreign government or foreign organization or its representatives; . . ."

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[103] Flynn went on the National Committee in 1938 and Gates went on it in 1945. Thus, Gates' testimony does not rebut petitioner's evidence, and Flynn's testimony reaches no substantial segment of such evidence. To the extent her testimony reaches contrary evidence, e.g., petitioner's evidence concerning the free news service, it does not preponderate.

The petition alleges inter alia:

> "The Communist Party regularly reports and has reported to the government and Communist Party of the Soviet Union and to the Communist International and the Communist Information Bureau, and has sent members and representatives to the Soviet Union and other foreign countries for instruction and training in the principles, policies, strategy, and tactics of the world Communist movement. . . ."

Respondent denies the foregoing allegations of the petition, but states in its amended answer that during the period of its affiliation with the Communist International its members and representatives attended and participated in Communist International Congresses and committees; that its members have from time to time visited foreign countries, including the Soviet Union; and that, in the past, certain of them have studied in the Soviet Union. Respondent argues, however, that these conceded facts have no relevance to any issue in this proceeding. We do not agree with this contention, for clearly the past is pertinent in determining the present character of an organization under this Act.

The evidence pertaining to "training" and "reporting" is somewhat interwoven and we have, therefore, consolidated these subjects in this section of our Report.

Since the Party admits that its members have studied in the Soviet Union, that it has participated in the Communist International, and that it has sent representatives to the Soviet Union, it is unnecessary to set forth in this part of our Report the considerable amount of detailed [fol. 2570] evidence establishing these points, and we do so only to the extent it may be necessary for an understanding of the findings and their significance.

An elaborate world-embracing school system was established in Moscow for training Communists and preparing them for leadership roles in the world Communist movement. The Western University taught trainees from the semi-agrarian areas, such as the Balkan and Baltic countries; the Eastern University schooled trainees from the

Asiatic countries, such as China, Siam, and Korea; the Academy of Red Professors was a training school for theoreticians for the world Communist movement; a special section of the Fronze Military Academy was devoted to training students sent from foreign countries; and the Lenin School took in trainees from the "more advanced" countries, such as Germany, France, England, and the United States. Petitioner's witness Honig was an American instructor at the Lenin School in 1934-1935, where he taught labor subjects to a select group of respondent's members. In the main, however, the school's instructors were Russians.

To qualify for training in Moscow a CPUSA member had to be recommended by respondent and approved by the Communist International, which had established as qualifications for selection that the student be less than 36 years of age, have 5 years of active Party work, and be above average in ability.

From 1928 to 1936, many of respondent's outstanding members were sent to the Lenin School for varying periods, where they received training and instructions in the strategy and tactics of the world Communist movement. Among them were Gus Hall, Irving Potash,[104] Charles Krumbein, Joseph Kornfeder, George Siskind, Morris Childs, Ray Hansborough, Roddie Lester, Admiral Kilpatrick, Abraham Lewis, Margaret Unjus, Rudolph Baker, Selar, Harry Haywood, Odel Nowell, Charles White, Celia Parinsky, John Scoven, William Patterson, George Hewitt, Sam Nessin, Beatrice Siskin, Philip Raymond, John Marr, William Brown, Claude Lightfoot, William Taylor, Bill Kruse, and Bell. Many of the aforementioned persons held high positions in respondent's leading State, District, or National Committees,[105] including Nowell and Kornfeder, who testified for petitioner in this proceeding.

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[104] Both convicted in 1949 of conspiring to teach and advocate the overthrow of the United States Government.

[105] Gus Hall signed respondent's amended answer in this proceeding as National Secretary of the CPUSA. Irving Potash was a member and Claude Lightfoot an alternate member of respondent's National Committee in 1950.

[fol. 2571] The evidence establishes that in the early 1930's respondent's students in the Lenin School were taught such subjects as Leninism; Marxism; the history of the labor movement; trade union and strike strategy; history of the Communist Party of the Soviet Union; history and organizational structure of the Communist International; the national and colonial problem, including the concept of a Negro nation in the "black belt" of the United States;[105a] the history of the CPUSA; international propaganda; the theory and practice of Soviet economy; revolutionary tactics; and the science of civil warfare. These subjects at the school were adapted to the peculiar conditions in the countries of the students, including the United States. For instance, the course given respondent's members on civil warfare included political and economic conditions in the United States, the culture of the people, the terrain, the histories of the United States and the CPUSA, and the degree of political maturity in the United States. Students in the course were taught also how to convert economic strikes into political strikes, and then into general strikes that might precipitate revolution. They were also taught how to assemble the guns and small arms of the major nations.

For the actual carrying out of the revolution, Red Army officers taught military details in both legal and guerrilla warfare, how to erect barricades, snipe, throw grenades, use gas masks, sabotage, take over the system of transportation, seize food supplies and persuade army units to fight with the insurgents and guerrillas. They were taught how to capture and hold hostages, capture arsenals, arm Communist supporters, utilize and destroy food and water supplies, and, in general, how to carry on a total revolution for the seizure of power. All this was taught with the object of establishing a dictatorship of the proletariat in the United States.

Concerning strategy and tactics, students at the Lenin School were taught, among other things, that "Partial demands" (i.e., demands within the framework of democratic

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[105a] See subsection "National Liberation" for a discussion of this subject.

procedure dealing with limited grievances on everyday problems) served as a tactical means, "a cutting edge," for the Party in mobilizing for the long range objective of the general strategy, this being the overthrow of capitalist governments everywhere through proletarian revolution. It is apparent from this Report that this tactic has been utilized constantly by respondent in this country. They were also taught there the concept of "just" and "unjust" wars.[105b]

[fol. 2572] Concerning the ultimate aim of the Party regarding capitalist-imperialist nations, students were taught that the class struggle prevailed throughout the capitalist world; that internal contradictions within these countries were becoming sharper; and that their international imperialist policies toward colonial peoples were becoming more oppressive. Further, that, in view of these political and economic conditions, it was the duty of the CPUSA, as a part of world communism, to cultivate revolutionary movements in colonial countries and, in striving for world socialism, to work for the overthrow and complete abolition of capitalist states and imperialism. In conformance with the foregoing, students from the United States were taught that the proletarian revolution was necessary and that it was their major duty to work under the leadership of the Communist International and respondent for the overthrow of the United States Government.[106]

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[105b] An illustration of adherence by the Soviet Union and respondent to this principle is found in the sections "Marxism-Leninism" and "Anti-Imperialism."

[106] The texts used by respondent's members at the Lenin School included Lenin's *State and Revolution; Left Wing Communism; Military Revolution; Imperialistic War; What Is To Be Done?; How It Is To Be Done; Imperialism; Infantile Leftism;* a modern treatment of Lenin's works by Leontov entitled *Leninism by Leontov;* Stalin's *Foundations of Leninism* and *Problems of Leninism;* Engels' *Scientific Socialism;* the *Programme of the Communist International;* Marx' *Capital;* the *Communist Manifesto;* the *Theses and Statutes of the Third (Communist) International,* including the 21 conditions for membership therein; a number of writings by Soviet authors concerning political policies and the economy of the Soviet Union; and other works.

The purpose of Lenin School instruction as explained by Earl Browder, then leader of respondent, and as borne out by petitioner's evidence, was to develop CPUSA leaders and through them to raise the political and ideological level of the Party membership as required by the development and intensification of revolutionary situations developing in countries throughout the world, including the United States.

In addition to the formal institutionalized schooling in the Soviet Union, many of respondent's highest functionaries have received training through serving abroad in various positions of the International Communist organization. Petitioner's witness Honig, while functioning as CPUSA representative to the Red International of Labor Unions, was sent to various places in the Soviet Union to study Soviet operations and the activities of Soviet trade unions. William Z. Foster,[107] Earl Browder,[108] Charles [fol. 2573] Ruthenberg, and petitioner's witness Gitlow functioned for various periods in Moscow as members of the Soviet-controlled Executive Committee of the Communist International, and Foster also served on the Presidium of the Communist International. Petitioner's witness Kornfeder also received training by functioning in Moscow as a member of the Anglo-American Secretariats of the Comintern and the Profintern, and while in Moscow met Alexander Bittelman, who later became a high functionary of respondent and who, along with respondent's witness Flynn, was convicted under the Smith Act. William F. Dunne served as an alternate member of the Executive Committee of the Communist International in the 1920's. Bosse functioned in the Information Department of the Communist International in 1926 and 1927. In the early 1930's Clarence Hathaway functioned as a representative of respondent to the Communist International and also served as a member of the Anglo-American Secretariat of the Communist International in Moscow. Party leader Robert Minor succeeded Hathaway as respondent's representative to the Communist International. Other members

[107] Presently leader of respondent.

[108] Leader of respondent 1929-1945.

who served as the Party's representatives in Moscow include Louis Farina, John Reed, Nicholas Horawich, Israel Amter, J. Louis Engdahl, Max Bedacht, Harrison George, and H. M. Wicks. Morris Childs was a member of the Lander Secretariat of the Comintern. Harry Haywood served on the International Negro Bureau of the Communist International.

The record establishes that following their return to the United States members of respondent who had been trained and indoctrinated in the Soviet Union taught in respondent's schools and put into practice to the extent circumstances permitted, that which they had learned in the Soviet Union.

There is no credited evidence showing training of respondent's members in the Soviet Union subsequent to the outbreak of World War II.[109] However, it is established that the extensive foreign training set forth is still being effectuated in this country by respondent. This training was clearly a program initiated by the Soviet Union to indoctrinate while there outstanding workers and leaders of respondent so as to have a cadre for imparting such training to respondent's membership in the United States. Further, the cessation of the training is consistent with the Party's reason for formally disaffiliating from the Communist International. More important, however, a number of outstanding Party members and leaders, having received [fol. 2574] Soviet indoctrination, were enabled to train, similarly, students at Party schools in this country and to dispense their previous training through respondent's publications and activities.

We find that prior to 1939 respondent sent its members and representatives to the Soviet Union, at the latter's instance and with its financial assistance,[110] for instruction and training in the principles, policies, strategy and tactics

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[109] We do not credit the testimony of witness Cummings concerning being solicited by functionaries of respondent in 1946 and 1947 to attend a school in the Soviet Union. In fact, due to his cross-examination, we have carefully scrutinized Cummings' testimony and have given it no effect except in the relatively few instances where findings are substantiated by his testimony.

[110] See findings under "Financial Aid," *supra*.

of the world Communist movement, as determined by the Soviet Union, for the purpose of adopting and effectuating such principles, policies, strategy and tactics in the United States, which it does.

There is considerable evidence of record showing that respondent has over many years reported on numerous occasions to the leadership of the world Communist movement, which we now set forth.

In 1926, William Z. Foster and Alexander Bittelman were in Moscow and made a written report to the Communist International covering respondent's activities during the year 1925 with reference to the economic and political situation in the United States, trade unions, Socialist Parties, Bolshevization of respondent, Leninist education, united front campaigns, Negroes, farmers, women, anti-imperialism and internal Party developments.[111] The witness Gitlow went to Moscow in 1927, 1928, and 1929 to discuss similar matters with Comintern officials. In 1929, Gitlow and other members of respondent traveled to the Soviet Union to participate in a hearing held in Moscow by the Communist International to resolve the factional dispute then raging in respondent.

Respondent's youth organization, known for a period as the Young Workers League, was in continuous communication with the Young Communist International. Reports of respondent's work on the Negro question were sent in the 1920's to the Eastern Department of the Comintern, which then had jurisdiction over this phase of respondent's activities. The witness Nowell reported on behalf of respondent in Moscow in 1930, on matters concerning the Trade Union Unity League (TUUL) in the United States. During his stay in Moscow, Nowell received instructions in various aspects of the world Communist movement, including the Negro question in the United States.

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[111] Their report also contains various statements as to respondent's activities in carrying out "decisions" and "main lines of policy" dictated by the Communist International and, therefore, constitutes additional evidence to that reviewed in support of our finding and conclusion that respondent acts pursuant to directives and to effectuate policies of the Soviet Union.

[fol. 2575] The witness Honig went to Moscow in June 1934 and remained there until November 1935 as "referent" and official representative of respondent and the TUUL to the Red International of Labor Unions, a creature of the Communist International. Representing respondent, he attended meetings held in Moscow not less than once a week where representatives from various Communist Parties throughout the world reported the activities in which their parties were engaged among trade unions in their respective countries. Discussions based on these reports followed and Comintern leaders, who were present at these meetings determined whether the work was being carried out in the various countries according to Comintern instructions and registered their approval or disapproval. They also gave directions as to how this work should be conducted. Honig, while functioning in the Communist International's labor organization (RILU) in Moscow, received reports from Jack Stachel,[112] then acting head of the Trade Union Unity League in the United States, and Earl Browder, then head of respondent, concerning the failure of the San Francisco general strike of 1934. Reports which Honig received at the Red International of Labor Unions were generally mimeographed or typed when not of a confidential nature and were sometimes sent to the Soviet Union through the mails or delivered by students or Party leaders. Confidential reports were taken to the Soviet Union by American Party leaders and by couriers.

Minutes of meetings of respondent's Central Executive Committee and its Political Committee were sent to Moscow during the 1920's. Reports also were sent by various departments of respondent's national headquarters and by individual CPUSA leaders. In addition to the foregoing, the minutes of respondent's Political Committee covering official actions of respondent during the years 1925 to 1928 reflect many instances of reporting to the Communist International through other channels of communication.

The Information Department of the Communist International collected and digested for the Comintern's Executive Committee all information sent from the American

[112] Convicted in 1949 of conspiring to teach and advocate the overthrow of the United States Government.

Party. The Anglo-American Secretariat of the Communist International received reports from the English-speaking Communist Parties, including respondent; and during witness Kornfeder's membership on this Secretariat in the period 1927 to 1930 reports and recommendations from respondent were received concerning the situation then existing in the United Mine Workers Union.

In 1932, Earl Browder reported to the Communist International on behalf of respondent's Central Committee concerning economic developments in the United States [fol. 2576] as they related to the world situation at that time.

Elizabeth Gurley Flynn, a member of respondent's highest governing body and a witness for the respondent herein, visited France in 1945 and 1949. She went again in 1950, to write articles for the *Daily Worker*. As a fraternal representative of respondent she met with Communist Party leaders of other countries, including, in 1945, those from the Soviet Union.

Flynn attended a convention of the British Communist Party in 1945, where she met with respondent's witness Gates who was also at this convention. Flynn explains that she attended this Congress by "accident" as she happened to call up Mrs. Pollitt, wife of the General Secretary of the British Party and was invited to attend. She explains the purpose of her 1949 trip as being to attend a birthday party in Paris, France, for Marcel Cachin, editor of the French Communist paper *Humanite*, to whom she took greetings from respondent. She there met other leading Communists, such as Duclos and Thorez from France. In 1950, Flynn attended the Congress of the French Communist Party in a suburb of Paris fraternally representing respondent and while abroad also attended a Congress of the British Communist Party in London to which she brought greetings from respondent and spoke concerning problems common to both Parties. She explains her attendance at this Congress by saying ". . . again it seems coincidental, but it is a fact that there was a London Party Congress going on which I had not known about, and which they whisked me off to, a postman's holiday. . . ." (Tr. 13683-4.)

Flynn testified that she would not consider her conversations with foreign Communists, including members of the Soviet Communist Party, as reports, but states they were simply an exchange of experiences between persons with common interests.

While we do not view this evidence as establishing that respondent has, through Flynn, reported to representatives of the world Communist movement, in the context of this record and evaluating her testimony we do not credit her testimony that she has not reported.

The record discloses an instance where, by means unknown, the content of an important letter written by William Z. Foster concerning respondent's affairs was communicated to Jacques Duclos, General Secretary of the Communist Party of France and a former member of the Executive Committee of the Communist International. The letter in question played a decisive part in respondent's reconstitution in 1945, as elsewhere herein covered.[113] [fol. 2577] The record further shows that respondent has reported its program and activities to the Soviet Union through Comintern representatives and other agents of the Soviet Union in the United States,[114] who exerted influence and control over the leadership and programs of respondent.

In addition to respondent's reporting in the aforementioned ways, the record establishes the existence of another form of reporting through the issuance and exchange of significant information in open communications often in the form of "greetings," which were generally published in Communist publications. When the evidence discussed earlier in this Report which shows the Communist technique of utilizing freedom of the press for revolutionary communication purposes, and that showing the use and importance of official Communist organs is considered, the documentary material and testimony now to be discussed takes on a materiality which would not ordinarily attach to such evidence.

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[113] See "Respondent's Internal Organization," *supra*.

[114] See subsection "Foreign Representatives in the United States," *supra*.

This type communication commenced early in respondent's history and we will cite typical examples of the many of record. The following "resolutions" were adopted by respondent at a convention in 1921 and sent to the Soviet Union:

"2. Greetings to the Third World Congress of the Communist International.

". . . In the name of the revolutionary proletariat of America, we affirm our determination to fight under the banner of the Communist International for the overthrow of American imperialism and for the establishment of the proletarian dictatorship. Hail to the International Soviet Republic! Long live the Communist International!

"3. Greetings to the Soviet Republic.

• • • • • • •

"The unified party, the Communist Party of America, declares that it will render all possible assistance to the Russian Soviet Republic in its struggle against the counter-revolutionary bands of the world imperialism. The Communist Party of America declares that only [fol. 2578] by the overthrow of world imperialism will the safety and mastery of the Soviet Republic over its enemies be definitely assured. The Communist Party of America pledges itself to rally the revolutionary proletariat of America for the annihilation of the most formidable stronghold of world imperialism: the American capitalist state, and to struggle for the establishment of the proletarian dictatorship. Down with world imperialism! Hail to the universal Soviet Republic! Long live the international solidarity of the workers!

"4. To the Third World Congress of the Communist International.

"The Unity Convention of the Communist [sic] of America and the United Communist Party of America fully upholds and endorses the firm and uncompromising stand stand [sic] of the Executive Committee of

> the Communist International against the opportunistic and centrist elements in various countries—in Italy (Serrati), and in German (Levi). The convention instructs its delegates to the third world congress to uphold and defend the stand of the Executive Committee of the Communist International. . . ." (Pet. Ex. 13.)

In September 1927, on the occasion of its Fifth Convention, respondent received one from the Comintern that was read to the Convention by acting chairman Gitlow, after which the governing body of respondent was instructed to draw up a reply. The communication from the Comintern, in part, follows:

> "In the country of the most powerful imperialism and a most brutal capitalist class the Communist Party can fulfill its duty and can become the leader of the working class against imperialism and capitalist aggression only if it is united and if it is not torn to pieces by factional struggle.
>
> "The Comintern considers as one of the central tasks of the Party the *extermination of all factionalism* and the *unification* organizationally as well as ideologically. It will be the duty of the newly elected Central Executive Committee to lead the Party in a non-factional [fol. 2579] spirit and it will be the duty of the whole Party membership to rally around the Central Executive Committee which it itself shall have chosen. . . ." (Pet. Ex. 23, emphasis added.)

This elicited a response which respondent openly declared to be a "reply" and in which it gave assurances to the Communist International that it would comply with what were, in effect, the directions contained in the Comintern "greeting." This reply is as follows:

> "'The Fifth Convention of the Workers (Communist) Party greets the international leader of the working class, the Communist International. Under its leadership and with our own firm and unanimous determination to unify our Party, we will overcome the

tremendous difficulties in the path of building a mass Communist Party in America. The Convention recognizes fully as Party's task the winning of the American proletariat for the revolutionary struggle against American imperialism.

"'In the execution of this task we are inspired and guided by the principles of Marxism and Leninism, by the experiences of the victorious struggles of the Russian proletariat and the heroic battles of the exploited and oppressed masses of Europe and Asia. The Convention and the incoming Central Executive Committee pledge themselves speedily *to eliminate all remnants of factionalism* and to unify the Party as a prerequisite for the further success of our work.

"'We pledge *the unification of our Party* and to fight more effectively for the defense of the Soviet Union and the Chinese revolution and against the war danger as well as to resist more effectively the offensive of the capitalist reaction and the reactionary trade union bureaucracy against our Party and the militant section of the American working class.

"'The Convention is spurred by a full consciousness of its duty to recruit the toiling masses of America for relentless struggle against American imperialism.

"'Long Live the Soviet Union!

[fol. 2580] "'Long Live the Communist International!

"'Fifth National Convention.

"'Workers (Communist) Party.'"

(Pet. Ex. 24, emphasis added.)

On the occasion of the Sixth Convention of respondent, in 1929, another open communication was sent to the Communist International in Moscow which contained the following:

"We greet our Communist International leadership and pledge our Convention and our Party to prepare itself, to strengthen itself, to clarify itself, for its share of this task. It will close its ranks, it will cleanse its ideology from the poison of opportunism, it will defeat Trotskyism, it will mobilize against and lead

the American proletariat for the struggle against the imperialist war; *it will mobilize the American workers for the defense of our Soviet Union and for the final defeat of American imperialism by the revolutionary overthrow of American capitalist rule.*

"Long Live Leninism!

"Long Live the Communist International!"

(Pet. Ex. 28, emphasis added.)

On December 21, 1949, the *Daily Worker* reprinted a telegram sent by respondent to Joseph Stalin on his 70th birthday which states, among other things:

". . . Like the Communists and other true partisans of peace, democracy and progress in all lands, we hail your more than 50 years of sterling leadership in the interest of the international working class and humanity.

* * * * * * *

". . . Under a Hitler-like anti-Soviet and anti-Communist smokescreen, the American imperialists launched their predatory and aggressive Truman Doctrine, Marshall Plan and North Atlantic Pact.

* * * * * * *

[fol. 2581] "Undaunted by the threats of the war instigators, the USSR steadfastly pursues its Stalinist peace policy and promotes cooperation with all who strive for peace. And the mighty world camp of peace, democracy and socialism headed by the Soviet Union, daily becomes more powerful and is destined to triumph.

"In our country, too, the organized peace forces, among the workers, the Negro people, men and women of science and culture, are growing and will continue to grow in unison with the peace forces of the world. . . ." (Pet. Ex. 375.)

After stating that American people "favor acceptance" of Stalin's proposals for a "Pact of Peace, for demilitarization

and democratizing Germany and Japan, . . . outlawing the atom bomb," the telegram declares that the American people envy and admire the Soviet Union's peaceful harnessing of atomic energy and that they rejoice at the victory of the Chinese Communists and their bond with the Soviet Union. It closes by stating:

> "With full confidence in the American working class and people, the Communist Party of the USA exerts every effort to assure that by their united action they will check and help defeat the fascist-minded monopolists and war-mongers. As this united action grows in influence and scope, it will bring its full weight to bear for the achievement of an American-Soviet pact of peace and friendship—the cornerstone for world peace.
>
> "Long life to you, Comrade Stalin, and to your great and enduring contributions to world peace, democracy and Socialism." (Pet. Ex. 375.)

Petitioner's witness Lautner establishes that the primary significance of this "greeting" lies in respondent's affirmation of loyalty to Stalin as the acknowledged leader of the world Communist movement.

That such communications actually convey significant messages between members of the world Communist movement when the wording appears comparatively innocuous to the uninitiate is made clear by both testimonial and documentary evidence of record. The following quotation from the August 1, 1948, issue of *For a Lasting Peace, for a* [fol. 2582] *People's Democracy*, official organ of the Communist Information Bureau, demonstrates the significance given to a simple statement of solicitude by Stalin:

> "Comrade Stalin's telegram to the Central Committee of the Communist Party of Italy said: 'The Central Committees of the Communist Party of the Soviet Union (Bolsheviks) is grieved that Comrade Togliatti's friends failed to protect him from this foul and cowardly attack.'
>
> "The reply sent by the Central Committee of the Italian Communist Party to Comrade Stalin is worthy

of this well-tested Party. *In their answer the Italian comrades assure Comrade Stalin that the solidarity of the heroic Soviet people and Stalin's warning about vigilance will be for the Italian Communists 'a spur to strengthen and develop the struggle of the united international front of peace, democracy and socialism.'*

*"All the Communist Parties took Comrade Stalin's message to the Italian Communist Party as the expression of his great solicitude for the international working class movement and its leaders.*

*"Increased struggle against remnants and revivals of fascism, the welding of all supporters of democracy and progress into a single socialist camp will be the best answer of the Communists of all countries to Comrade Stalin's solicitude."* (Pet. Ex. 264, emphasis added.)

To show further that significance is attached by the initiate to these communications, Lautner explains in this light the import of one received by respondent at its 15th Convention in December 1950 from the Communist Party of the Soviet Union (CPSU), which follows:

"The Central Committee of the Communist Party of the Soviet Union extends fraternal greetings to the 15th Convention of the Communist Party of the U.S.A. We wish the Communist Party of the U.S.A. successes in its *struggle against reaction,* for the vital interests and rights of the working class and all toilers of the United States of America, for the *ideological strengthening of the Party ranks,* for lasting peace between the peoples.

[fol. 2583] "May the international solidarity of the toilers in the *struggle for peace, democracy and Socialism* gather strength.

"Long live the friendship between the peoples of the United States and of the Soviet Union!

"Long live the Communist Party of the United States!

"CENTRAL COMMITTEE
"Communist Party of the Soviet Union"

(Pet. Ex. 376, p. 229, emphasis added.)

Lautner, from his experience as a former high official of respondent (until January 1950) and as a student of Marxism-Leninism, establishes that this greeting from the CPSU was a political document of importance to Party members since in a concise way it raised all the key problems confronting respondent. Specifically he interpreted some of the various terms used by the CPSU as follows: "struggle against reaction" as basic Marxist-Leninist opposition to imperialism and monopoly capitalism, i.e., the basic line of the Party; "struggle for peace, democracy and Socialism" as the new tactical approach since the end of World War II on which a new tactical united front is to be built; "ideological strengthening of the Party ranks" as a reference which the Soviet Party used to call the attention of the rank and file Party members to the "Browderite" disaffection and other opportunist deviations.

It is reasonable to conclude that the language used by respondent in its open communications to the Soviet Union is possessed of a content through which respondent reports in rather general terms to the Soviet Union. While they are not sinister messages by secret couriers, in the light of this record they have some significance.

Respondent's witnesses deny categorically that respondent reports or has reported to the Soviet Union or its representatives. The weight of the evidence is to the contrary.

We find that respondent upon occasion reports to the Soviet Union and its representatives.

[fol. 2584] 9. Secret Practices

Section 13(e)(7) of the Act provides that the Board shall take into consideration:

> "the extent to which, for the purpose of concealing foreign direction, domination, or control, or of expediting or promoting its objectives, (i) it [respondent] fails to disclose, or resists efforts to obtain information as to, its membership (by keeping membership lists in code, by instructing members to refuse to acknowledge membership, or by any other method); (ii) its [respondent's] members refuse to acknowledge member-

ship therein; (iii) it [respondent] fails to disclose, or resists efforts to obtain information as to, records other than membership lists; (iv) its [respondent's] meetings are secret; and (v) it [respondent] otherwise operates on a secret basis".

The petition alleges:

"For the purpose of expediting and promoting its objectives and concealing its foreign direction, domination and control, the Communist Party from its inception has adopted a multitude of clandestine practices. While the degree of secrecy has varied from time to time, there has been strict adherence to the practice of secrecy during the period from July 1945, to the filing of this petition." [115]

Respondent acknowledges that it engages in certain clandestine practices, but contends that such activity is not for the purpose of concealing foreign domination and has "nothing whatsoever to do with concealing the views or the program of the Communist Party"; (Amended Answer, p. 3, 18-20; Tr. 12936) and asserts that these practices are in response to repressive measures taken against it and its members and are intended merely to "protect the Constitutional rights of members of the Communist Party." (Tr. 12936.)

Petitioner's evidence clearly preponderates to establish that the Party has employed the practices alleged by the Attorney General and there is no serious dispute in the evidence concerning respondent's adherence to the majority of these practices. The real issue raised by the record here is as to the purposes of these practices, i.e., [fol. 2585] whether they are undertaken to conceal foreign domination or to expedite or promote respondent's objectives, or *are simply to protect the Constitutional rights of respondent's members from so-called repressive and un-Constitutional measures*, and to protect "the lives, the safety and the means of livelihood of . . . members of the Communist Party." (Tr. 12936.)

[115] It then proceeds to allege specific secret practices.

Upon our reconsideration of the record as expunged we find that the evidence preponderates to establish that many of these practices are primarily undertaken for the purpose of promoting respondent's objectives, a statutory consideration (Sec. 13(e)(7).)[116] The evidence showing this will now be discussed.

The Marxist-Leninist Classics and official publications of the Comintern provide that clandestine practices must necessarily be employed by a Communist Party in order to enable it to better achieve its objectives. *Strategy and Tactics of the Proletarian Revolution* (Pet. Ex. 343) exemplifies this by reference to the Russian Revolution and the necessity for the Party there to go underground in accordance with the ebb and flow of the revolution. Lenin, in his work *What Is To Be Done?* (Pet. Ex. 417), which respondent urged its members to read in 1951,[117] makes clear that some secrecy is always necessary and that the degree of secrecy required of the Party depends upon the degree to which it is permitted under the circumstances prevailing in a given country to operate "legally." Lenin teaches that the way to reconcile the requirement for a mass Party yet maintain "that degree of secrecy which is essential for the persistent and continuous struggle against the government" (p. 117) is to maintain within the Party organization a nucleus of "revolutionists" which is "not too extensive and as secret as possible." (P. 106.) Lenin shows that in order to avoid detection by Governmental authorities the revolutionary movement is only properly based upon "a solid foundation of a strong organisation of revolutionists." (P. 112.) He discusses the question as to whether an "organization" or "committee" can be caught by the constituted authorities and arrives at the proposition

[116] We do not find, however, that the evidence establishes the practices are undertaken to conceal foreign domination (Sec. 13(e)(7)).

[117] Alexander Trachtenberg, presently a leader of respondent, wrote in the "Editor's Foreword" of this book that it "still retains its freshness because of . . . the great lessons it has toda for the workers in capitalist countries who build their revolutionary parties after the pattern fashioned by Lenin during the formative period of the Bolshevik Party." (Pet. Ex. 417.)

that "it is far more difficult to catch ten wise men [professional revolutionists] than it is to catch a hundred fools." (P. 116.) That this basic requirement of secrecy stems [fol. 2586] from the Marxist-Leninist class concept that a "capitalist" government is the class enemy of the proletariat and that the requirement is intended primarily to promote Communist objectives and not to "protect" members of the Communist movement is indicated by Lenin, who explains that the "more secret functions" are best centralized in the hands of "a 'dozen' experienced revolutionists, no less professionally trained than the police." (Pet. Ex. 417, p. 118.)

According to Marxism-Leninism, the degree of secrecy in Communist Party operations is determined by the extent to which a Party may carry on its operations openly or lawfully in a given country. However, Marxism-Leninism requires, even where a Party may operate openly, the creation of a secret, parallel illegal apparatus. For example, a "statute" of the Comintern provided:

> "The general state of things in the whole of Europe and of America makes necessary for the communists of the whole world an obligatory formation of illegal communist organizations along with those existing legally. The Executive Committee should take charge of the universal application of this rule." (Pet. Ex. 8, p. 7.)

One of the "conditions" for membership in the Comintern to which respondent openly adhered for two decades clearly explains the purpose of this secret illegal apparatus:

> "The class struggle in almost every country of Europe and America is entering the phase of civil war. Under such conditions the Communists can have no confidence in bourgeois laws. They should create everywhere a parallel illegal apparatus, which at the decisive moment should do its duty by the party, and in every way possible assist the revolution. In every country where, in consequence of martial law or of other exceptional laws, the Communists are unable to carry on their work law, fully [sic], a combination of

lawful and unlawful work is absolutely necessary." (Pet. Ex. 8, p. 28.)

An instructive example of the emergence of an underground Party at the decisive moment is set out in the *History of the Communist Party of the Soviet Union* (Pet. Ex. 330), used by respondent as a guide to action. It relates that: "After the February Revolution, the organizations of the Bolshevik Party, which had worked illegally under the extremely difficult conditions of tsardom, emerged from underground and began to develop political and or- [fol. 2587] ganization work openly. The membership of the Bolshevik organizations at that time did not exceed 40,000 or 45,000. But these were all staunch revolutionaries, steeled in the struggle." (P. 183.)

Neither in the Classics nor the organizational requirements of the Communist International is there any indication that the requirements for secrecy which both impose is to protect the individual Party members, but, on the contrary, the purposes of these requirements are shown to be to enable the Party, which by its very nature is conspiratorial,[118] to function against the Government. In the *Programme of the Communist International* (Pet. Ex. 125, p. 92) it provided, "The Communist Parties must be prepared for transition to illegal conditions . . ."

Consequently, it is clearly established without material contradiction by documentary evidence that Marxism-Leninism and the organizational requirements of the Comintern require the existence of a secret apparatus even where a Party may operate openly, the purpose being to insure that at the "decisive moment" there will be a secret apparatus which will "in every way possible assist the revolution."

It is against these requirements of a secret as well as an open apparatus that much of the evidence of clandestine practices must be viewed.

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[118] See for example Stalin's speeches on the CPUSA (Pet. Ex. 109) published by the Central Committee of the CPUSA in pamphlet form, wherein he speaks of the danger of respondent's losing its "conspirative" protection.

It is conceded by respondent and the evidence establishes that it has maintained both open and secret members, that some portion of its membership was and is concealed. Open members of the CPUSA have been those who, by reason of their Party position or because of the type of their operations, need not be concealed. For the most part these were the national, State and district officials and candidates for public office on the Communist Party ballot. Party members active as labor union leaders, mass organization leaders, members of professions, and others have concealed their Party membership from the general public or from the organizations in which they worked or in which they were members. The degree of concealment of such members varies with respondent's current policy regarding its activities; however, the membership of important civil servants, in the armed forces, teachers, and those individuals engaged in illegal and confidential activities for the CPUSA or the Soviet Union is kept secret and is known only to leading officials of respondent or to a restricted number of other members.

[fol. 2588] As required by Marxism-Leninism and as was required of it as a member of the Comintern, respondent has at all times maintained in the United States an underground or secret apparatus, even though operating on a comparatively open basis. This underground apparatus has been kept in readiness to assume leadership and to direct the functions of the Party during the periods when its leaders determine that underground operations are necessary in order to carry out Party activities. Extensive plans have been devised and great quantities of materials have been gathered in preparation for underground operations. Reserve sums of money have been set aside. Hideouts and secret storage space have been acquired. Mimeograph and printing equipment and materials have been assembled in secret hiding places. Reserve officials have been designated to perform, if the situation so demands, as leading functionaries of the Party. The membership of respondent in the early 1920's and since the late 1940's has been divided into groups of five or even fewer persons, and confidential mailing addresses, couriers and other secret devices have been employed in connection with the

preparations for underground activities. During periods when respondent's activities have been conducted with greater secrecy, preparations for underground operations have been intensified correspondingly, along with a like increase in the employment of many of the secret practices described later herein.

Respondent went entirely underground for several years in the early 1920's maintaining a secret headquarters, holding secret meetings, and otherwise conducting its affairs on a secret basis. As its "legal" expression, it organized and dominated the Workers Party, an "open" organization consisting of both Party and non-Party members. Pursuant to instructions received from the Communist International, pointing out that the Party could function openly,[119] the underground Party was liquidated as such but the underground apparatus still remained. The "open" Party, or Workers Party, was merged with the underground Party and thereafter adopted the name Communist Party of the United States of America.

On the continuation of this underground apparatus, Lautner shows that J. Peters, a high Party functionary, directed the Party secret apparatus in the United States Government in the 1930's, and in 1935 Peters told Budenz that the underground Party, being the conspiratorial apparatus, was the most important, that it was the real decisive Communist Party.

[fol. 2589] A few years later, after the signing of the Hitler-Stalin Pact in 1939, the Party, being placed in a position of supporting an ally of Hitler, entered a period of strict secrecy which continued until the invasion of the Soviet Union by Germany in June 1941, and it undertook at this time to strengthen its underground apparatus in preparation for going entirely underground. Eugene Dennis, a high Party official, declared at a meeting of Party functionaries during this period that the secret measures then being placed into effect must be completely estab-

[119] Cf. in this connection Party leader Gilbert Green's report to the Plenum on the need for strengthening Communist vigilance, *Political Affairs*, May 1950 (Pet. Ex. 363), wherein he states: "There was a time when Lenin referred to the United States as 'unequalled' in the 'degree of its political freedom.'" (P. 119.)

lished and adhered to so that, if the United States joined Great Britain in the war against Hitler, the Party would be prepared to turn such an "imperialist" war into a civil war, as Lenin advocated.[120]

While prior to the Pact respondent's clubs averaged from 12 to 20 members and branches from 50 to 100 members, after the Pact the clubs were divided into groups of five, the branches broken down, the size of its national, state and section committees was reduced, and the underground group system was readied for functioning. Directives were issued to destroy records and such literature as would identify members with respondent, membership cards were not issued, and some national CPUSA leaders went partially underground. These measures were intended to place the Party on a complete war basis when put into effect. After the attack by Germany on the Soviet Union and the reversal of the Party's anti-interventionist policy, many of these measures were relaxed.

Further showing the existence and operation of a concealed apparatus doing the secret part of respondent's work, Budenz establishes that the World Travel Agency, headed for a time by Jacob Golos, was connected with a Soviet espionage agency during the period 1936-1943, and that Golos acted as the liaison for communication between Elizabeth Bentley, a member of respondent's underground, and the Soviet Secret Police agents operating in this country.

Extensive preparations for taking the Party underground were again commenced in 1948 when respondent's operations came under the scrutiny of the authorities and relations between the United States and Russia became strained. Various measures were again taken by

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[120] We have assayed Budenz' testimony on this point and credit it, notwithstanding that cross-examination showed that in a book authored by him he did not mention "civil war" in discussing the incident. That this is respondent's position is shown by numerous other circumstances of record, including that this is an axiom of Marxism-Leninism and has been advocated by the Party, see e.g., fol. 2424, *supra*, and fol. 2605, *infra*. Moreover, Dennis, a party to this conversation, is a leader of respondent, but was not called in rebuttal.

the Party to strengthen its underground apparatus. Respondent's National Committee issued directives, which were carried out, that leaders should refrain from communicating by telephone and from identifying Party members by name, that Communist documents and directives should not be sent through the mails, and that the size of all committees within the Party be reduced. In announcing such a directive, Gus Hall, then Chairman of the Ohio Party, stated that the reduction of the State [fol. 2590] Committee of Ohio from approximately 50-odd members to about 11 members was being effected for "security" purposes. At the same time, the National Committee was reduced in number from about 55 to approximately a dozen members, and later, at the 1950 National Convention, it was fixed at 13 members.

By January 1950 respondent had placed into effect throughout New York State a plan for the integration of about 10 per cent, or about 3,000, of its members into a seven-level, vertical underground operation, known in the Party as "a system of threes" and patterned after the three-system of organization in effect in most of the countries in Europe when Communist Parties there were underground. Thompson, a high Party official who has been convicted under the Smith Act, stated that this organizational setup was intended to function even if the Party as such should be declared illegal. In addition, portions of the New York State Party budgets for 1948 and 1949 were assigned to underground work.

In the summer of 1949 instructions were given and steps were taken by respondent's leaders to establish a national system of radio communication which involved the acquisition of radio receivers, familiarization with the use of radio equipment, plans for the location of mobile transmitters and receiving equipment, and a search to find amateur radio operators among CPUSA members. Party leaders sought to establish this system in such a manner as to avoid detection by the Federal Communications Commission of illegal transmissions.

Since about 1948 and continuing on into early 1952, a large number of Party members, including witnesses for petitioner in this proceeding, have been severed from regu-

lar Party units and were either transferred to underground operations, in order to assist in underground planning and to receive instructions in underground activities, or placed in a reserve leadership status.

Beginning around 1948 the CPUSA divided its basic clubs throughout the United States, including those of professional people, into groups of about five members, increased precautions were taken to conceal the meetings of the professional groups, and members were instructed that they should not communicate with others outside their own particular group. Membership cards were no longer issued and names of members were not to be mentioned at group meetings, and communication between the groups and other CPUSA units were to be made through group captains directly to section leaders.

Since this time stringent concealment measures have also accompanied the conventions held by respondent and only the most trusted members of the Party have been permitted to attend, and Party names and aliases have been used in place of given names.

[fol. 2591] During this period the payment of dues and other contributions to the Party has been recorded by the use of a system whereby the members are designated by number at the club level. Also, numbers and symbols have been used by the Party in order to identify its members on mailing lists. As was done during the period of the Hitler-Stalin Pact, extraordinary precautions were taken to conceal the existence of Party schools and the names of the trusted Party members selected to attend them. The nature of the curriculum of these schools (see section "Training and Reporting" *supra*) clearly shows the illegal purpose behind the extensive measures adopted to conceal their existence. Students at a Party school in Oakland, California, during the period 1949-1950 were enrolled by numbers instead of by names, and students at the former were directed to refer to each other by their enrollment numbers rather than by their correct or Party names. The record shows that this group system continued to function after 1950 under strict concealment measures which have been employed by respondent.

In addition to these steps, respondent also adopted during these periods the practice of keeping no records which would divulge information concerning its members and activities. In situations where it was necessary to keep records, however, secret devices such as charts and code systems have been used. (Pet. Ex. 353.) Records have been kept at a minimum by such varied practices as engaging in cash financial transactions, issuing oral directives without ever reducing them to writing, and requiring club leaders of respondent to memorize the names of members of their respective clubs. [redacted] records as have been kept are maintained secretly, and carefully concealed in homes and business offices of secret or concealed members of the Party or of other persons who would be least suspected of being identified with the CPUSA.

That these measures are to prevent disruption of the "world Communist movement" is further evidenced by Party leader Gilbert Green's "Report to the [Party] Plenum on the Need for Strengthening Communist Vigilance," as published in *Political Affairs* of May 1950. (Pet. Ex. 363, pp. 115-116.) It provides:

> "Our whole Party has not yet drawn the full lessons from the experience at the Foley Square trial, from certain incidents since the trial, particularly from the valuable experience of the world Communist movement in the past few years. These prove, beyond a doubt, that the ruling class of this country is assiduously cultivating every known stoolpigeon and agent-provocateur method of the past, and adding a few new ones, in its attempt to infiltrate and disrupt the world Communist movement from within."

[fol. 2592] As "The Immediate Tasks" Green emphasizes the need for "Leninist methods," stating:

> "We must put an end to all opportunist carelessness arising from an underestimation of the duplicity of the enemy. This includes where and how we hold meetings, the use of telephones, etc. We must understand that slothful, careless methods are the opposite of the Leninist methods." (Pet. Ex. 363, p. 129.)

In addition to the foregoing, it is also established that respondent has throughout its history sent its members into various organizations in the United States for the purpose of gaining control of such organizations and influencing their policies to support Party policies and programs. Pursuant to respondent's directives, its members have pursued this infiltration policy with respect to professional organizations, cultural organizations, and trade and industrial unions.[121] Secret Communist factions were planned or formed in such organizations for the ultimate purpose of obtaining control and making the policies of the organization subservient to those of respondent. Students at respondent's schools were taught the importance of infiltrating mass organizations as a means of acquiring mass support for the Party program. Party members designated to carry out infiltration work in mass organizations were instructed to use care not to expose the Party in these organizations.

Continued adherence to this practice is shown by evidence establishing that at a California regional Party convention held in January 1951 the need for Party members to infiltrate other organizations through which the purposes of the Party could be carried out was emphasized.

In connection with this policy, as well as with its other underground operations, Party members were instructed to and did conceal their membership from the organizations involved. Most notable is the Party's activity among trade unions, heretofore shown to be for the purpose of promoting the Party's ultimate objectives in the United States. That this is basic can be seen from a book by Lenin entitled *What Is To Be Done?*, which respondent's members read and studied. In this book Lenin declares that trade unions are "a very useful auxiliary to the political, agitational and revolutionary organisations" and that they can be controlled by a "small, compact core" of agents "connected by all the rules of strict secrecy with the organisations of revolutionists." (Pet. Ex. 417, pp. 109-112.)

There are numerous instances of record where, early in the Party's history, its attempts to secretly infiltrate unions were discussed at Politburo meetings, as reflected in offi-

[121] See sub-section "Trade Unions," *supra*, for more details concerning unions.

cial minutes received in evidence. At such meetings it was [fol. 2593] decided respondent's members were to be instructed to falsely deny they were Party members in order to avoid expulsion from the unions or, if this was impossible because their membership could be established or was known, they were instructed to take the false position that they had withdrawn from the Party.

Jack Stachel, a CPUSA National Committee member, instructed witness Honig in the 1930's to testify falsely in an injunction suit brought against the Shoe and Leather Industrial Union concerning the issue of whether this union was Communist-controlled, and he did so.

More recently, in order to circumvent the non-Communist affidavit provisions of the Taft-Hartley Act, CPUSA members holding positions in labor unions were instructed by respondent's officials to "resign" formally from the CPUSA, but nevertheless to continue functioning as Party members. In this connection, Gus Hall, a CPUSA official thereafter convicted under the provisions of the Smith Act, in 1948 instructed petitioner's witness Blanc, then a union official, to sign a letter of resignation back-dated to a time prior to the effective date of the Taft-Hartley Act in order to protect him from prosecution under the provisions of that Act, and Blanc did so.

It is clear that these measures were undertaken by respondent for the express purpose of effectuating its trade union policies and not to protect its members.

Allied to this policy, the Party has constantly refused and instructed its members to refuse to reveal information and to swear falsely if necessary to advance the Party's interest. The Party's Politburo minutes for June 1926 show that when asked for instructions as to how a Party member involved in an action to revoke his citizenship on the grounds he was a Communist should answer questions, the Party's highest committee gave a number of instructions of the following tenor: "if it cannot be proven that he is a member of the Party, he shall deny membership in the Party." (Pet. Ex. 72, p. 1.) The *Daily Worker* for February 17, 1930, summarizes this policy as follows:

"... It is the duty of Communists to throw every possible obstacle in the way of conviction of their fellow

> Party members in the courts, to defend these members by all possible means, and absolutely to refuse to give testimony for the State in any form. Testimony of Communists can only be given for the defense of Communists, not for the state, and then it must be based upon uncompromising defense of the Party and its program . . ." (Pet. Ex. 496.)

[fol. 2594] CPUSA members were taught in respondent's schools and at meetings during the late 1930's and early 1940's that the moral basis of all acts by a Communist is the determination of whether such acts do or do not help in the achievement of the victory of the classless society; that no oath, or statement in court, or consideration of any kind can take precedence over the question of whether or not his act helps or harms the CPUSA.

The record is replete with instances of where respondent's members have been instructed to swear falsely in order to advance the Party's interest. Witness Kornfeder, upon Party instructions, swore falsely in obtaining a passport in 1927 to conceal his going to the Soviet Union. A Party member, in early 1948, falsely denied his membership in the Party before a court in Virginia and subsequently at a Party meeting in Washington, D. C., his resignation from respondent was so dated as to document his false testimony.

Another exemplification of this policy, clearly unrelated to protection of respondent's members, is the filing by respondent of false documents with the Department of State, some signed by petitioner's witness Budenz, then a Party official, to the effect that the Intercontinent News Agency was an independent agent, when, in fact, it was formed by respondent for the purpose of circumventing the Foreign Agents Registration Act of 1938. The record discloses a number of other instances wherein CPUSA members, several of whom testified for petitioner in this proceeding, were instructed while members to deny their Party membership in the courts and to Government agencies, e.g., to the Federal Bureau of Investigation, in connection with the Loyalty Program of the Federal Government.

It is reasonable to conclude on the basis of this record that the basic underlying origin of the afore-discussed practices stems from respondent's adherence to Marxism-Leninism and the concept of a constant class struggle against the state and Government as the embodiment of the class enemy and that the primary purpose of these practices is to aid in promoting the Party's objectives in this struggle and not simply to protect or to shield its members.

Another pertinent characteristic of respondent's operation, which it is reasonable on this record to find, serves a dual purpose, namely, of protecting Party members and also of promoting Party objectives, is the use by its members of Party names or aliases. As stated elsewhere in this Report, Comintern representatives operating in the United States were known by a number of aliases, e.g., Eisler was known as Edwards and Berger, and Gussev was also known as P. Green. By direction of respondent, Party names or aliases were used by its members in 1927 and 1934 on American passports, which had been obtained illegally in order to conceal from the United States Governmental agencies the knowledge that trips were being, [fol. 2595] or had been, made to the Soviet Union. CPUSA leaders have at other times, for the same reason, used false names in connection with their trips to the Soviet Union, as have respondent's students en route to the Lenin School at Moscow. Also, respondent's leaders and members, acting on instructions, have used Party names or aliases to conceal their activities on behalf of the CPUSA in labor circles and in other organizations, as well as in the conduct of strikes and labor disputes. Concealment of Party membership from law enforcement agencies, by the use of Party names, has been practiced by respondent's members throughout the existence of the Party, and false or Party names have been permitted by respondent for use on membership cards.

Turning now to another aspect of clandestine practices engaged in by respondent, the record shows that early in its history Party leaders received training in the secret department of the Communist International in the use of codes for the transmittal of Party messages, as well as

training in the operation of short wave communication. As a result of raids by the authorities in Great Britain during 1927, which revealed the identity of certain Party leaders in the United States who had received confidential letters, reports, cables and sums of money from the Soviet Union, new codes for respondent's use were delivered in Moscow by a Comintern official to a CPUSA official who in turn brought them into the United States.

During the 1930's respondent established and used various code systems in transmitting confidential messages between its units and its leaders in the United States. Instructions were received by respondent in code from the Comintern in connection with the 1934 general strike in San Francisco. Prearranged code words or phrases have been used by CPUSA members in communicating with each other, particularly with respect to underground activities since 1947. A telephone code was devised in 1949 and used through 1950 to transmit information about meetings and other Party affairs in California. Extensive use has been made of confidential mailing addresses by the CPUSA and its members through 1949.

In addition to code communication, couriers have been used extensively by respondent as a concealment measure in the transmission of documents and other material over a period of many years. Until 1940, CPUSA members served as couriers for the transmission of documents between the United States and the Soviet Union and also on behalf of the Communist International in Moscow, transferring funds and documents between the Soviet Union and other foreign countries. Communist International representatives to the CPUSA have acted as couriers in exchanging documents between the United States and the Soviet Union.

In February 1952, petitioner's witness Evans, then a Party member, was told by a Party official that he was to receive instructions as to the performance of the Party's underground activities; and, further, that he would act largely as a courier between certain Party units.

[fol. 2596] The use of codes and couriers is not related to the protection of Party members' Constitutional rights, but is shown in the context of this record to be a device

utilized to insure the proper functioning of respondent as a conspiratorial organization.

A decisive clause in the preamble to the CPUSA constitution of 1942, viz., "by the establishment of socialism, according to the scientific principles enunciated by the greatest teachers of mankind, Marx, Engels, Lenin, and Stalin, embodied in the Communist International" (Pet. Ex. 328, pp. 5-6) was taught in Party schools as equivalent to the statement, " 'in accordance with the principles of Marxism-Leninism,' " (Tr. 5763) as defined hereinbefore. Notwithstanding any other language to be found in the preamble, this clause controls the interpretation which CPUSA members place upon the constitution. Similarly, statements in the preambles of the 1945 and 1948 constitutions of the CPUSA to the effect that respondent's functions are founded "upon the principles of scientific socialism, Marxism-Leninism" (Pet. Ex. 329, p. 3) cannot be reconciled with subsequent statements extolling the support of the Constitution of the United States. These direct and implied references to Marxism-Leninism control the interpretation which Communists must place upon the subject matter found in the Party constitution and are intended to negate any other matter contained therein which may be conflicting in any manner. Marxism-Leninism and adherence to its principles is discussed fully elsewhere in this Report and as shown adherence to and implementation of its principles is inconsistent with attachment to the Constitution and primary allegiance to the Government.

Respondent seeks to explain the concealment practices as they pertain to its members as a defensive device to protect them from un-Constitutional interference by Government authorities and from public harassment. However, when viewing these factors with the other evidence set out herein concerning the Party's underground plans and operations, its policy to have its members swear falsely and to refuse to disclose membership in their trade union activities both prior and subsequent to the requirements of the Taft-Hartley Act non-Communist affidavit, and the evidence of the Party's many years of open affiliation with the Comintern, its adherence to Marxism-Leninism, its advocacy of force and violence to unseat the Government and

the evidence of allegiance to the Soviet Union owed by its members, set out *infra*, it seems patent that these secret practices are not adopted by respondent for the purpose which it asserts. This conclusion is overwhelmingly supported when the secret practices are examined in the light of the whole record and all the surrounding circumstances under which they were and are performed. As has been shown, the underlying philosophy of the Communist movement is contained in the doctrine of Marxism-Leninism, [fol. 2597] the real nature of which is described in other portions of these findings. Explicit therein are secrecy and concealment to effectuate attainment of its objectives. It is the aim of respondent to bring about the dictatorship of the proletariat by violent means if necessary and to help the Soviet Union in the event of a war between that country and the United States.

It is basic in the *Theses and Statutes of the Third (Communist) International* that both open and secret nuclei be formed to carry on the work of propaganda and education under the control and discipline of the Central Committee of the Party; and that members were required to join in unlawful work and unlawful organizations if necessary for the Party's purposes. In addition, the conspiratorial nature of the Party as an instrument to lead the struggle against the "class enemy" must be taken into account, as exemplified by Stalin's statement[122] that the 1929 factional dispute in respondent robbed the Party "of its *conspirative* protection in the face of the class enemy." (Pet. Ex. 109, p. 29, emphasis added.) There is also, as shown, evidence which establishes that during the Hitler-Stalin Pact period[123] when it was not unlikely that the United States would enter the war on the side of England and thus be arrayed against Germany and its ally the Soviet Union, "the whole organization was on a conspiratorial basis"

[122] *Stalin's Speeches on the American Communist Party* (May 1929) (Pet. Ex. 109).

[123] The international situation during this period and the Soviet Union's and respondent's policies with respect thereto, which were generally in bitter opposition to the United States policy, are set out in the section "Nondeviation," *supra*.

(Tr. 5548) and the schools were conducted "in accordance with the rules of conspiracy." (Tr. 5549.) In the late 1940's many secret practices were again instituted by respondent and in July 1950 its members were told that the world situation caused the Party to adopt stricter "security" measures.

Secrecy and concealment in connection with the maintenance of an underground apparatus have been continuous and have not been limited to the period when respondent felt it was under particular stress from public resentment or Governmental authority. However, these factors doubtlessly have caused a fluctuation in the degree of some of the secret practices discussed above.

We do not accept respondent's contention that such practices are solely devices utilized to protect the rights and liberties of its members. While the practices doubtless have a dual effect, which envelops seeking anonymity for [fol. 2598] the membership outside the Party, we conclude that secret practices are undertaken by respondent primarily for the purpose of concealing its true nature and of promoting its objectives.

Upon the basis of the foregoing and on the whole record, we find that respondent engages in extensive secret practices within the meaning of the Act, for the primary purpose of promoting its objectives and thereby to advance those of the world Communist movement.

[fol. 2599] 10. ALLEGIANCE

Section 13(e)(8) of the Act requires that the Board consider:

> "the extent to which its (respondent's) principal leaders or a substantial number of its members consider the allegiance they owe to the United States as subordinate to their obligations to such foreign government or foreign organization."

As we have heretofore discussed, the evidence shows that a basic aim of Marxism-Leninism is the establishment of dictatorships of the proletariat in all non-socialist countries of the world, and that respondent adheres to and

works to attain this goal in the United States. The Marxist-Leninist "Classics" define dictatorship of the proletariat and demonstrate that it must if necessary be established by the forceful overthrow of existing non-socialist governments. (See Pet. Ex. 138, pp. 20-21, 26-27, and Pet. Ex. 121, p. 55.)

Although we have heretofore set forth in other sections of this Report our findings that respondent's adherence to Marxism-Leninism has implicit in it acceptance of its fundamentals, it is desirable, because of the principles and policies of the "Classics" concerning allegiance to the Soviet Union, and particularly the necessity for the overthrow of existing "imperialist" governments, including, *inter alia*, the United States, to summarize here, by way of review, some of the evidence establishing respondent's present adherence to the "Classics."

In 1945, when respondent reverted to the name Communist Party of the United States of America the "Classics" assumed an even greater importance. The "Classics," including the *Communist Manifesto*, were in use by the Party up to and including the year 1950. Marxism-Leninism, as embodied in the "Classics," provided the basis of what petitioner's witness Lautner taught and was taught at respondent's National Taining School. The "Classics" were used in the Marxist-Leninist Institute in Los Angeles which Petitioner's witness Evans attended until it was discontinued in June 1950, and they have been used in study courses during the years 1945-1950, in teaching respondent's members.

A recent article by Alexander Bittelman, a CPUSA leader, states:

> "A theoretical contribution of Stalin which, like the *Foundations of Leninism and his other theoretical works, ranks with the fundamental theoretical and philosophical works of Marx, Engels, and Lenin.* is the *History of the Communist Party of the Soviet Union.* The *History* is a fountainhead of Marxist-Leninist [fol. 2600] knowledge—theory, ideology, strategy, tactics, principles of organization. It is a guide to Marxist-Leninist action. It embodies the theoretical and

programmatic positions of Marxism-Leninism." (*Political Affairs*, December 1949, Pet. Ex. 373, p. 8, emphasis added.)

The same highly placed author, in January 1952, states:

> "Lenin's teachings are triumphing because they are true. The teachings of Lenin, further developed by Stalin, demonstrate their creativeness and cogency in all the great progressive struggles of our day and epoch. Lenin's teachings inspire the actions of the vanguard fighters for peace and democracy. Peoples fighting for equal rights and national independence find their advance fighters and leaders guided by the teachings of Lenin, so brilliantly continued and further developed by Stalin. And the magnificent historic fight of our epoch—the fight for socialism, for Communism .... we are proud to say, is guided by the teachings of Lenin and of his great continuer Stalin. It is led by parties of Marxism-Leninism, by Communist and Workers Parties." (*Political Affairs*, Pet. Ex. 489, p. 1.)

In addition to the documentary evidence, it was established through the testimony of petitioner's witnesses Gitlow, Kornfeder, Nowell, Janowitz, Honig, Evans, Meyer, Hidalgo, and Budenz, among others, that the CPUSA in reality advocates the overthrow of the Government of the United States by force and violence if necessary. The membership of the above witnesses in the CPUSA spanned the entire existence of the Party until February 1952. Their various positions therein ranged from high offices to rank and file Party membership. All were in a position to know whereof they spoke.

Respondent engaged in extensive cross-examination of these witnesses on their testimony concerning force and violence and also examined its own witnesses at some length on this subject, thus joining issue thereon.[124]

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[124] Respondent at oral argument contended that witness Honig's testimony was to the effect that the Party advocated peaceful transition to socialism and not overthrow of the Government by

[fol. 2601] In essence, respondent's witnesses testified that the CPUSA does not seek to overthrow the Government of the United States by forcible means, but rather it seeks to establish its program by peaceful means within the framework of the United States Constitution; that "force and violence" as referred to by respondent comes into play only in the event that a duly elected "socialist" government is subject to "counter revolutionary" force by the unseated capitalist-monopolists; it then advocates meeting such an attempt by force to maintain the "socialist" government. Respondent points to language in its 1945 and 1948 constitutions (Pet. Ex. 329, and Pet. Ex. 374, respectively) which embraces the United States Constitution. On the other hand, petitioner's witnesses establish that the "principles of scientific socialism," of "Marxism-Leninism," as used in respondent's constitution and other writings, have a definite meaning to CPUSA members,[125] i.e., that the basic goal of respondent, founded on the writings of Marx, Engels, Lenin and Stalin, namely, the establishment of the dictatorship of the proletariat, can be attained only by the violent shattering of the "bourgeois" state, and this includes the Government of the United States.

It has been concluded that such language in these constitutions of respondent, and other similar statements embracing the Bill of Rights and the United States Constitution, are irreconcilable with Marxist-Leninist principles, and are devices to clothe a conspiracy against the United States Government in the habiliments of legality. The testimony of respondent's witnesses, to the contrary as set forth above, is rejected as being irreconcilable with the great weight of the evidence.

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force and violence. On reweighing Honig's testimony on this point, we have taken fully into account the cross-examination and because his clear and unequivocal direct testimony as set out at Tr. 4495 is consistent with a great mass of documentary and testimonial evidence of record and is in the light of this record substantially unimpaired by cross-examination, we credit it. Accordingly, we find no basis for respondent's contention that Honig testified to peaceful advocacy by the Party. His testimony is to the contrary.

[125] See section "Marxism-Leninism," *supra*.

The testimony of petitioner's witnesses also preponderates to establish that, pursuant to the preachments of the "Classics," the CPUSA seeks to overthrow the existing Government in the United States and its institutions, by forcible means, if necessary, and to establish a dictatorship of the proletariat in proceeding to establish "socialism."

The evidence in this proceeding discloses, and we officially notice, that most of respondent's foremost leaders, despite contentions like those made by respondent in this proceeding, have been convicted under the clauses of the Smith Act (18 U.S.C. § 11, 13, and 37) variously of conspiring to organize as the Communist Party a society group and assembly of persons who teach and advocate the overthrow and destruction of the Government by force and [fol. 2602] violence, and to use leadership therein with the intent to accomplish the overthrow and destruction of the Government of the United States.[126]

Respondent's adherence to and implementation of a concept requiring the overthrow of the United States Government by any means, including force and violence, is completely incompatible with, and the exact antithesis of, allegiance to the United States. This becomes even more clear when we weigh this evidence along with that concerning the international aspects of Marxism-Leninism from which this concept flows, as set forth *supra* in sections "Marxism-Leninism" and "World Communist Movement."

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[126] Leaders of respondent involved in this record so convicted include: Eugene Dennis, John B. Williamson, Jacob Stachel, Robert G. Thompson, Benjamin J. Davis, Jr., Henry Winston, John Gates, Irving Potash, Gilbert Green, Carl Winter, Gus Hall, Philip Frankfeld, Leroy H. Wood, Elizabeth G. Flynn, Pettis Perry, Alexander Bittelman, Victor J. Jerome, Louis Weinstock, Arnold S. Johnson, Albert F. Lannon, Betty Gannett, Jacob Mindel, William W. Weinstone, and Claudia Jones. ~~Alexander Trachtenberg, George B. Charney, Sidney Steinberg (Stein), James Jackson, William Schneiderman, Dorothy R. Healey, Rose C. Kusnitz, and Frank Carlson.~~ See *U.S.* v. *Dennis, et al.*, 341 U.S. 494; *U.S.* v. *Frankfeld, et al.*, 198 F. 2d 629, cert. den. 344 U.S. 922; *U.S.* v. *Flynn, et al.*, 216 F. 2d 354, cert. den. 348 U.S. 909. ~~*U.S.* v. *Trachtenberg, et al.*, C-136-7 pending on appeal U.S.C.C.A. Second Circuit; *Yates* v. *U.S.*, [illegible] F. 2d 146, now pending on writ of certiorari.~~

The Soviet Union being the fatherland or home base of the world revolution, the leaders of the Soviet Union serve also as leaders of the organized world Communist movement. In this capacity the Communist International, the Soviet Union, and Stalin were given pledges of allegiance by respondent's leaders and members, as shown by the evidence we now set forth.

Nowell testified for petitioner in this proceeding as a former CPUSA official who took an oath upon joining the CPUSA (in 1929) to carry out the Party line and to adhere to the principles of the Comintern at all times.

A pledge read by Earl Browder to 2,000 Party initiates in New York in 1935 stated:

> "I pledge myself to rally the masses to defend the Soviet Union, the land of victorious socialism. I pledge myself to remain at all times a vigilant and firm defender of the Leninist line of the Party, the only line that insures the triumph of Soviet Power in the United States." (Pet. Ex. 145, p. 105.)

[fol. 2603] In Madison Square Garden, New York City, in 1937, about 3,000 new recruits to the Party pledged, among other things, to uphold and advance the program of the Communist Party, as well as their "complete devotion to the Leninist struggle for socialism—for a Soviet America." (Pet. Ex. 382.)

At the Seventh World Congress of the Communist International in Moscow in 1935, delegates from the CPUSA, including some of the present leaders of the Party, took an oath of fealty "to Comrade Stalin, leader, teacher, and friend of the proletariat and oppressed of the whole world" whom they assured that "the Communists will always and everywhere be faithful to the end and to the great and invincible banner of Marx, Engels, Lenin, and Stalin" and that "under this banner, Communism will triumph throughout the world." (Pet. Ex. 430.)

The delegation of respondent to this Congress approved this oath of fealty to Stalin and two of the delegates, Browder and Foster, were elected to the Presidium of the Executive Commitee of the Communist International. Subsequently, the decisions of the Seventh Congress of the

Communist International and the work of the CPUSA delegation at that Congress were fully approved by respondent. After this 1935 Congress of the Communist International all Communist leaders and functionaries had to take a basic pledge or oath of loyalty to Stalin.

Of the nine members of the delegation to the Seventh World Congress of the Communist International who took and approved this oath to "Comrade Stalin," six, namely, William Z. Foster (National Chairman), John Williamson (Labor Secretary), Gilbert Green, Jack Stachel, William Schneiderman, and Martha Stone, are top leaders of the CPUSA, having been elected at its 15th National Convention in December 1950 as members or alternates of its National Committee.

Further evidencing respondent's allegiance to the Soviet Union is the reprinting in its official organ *The Communist* in June 1937 (Pet. Ex. 380-D) of Comintern leader Georgi Dimitroff's statement that:

> ". . . One cannot be a Socialist or even an honest democrat if one is not resolutely and entirely on the side of the Soviet Union, the great land of socialism and real democracy for the whole of the people.
> [fol. 2604] "The attitude toward the Soviet Union is in essence the touchstone testing the devotion of every individual active in the working class movement, and of every working class organization to the interest of the working class, and their loyalty to socialism." (Pet. Ex. 380-D, p. 512.)

Party leader Foster, as the principal speaker at respondent's 1948 Ohio State Convention, stated that the Party in Ohio should elect as leaders only those individuals upon whom they could depend in the event of a war between the Soviet Union and the United States.

In 1949 respondent published a message to Stalin in which the Party accused the United States Government of violating the commitments made at Yalta and at Potsdam and referred to the existing Government as "American imperialists." Petitioner's witness Lautner establishes that this message, in effect, constituted a reaffirmation by

the CPUSA of its loyalty and a further acknowledgment of Stalin's leadership of the world-wide Communist movement.

Twelve of the thirteen members of the National Committee of the CPUSA, who were elected at the 15th National Convention of the Party held in December 1950, and two of the alternates have been convicted under the Smith Act as heretofore noted. Three of those convicted, namely, Williamson, Green, and Stachel, were among those leaders of respondent who took an oath of fealty to Stalin at the Comintern's Seventh World Congress in Moscow in 1935. The record does not disclose that any of these CPUSA leaders have ever repudiated the oaths, or that respondent has repudiated their action.

That the allegiance owed the United States is subordinated to a loyalty to the Soviet Union by respondent's leaders and a substantial portion of its membership is further borne out by the evidence showing numerous instances in the past where respondent and its leaders have urged its members to defend the Soviet Union, even in the event of a war between that country and the United States of America. The slogan "Defend the Soviet Union" has been used in this regard. (See e.g., Pet. Exs. 132, 133, 135, 136, 137, 143, 144, 145, 149, 159, 160; 343, 380-A.B.C.)

Respondent's students at the Lenin School in Moscow in the period between 1927 and 1937 were taught that the role of the CPUSA, in the event of war between the Soviet Union and the United States, is to support and defend the former and to labor for the defeat of the latter.

Early in its history, the CPUSA regarded as one of its purposes or duties the defense of the Soviet Union as the fatherland of the working classes all over the world. All new members of respondent were instructed, between 1927 and 1939, that the first and only allegiance of a Party [fol. 2605] member is to the workers' fatherland, namely, the Soviet Union, and not to any capitalist government. The Red Flag of the Soviet Union was used at Party functions during the early 1930's to signify the fatherland of the working class. During this period, Party leader Alexander Bittelman, in *The Communist Party in Action*, pro-

claimed: "Our Party is the United States Section of . . . a world Communist Party and each one of us is therefore a member of a world Party." (Pet. Ex. 144, p. 33.)

In December of 1929, when the United States was suffering severe economic upheavals, the Party launched a "Lenin campaign" and its Central Committee instructed in connection therewith that:

> "Civil war is socially progressive and necessary .... we must prepare the American working class for the coming civil war against American capitalism." (Pet. Ex. 108, p. 4.)

Concerning defense of one's own country, the Party's Central Committee taught its members that:

> "The proletariat, unless it captures political power, has no country to defend. To us the bourgeois theory of offensive and defensive wars is of little value . . . If Haiti and China attack American imperialism, we would absolutely justify this war . . . even if the Haitian and Chinese workers were the first ones to attack . . . The question for us to consider is: who attacks whom, and not who attacks first. * * * This Marxist-Leninist axiom, therefore, tells us that the first attitude of the American proletariat in case of an imperialist war is to turn this war into a civil war against their own bourgeoisie. The American Party must widely popularize this policy and advocate it in our every day struggles against capitalism and imperialist wars. * * * A revolutionary class in a reactionary war cannot but wish the defeat of its own government. This is an axiom." (Pet. Ex. 108, pp. 4-5.)

The Central Committee listed as one of the Party's "Tasks" during this critical period, "To popularize the slogan of civil war against American capitalism." (*Ibid.*, p. 6.)

In 1935, Dimitri Z. Manuilsky, then head of the Comintern, told respondent's delegates to its Seventh World Congress that the first allegiance of all CPUSA members was

to the Soviet Union, and he demanded that the subject of [fol. 2606] allegiance again be stressed throughout the lower ranks of respondent. Students in Party schools during the 1930's and early 1940's were taught that the first and only allegiance of a Party member is to the Soviet Union, the fatherland, rather than to the United States.

Students at the Party's Midwest Training School in Chicago were taught in 1945 that Communists owe their allegiance to the Soviet Union. Party members were taught at respondent's meetings in 1948 that they owe allegiance to the "democratic forces" of the world and that the Soviet Union represents such forces.

Petitioner's witness Lautner learned from his varied experience in the Party from 1929 to 1950 that "the primary allegiance" (Tr. 9622) of a CPUSA member lies in the defense of the Soviet Union. A CPUSA leader in November 1950 denounced the United States for inciting war against the Soviet Union. He urged Party members to respond to "imperialist slanders and war-incitements" by an "ideological and political offensive in the defense of the Soviet Union as the leader of the world camp of peace, democracy and Socialism," as well as "to support and defend the peace policy of the Soviet Union." (Pet. Ex. 477.)

This evidence takes on clearer meaning when it is viewed against the Marxist-Leninist concept of "imperialism," its corollary "just and unjust wars," the concept of two hostile world camps, and respondent's policies in implementation thereof, as heretofore discussed.[127] The preponderance of the evidence establishes that in applying this basic concept it was taught at the Lenin School in Moscow and by respondent at its schools and meetings during its entire existence that a "just" war is any war in which the Soviet Union has as an adversary an imperialist power, regardless of whether the Soviet Union is the aggressor or the defender. Conversely, any war against the Soviet Union, regardless

[127] See pertinent findings in sections "Marxism-Leninism," "World Communist Movement" and "Anti-imperialism," *supra*, which we also take into account in applying the allegiance criterion.

of which nation might be the aggressor, is an "unjust" war for the Soviet Union's adversary. In the event of war between two capitalist countries, the Communist role is to work for the destruction of both, thus leaving to the Soviet Union a clear path for future conquest.[128] In the event of war between the Soviet Union and the United States, however, CPUSA members are to work for the defeat of the United States.

[fol. 2607] The CPUSA, adhering to the principles of Marxism-Leninism, has consistently characterized the United States as an "imperialist" and a "capitalist" nation which by definition can participate only in "unjust" wars.[129] Any war among capitalist countries or by a capitalist nation against a "socialist" country, such as the Soviet Union, is considered by respondent to be an "unjust" war. However, the Soviet Union or any other "socialist" countries are upheld as "anti-imperialist" nations which cannot possibly start an "unjust" war; any war participated in by "socialist" nations is considered by respondent to be a "just" war from the standpoint of such nations. Students at Party schools in 1949 and 1950 have been taught that the Soviet Union could at no time start an "unjust" war while the United States could start an "unjust" war but never a "just" one; further, that a good Communist must support a nation engaging in a "just" war and oppose an "unjust" war. Pursuant to these concepts, the CPUSA took the position that the Korean War was an "unjust" war which the United States and her allies were waging as aggressors against the North Korean and Chinese peoples.[130]

From the evidence contained in this record, we find that respondent has as a fundamental purpose, which it constantly seeks to further, the overthrow of the Government

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[128] It has pertinence to advert here to the history of the Hitler-Stalin Pact as related in our findings herein under "Nondeviation," *supra*.

[129] Unless, of course, the United States is allied with a "socialist" country such as in World War II.

[130] See sections "World Communist Movement" and "Nondeviation," *supra*.

of the United States by any means, including force and violence if necessary, in order to install "socialism" under a dictatorship of the proletariat, after the manner of the Soviet Union, and that this is the very antithesis of allegiance to the United States.

We find upon the whole record that the evidence preponderantly establishes that respondent's leaders and a substantial portion of its membership consider the allegiance they owe to the United States as subordinate to their loyalty and obligations to the Soviet Union.

[fol. 2608] SUMMARY

The evidence in this proceeding traces the entire existence of the Communist Party of the United States, a period of more than 30 years. It has been a satellite of the Soviet Union from its inception.

At the outset of its existence it joined the Communist International, an instrumentality of the Soviet Union, and the organizational manifestation of the world Communist movement at the time. In joining the International the Party agreed to accept its direction and to adopt the policies enunciated by it.

The Communist International was avowedly Marxism-Leninism in action. The period of about two decades when the Party was formally a member is traced in the record by official documents of the International and respondent and oral testimony. This evidence shows unequivocally the character, objectives and leadership of the world movement and the Party's role therein. That respondent during this period was dominated and controlled by the Soviet Union, which controlled the world Communist movement[131] and operated primarily to advance the objectives of that movement is not seriously disputed by respondent's evidence.[a] Indeed, incontrovertible documents virtually preclude such a showing.

Until 1940, then, respondent was openly an active participant in a Soviet led international movement with a "programme of struggle for the world proletarian dicta-

[131] And we find in this Report that this world movement is substantially as described in section 2 of the Act.

torship." Cutting through the semantics, a proletarian dictatorship is what exists in the Soviet Union.

The only substantial issue of fact is whether upon the announcement in 1940 of its disaffiliation from the Communist International, the latter's dissolution in 1943, or thereafter, respondent ceased its relationship with the Soviet Union or the world Communist movement. The evidence shows the disaffiliation was merely *pro forma* and did not sever the relationship. In fact, the Party did not so much as assert a cleavage in policy or program with the Soviet Union or the world movement. While the Communist International was disbanded, as such, in 1943 once again this was only a *pro forma* maneuver. The world movement remained intact in theory and program. And, here again, there was no renouncement of program or purpose. Both as to the disaffiliation and the dissolution, to have substantial significance here there would have to be an indication of some repudiation of policy and program. But there is none.

[fol. 2609] More than this, however, the evidence shows affirmatively that the program of the world movement and respondent have continued to be the program promulgated by the Communist International. In fact, the reorganization of the Party in 1945 occurred because of a revulsion against a temporary departure from the world Communist program in the waning years of World War II. The reorganization was accompanied by a dynamic reaffirmation of Marxism-Leninism. It would seem clear that, the world Communist movement being Marxism-Leninism in action, there would be no substantive break from the movement without a substantial departure from or revision of Marxism-Leninism by respondent. This there has not been. Its policies and programs were originally laid down for respondent by the Soviet Union, through the Communist International. These programs respondent has effectuated without discernible variance to the time of this hearing. Leaving aside the denials of its witnesses that the alleged relationship with the Soviet Union and the world movement exists, it is striking that it is unable to point to events in the various periods of its history demonstrating its independence and bona fide domestic character. Having con-

tinually fought the charge at least for two decades, if not before, that it is foreign controlled the lack of affirmative, substantial evidence of independence is all the more significant.

The short of it is this and, to a substantial degree, it can be found through the hundreds of official documents in evidence alone—the Communist Party began its history by voluntarily submitting to the control of the Soviet Union and adopting that nation's international program for the Communist movement. The record shows that neither the basic program or objectives of the Soviet led world Communist movement nor those of respondent have changed. And, beyond that, respondent itself points to no real cleavage.

Thus there is inside our border a disciplined organization which under Soviet Union control seeks, by unconstitutional means, to install a Soviet style dictatorship in the United States, just as other Communist Parties in other countries have done. At no time does respondent declare that it is singular among Communist Parties in the world.

Our reconsideration of the record as expunged leads to the conclusion that the evidence establishes beyond doubt that respondent is substantially directed, dominated, and controlled by the Soviet Union, which controls the world Communist movement referred to in section 2 of the Act, and operates primarily to advance the objectives of such world movement; and our prior determination to this effect is reaffirmed.

We find, therefore, that the Communist Party of the United States is a Communist-action organization, as defined.

[fol. 2610] RECOMMENDATION

Pursuant to section 14(a) of the Act, it is recommended that the United States Court of Appeals for the District of Columbia Circuit affirm the Board's Order entered April 20, 1953, requiring the Communist Party of the United States to register as a Communist-action organi-

zation under section 7 of the Subversive Activities Control Act of 1950.

Thomas J. Herbert, Chairman, Francis A. Cherry, Member, R. Lockwood Jones, Member, James R. Duncan, Member, Dorothy McCullough Lee, Member.

(Seal)

December 18, 1956, Washington, D. C.

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[fol. 2611]

BEFORE SUBVERSIVE ACTIVITIES CONTROL BOARD

Docket No. 51-101

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HERBERT BROWNELL, JR., Attorney General of the United States, Petitioner,

v.

THE COMMUNIST PARTY OF THE UNITED STATES OF AMERICA, Respondent.

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ORDER

The Board having this day issued, pursuant to remand from the United States Court of Appeals for the District of Columbia, its Modified Report and Recommendation in this proceeding, it is hereby

Ordered that said Modified Report and Recommendation be filed forthwith in the Court of Appeals and a copy thereof served on each party.

Thomas J. Herbert, Chairman, Francis A. Cherry, Member, R. Lockwood Jones, Member, James R. Duncan, Member, Dorothy McCullough Lee, Member.

(Seal)

December 18, 1956, Washington, D. C.

[fol. 2612] APPENDIX A

*The Witnesses*

Of the nineteen witnesses for petitioner, sixteen were former members of respondent. All three of the witnesses for respondent are members of the CPUSA. The periods of membership appear in parentheses after the names of witnesses. An asterisk appears after the names of witnesses who joined or rejoined respondent as a result of conference with the Federal Bureau of Investigation.

*Petitioner's Witnesses*

A. Petitioner's witnesses—formerly members of the respondent:

BERENIECE BALDWIN*: (1943-1952) Membership director of Party Club in 1943; delegate to Michigan State Communist Party Convention in 1944; handled registration and membership records for Michigan District in 1947-1948; secretary of Party Section 1947-1950.

JOHN VICTOR BLANC*: (1934-1936; 1944-1949) Attended CPUSA schools in 1947 and 1948; dues secretary of Party Club in 1944; press and literature director for Party Club; organized and was chairman of Party Club 1947-1949; attended Ohio State Communist Party Convention in 1945, 1947 and 1948.

LOUIS FRANCIS BUDENZ: (1935-1945) Member, New York State Trade Union Committee, 1936-1937; labor editor of the *Daily Worker,* 1936-1937; member of respondent's National Committee, 1936-1940; member of Illinois State Committee, 1937-1940; editor, *Midwest Daily Record,* 1937-1940; member of New York State Committee, 1940; president of Freedom of Press Company, Inc., 1940-1941; managing editor, *Daily Worker,* 1941-1945; alternate member, National Committee of Communist Political Association, 1944-1945.

WILLIAM GARFIELD CUMMINGS*: (1943-1949) Press director, secretary, vice chairman, and chairman of Party Clubs; member, Ohio State Communist Party Committee;

delegate to Ohio State Communist Party Convention, 1945 and 1948; delegate to CPUSA National Convention, 1948.

TIMOTHY EVANS, JR.*: (1948-1952) Chairman of Party Club; delegate to CPUSA regional convention in 1951; group leader and section educational director in 1951; assigned as "underground" member of CPUSA in summer 1951.

[fol. 2613] BENJAMIN GITLOW: (1919-1929) Helped organize respondent in 1919; member of Labor Committee and National Committee of Communist Labor Party; member of Political Committee (governing body) for most of time as member of respondent; member of Secretariat, 1927-1929; General Secretary, 1928-1929; member, Executive Committee of Red International Trade Union, 1928-1929; present at conferences in Moscow, 1927, 1928, 1929; member, Executive Committee of the Communist International, 1928-1929.

BALMES HIDALGO*: (1946-1949) Membership director of Party Club; financial secretary of Party Club; press director of Party Section; attended Party leadership school, 1947.

NATHANIEL HONIG: (1927-1939) Discussion leader in Party Unit; employed by *Daily Worker;* editor, *Timber Worker,* 1937-1938, also editor of *Labor Unity,* 1930-1934; attended CPUSA National Convention, 1929-1934; teacher at Lenin School in Moscow, 1934-1935; representative of Trade Union Unity League to Red International of Labor Unions (Profintern) in Moscow; managing editor of *Western Worker,* 1936-1937.

JOHN EDWARD JANOWITZ*: (1943-1952) Member of various Party Clubs and Shop Units; alternate delegate to CPUSA Ohio State Convention, 1950.

JOSEPH KORNFEDER: (1919-1934) Helped organize respondent in 1919; Branch organizer, 1919-1920; member, Central Committee, 1920-1924 and 1926-1928; labor union activities director, 1921-1922, eastern area director, 1920-1927; member, district committee and district bureau of Ohio, 1932-1934; general secretary, Trade Union Unity Council of New York; member, district bureaus and district

committees; attended Lenin School in Moscow 1927-1930; Communist International representative in South America, 1930 and 1931.

JOHN LAUTNER: (1929-1950) District Secretary of CPUSA National Hungarian Bureau in various states during 1930-1941; organizer in CPUSA sections and districts 1933 and 1936; director, CPUSA National Training School for Hungarian members, 1932; head of New York State Communist Party Review Commission, Fall 1947; member of CPUSA National Review Commission and in charge of security for New York State Party, 1948-1950.

MARY STALCUP MARKWARD*: (1943-1949) Chairman, Party Club in 1944; membership director and treasurer for City of Washington, 1944; City Committee for Washington, D. C., 1945; member, District Committee, 1945 and 1948; visitor at Party National Convention in 1944.

[fol. 2614] FRANK STRAUS MEYER: (1934-1945) Transferred from British Communist Party; worked in Paris for British Communist Party in 1934; associated with British Young Communist League's Secretariat of the Central Committee; active in youth work in United States and Canada while a member of CPUSA; Area secretary, youth section, American League Against War and Fascism; Educational Director of Party Section, 1935-1937; Director, Chicago Workers' School and District Educational Director, 1938-1941; District Membership Director and Assistant Organizational Secretary, 1941-1942; instructor at Jefferson School, 1944.

WILLIAM ODELL NOWELL: (1929-1936) Student, instructor and director in Communist Party School in Detroit, Michigan; member and secretary of District Negro Commission, 1929; member of Michigan District Bureau and District Secretariat, 1930; member and later President of the Detroit Chapter of the Anti-Imperialist League, 1929; member, International Labor Defense, 1929; organizer, American Negro Labor Congress, 1929; Communist Party organizer in Auto Workers Union and Union representative to founding convention of Trade Union Unity League, 1929; manager, Workers' Book Store, De-

troit, 1930; circulation manager of *Daily Worker* and Education Director in Michigan District; attended Lenin School, Moscow, 1931; Communist Party delegate to a celebration of Russian Revolution in Moscow, 1929; representative of Trade Union Unity League to Profintern.

HERBERT A. PHILBRICK*: (1944-1949) Joined Massachusetts Youth Council in 1940 and was later chairman; joined Young Communist League in 1942 and American Youth for Democracy in 1943; member, Communist Party State Education Commission of Massachusetts; chairman, Massachusetts Communist Party leaflet production; alternate delegate, Massachusetts Communist Political Association Convention, 1945; State Treasurer, American Youth for Democracy, 1943-1945; Cell Organizer, 1944; attended Communist Party Training School, 1945; District Educational Director, 1947; Professional Group Literature Director, 1947-1949.

DANIEL SCARLETTO*: (1947-1952) Member of various Communist Party Clubs in 1947-1948; Press Director, El Sereno Club, 1948; Club organizational secretary, Mexican Concentration Club, 1948-1951; transferred to "underground" January 1951.

B. Petitioner's witnesses—never members of or connected with respondent.

JOHN W. CARRINGTON: Clerk of the Un-American Activities Committee of the House of Representatives. This witness was subpoenaed by the Attorney General in this proceeding to produce and authenticate, in his official capacity, certain documents from the files of the House Un-American Activities Committee.

[fol. 2615] ALEXANDER LOGOFET: Born and educated in Russia. Formerly employed by the Czarist government. Presently Russian interpreter for International Conferences for the Department of State. This witness was subpoenaed by the Attorney General in the instant proceeding to translate a document in the Russian language. (Petitioner's Exhibit No. 3.)

PHILIP E. MOSELY: Director of the Russian Institute; Professor of International Relations, Columbia University.

Dr. Mosely testified as an expert for the Attorney General in regard to the allegations of the Petition under Section 13(e)(2) of the Act.

*Respondent's Witnesses*

HERBERT APTHEKER: (1939 to present) Dr. Aptheker testified as an expert on Marxism-Leninism. Member of a Brooklyn Communist Party Club, 1940-1941; teacher, Jefferson School of Social Science, 1946 to present; editor, *Masses and Main Stream*, 1948 to present; managing editor, *Political Affairs*—about 1950 to present; trustee, Jefferson School, New York City, 1950 to present.

ELIZABETH GURLEY FLYNN: (1937 to present) Member, National Committee, 1938 to present; chairman of Women's Commission of Communist Party, 1945 to present; chairman of Defense Commission, CPUSA, 1948 to present; columnist for *Daily Worker*, 1937 to present; delegate to Congress of Women for Peace, Paris, 1945; member, Political Bureau, later called National Board, 1941-1946, 1948; representative of *Daily Worker* at 80th birthday party for Marcel Cachin in Paris, 1949; representative of CPUSA to French Communist Party Congress, 1950.

JOHN GATES: (1933 to present) Member of Young Communist League, 1931; organizer for the League, 1932-1937; organizer of various clubs in Youngstown and member of the Section Committee, 1933-1937; member, International Brigade in Spanish Civil War in 1938 and rose to rank of Brigade Political Commissar (Lt. Col.); National Executive Secretary, Friends of Abraham Lincoln Brigade, 1939; National Education Director of Young Communist League, 1939-1940; "Head", Young Communist League for New York State, 1940; United States Army, December 17, 1941-January 17, 1946; elected member, National Council Communist Political Association *in absentia*, 1944; elected member of National Committee of Communist Party *in absentia*, 1945; National Vets Director Communist Party, 1946-1947; member, National Committee, Communist Party, 1946 to present; chairman, National Legislative Commission, 1947-

1951; member, National Board, Communist Party, 1947 until it was discontinued; editor, *Daily Worker*, 1947 to present; chairman, National Review Commission, 1951.

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[fol. 2616]

SUPREME COURT OF THE UNITED STATES

No. 48, October Term, 1955

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA, Petitioner,

vs.

SUBVERSIVE ACTIVITIES CONTROL BOARD.

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

JUDGMENT—April 30, 1956

This Cause came on to be heard on the transcript of the record from the United States Court of Appeals for the District of Columbia Circuit, and was argued by counsel.

On Consideration Whereof, It is ordered and adjudged by this Court that the judgment of the said United States Court of Appeals, in this cause, be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the United States Court of Appeals for the District of Columbia Circuit with directions to remand the case to the Subversive Activities Control Board for proceedings in conformity with the opinion of this Court.

April 30, 1956

Dissenting opinion by Mr. Justice Clark in which Mr. Justice Reed and Mr. Justice Minton join.

Filed May 16, 1956
Joseph W. Stewart, Clerk

[fol. 2758] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11850

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COMMUNIST PARTY OF THE UNITED STATES OF AMERICA, Petitioner,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD, Respondent.

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On Petition for Review of Order of the Subversive Activities Control Board and on Further Hearing Following Further Proceedings before the Subversive Activities Control Board on Remand Pursuant to the Judgment of the Supreme Court.

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*Mr. John J. Abt*, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of Court, and *Mr. Joseph Forer* for petitioner.

*Mr. George R. Gallagher*, General Counsel, Subversive Activities Control Board, with whom *Messrs. Frank R. Hunter, Jr.*, and *Leo M. Pellerzi*, Assistant General Counsel, Subversive Activities Control Board, and *Messrs. Harold D. Koffsky, Philip R. Monahan*, and *William F. O'Donnell, III*, Attorneys, Department of Justice, were on the brief, for respondent.

Before PRETTYMAN, BAZELON and DANAHER, Circuit Judges.

[fol. 2759] OPINION—January 9, 1958

Prettyman, Circuit Judge: This is the second time this case has been here. After our decision upon the first petition[1] the Supreme Court ordered the case remanded to the Subversive Activities Control Board for reconsideration under Section 14(a) of the Subversive Activities Control Act[2] in the light of allegations that the testimony of three witnesses, Crouch, Johnson and Matusow, who had testified for the Government at the original hearing, was perjured.[3] The Board struck the testimony of those witnesses and issued a Modified Report and an order based thereon. The Party petitions for review of that order.

I

The Party renews all the points of law it presented upon its first petition to this court. Upon reexamination we adhere to, and now reaffirm, the views we expressed in our opinion in that case.

II

Section 3(3)(a) of the Act[4] provides:

"Sec. 3. For the purposes of this title—

* * * * * * *

"(3) The term 'Communist-action organization' means—

"(a) any organization in the United States (other than a diplomatic representative or mission of a foreign government accredited as such by the Department of State) which (i) is substantially directed, dominated, or controlled by the foreign government [fol. 2760] or foreign organization controlling the world Communist movement referred to in section 2 of this

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[1] Communist Party of U. S. v. Subversive Activities Control Board, 96 U.S. App. D.C. 66, 223 F.2d 531 (1954).

[2] 64 Stat. 1001 (1950), 68 Stat. 780 (1954), 50 U.S.C.A. § 793(a).

[3] Communist Party v. Subversive Activities Control Board, 351 U.S. 115, 100 L.Ed. 1003, 76 S.Ct. 663 (1956).

[4] 64 Stat. 989, 50 U.S.C.A. § 782(3)(a).

title, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title; * * *."

In the language of this litigation the foregoing definition is said to have two components, a control component and an objective component. The Party says the findings of the Board are not supported by a preponderance of the evidence, in that the evidence does not support the finding as to control within the meaning of the control component and does not support the finding as to objectives within the meaning of the objectives component. The point rests upon a construction of the quoted section of the statute.

The Party says the control component means a relationship in which the Soviet Union exercises an enforceable power to exact compliance with its demands, and the Party adds of course that there is no showing that the Soviet has any means of enforcing conformity by the Party with Soviet desires. But we think this construction of the statute would be erroneous. In the first place, and conclusively, Section 13(e) of the statute[3] makes the matter clear. That section says: "In determining whether any organization is a 'Communist-action organization', the Board shall take into consideration" a list of eight subjects. Among these items are such things as "the extent to which its views and policies do not deviate from those of such foreign government" and "the extent to which it reports to such foreign government". These items demonstrate that the definition of a Communist-action organization was not intended by the Congress to be restricted to organizations which are subject to enforceable demands of the Soviet Union. In the second place the words of Section 3(3) do not necessarily imply enforceable power. The words are "substantially directed, dominated, or con- [fol. 2761] trolled". The statute uses the word "substantially". An organization or a person may be substantially under the direction or domination of another person or organization by voluntary compliance as well as through compulsion. This is especially true if voluntary compliance

[3] 64 Stat. 999, 50 U.S.C.A. § 792(e).

is simultaneous in time with the direction and is undeviating over a period of time and under variations of direction. If the Soviet Union directs a line of policy and an organization voluntarily follows the direction, the terms of this statutory definition would be met.

As to the objectives component of the definition the Party says this clause in the statute requires proof that the accused organization operates primarily to advance three objectives: (1) overthrow of the Government by any means necessary, including force and violence; and (2) establishment of a Communist totalitarian dictatorship, which (3) will be subservient to the Soviet Union. The Party says the Board found only the first of these three objectives and that its finding is not supported by the evidence and is based in large part on misrepresentations of the evidence. The Party derives its construction of the objectives component by analyzing Section 2 of the statute. That section is a recitation of fifteen findings made by the Congress. In these fifteen findings the Party discerns findings as to the objectives of the world Communist movement. As thus discerned the Party describes these objectives in three parts, as we have just indicated. The Board clearly concluded in the affirmative on each of the foregoing objectives. See its Modified Report[6] at pages 39, 89-90, 194-202, 204. Its conclusions were clearly supported by a preponderance of the evidence. It would prolong this opinion beyond permissible length even to sketch that evidence. It is referred to at length in the Modified Report. So, even if we accept the Party's analysis of Section 2—we intimate no opinion upon whether [fol. 2762] or not that analysis is accurate—we think the objectives component of the definition of a Communist-action organization has been met.

## III

The Party says the Board's finding with reference to a world Communist movement, if authorized by the Act, is not supported by the evidence. By "if authorized by the Act" the Party is referring to the section of the Act

[6] Available from the Government Printing Office.

(Section 2) which contains a congressional finding upon the existence and characteristics of the world Communist movement. The Party says that in view of that finding the subject may not be litigated. We discussed that matter in our former opinion. The finding made by the Board is, in our view, supported by ample evidence in this record. So, whether that finding is superfluous or not, the fact is established, either by the congressional finding or by the Board finding, or by both.

## IV

The Party says that the order of the Board must be set aside because the Board refused to require production of alleged reports made to the Federal Bureau of Investigation by Government witnesses. Reports said to have been made by four witnesses—Scarletto, Gitlow, Bude and Markward—are involved. The Party moved for the production of these reports both at the original trial and at the hearing after remand.

*Scarletto.*

The Board affirmatively stated that Scarletto's testimony was not credited. It said:

> "Relevant to this issue petitioner's witness Scarletto testified concerning a meeting of a Party club where sabotage of United States efforts in the Korean War were discussed, however, this testimony was rendered questionable on cross-examination and is not credited."

[fol. 2763] The Party's objective in demanding production of Scarletto's alleged report to the F.B.I. was to impeach him as a witness. Since the Board did not credit the testimony that objective was achieved. The Party accomplished the full purpose it sought from the production of the report. We need therefore consider this point no further.

*Gitlow.*

Gitlow was for years a high official of the Communist Party—a member of the Executive Committee of the Com-

munist Internationale, a member of the Executive Committee of the Profintern, and head of American delegations to Moscow in 1928 and 1929. In 1929 he was expelled from the Party because of a difference with Joseph Stalin on the question of the leadership of the American Communist Party. Over a decade later, in about 1940, Gitlow turned over to the F.B.I. all documents and papers in his possession pertaining to the Party, including a quantity of minutes of meetings of top committees. A few weeks later he dictated for the F.B.I., over a period of weeks, memoranda explaining and interpreting those documents.

Gitlow was not at any time an employee of the F.B.I. He never at any time made to the F.B.I. contemporaneous reports of events.

Much of Gitlow's direct testimony before the Board consisted of his identification of documents which he had delivered to the F.B.I. He explained those documents on the witness stand.

While Gitlow was testifying before the Board he was shown a document, which he said was a copy of his interpretation of certain minutes and documents which he had submitted to the F.B.I. He was asked whether this document refreshed his recollection. He replied that it did not—"Not at all." The Government gave counsel for the Party the memorandum with which the Government attempted to refresh the witness's recollection. The dispute here concerns the remaining memoranda.

[fol. 2764] The Party moved that the Attorney General be directed to produce for the inspection of the Party the so-called explanatory memoranda.

The problem posed is this: Where a witness, approximately contemporaneously with turning over to the F.B.I. quantities of minutes of Party meetings, wrote for the F.B.I. interpretations and explanations of those documents, and the witness testified before this Board at length in explanation of the same documents, must his explanatory memoranda be produced upon request?

The first point here concerns the status of the documents involved; they are official possessions of the F.B.I. The Government repeatedly urges that they are confiden-

tial. Only in its brief here, and only in one sentence, does it claim they are privileged. There is a vast difference between confidential and privileged. Almost any communication, even an ordinary letter, may be confidential. Such a document may not relate to any matter of high public concern. But privileged means that the contents are of such character that the law as a matter of public policy protects them against disclosure. A communication from a person to his banker may be confidential, but it is not privileged; certain of his communications to his doctor or his lawyer are not only confidential but also privileged; the law does not permit their disclosure even under *subpoena* by a court. So, too, with Government documents. Some are privileged, such, for example, as the President's advices in the conduct of foreign affairs and some papers relating to the internal security of the nation.

The Government did not claim before the Board in the present proceeding that the documents here involved are privileged. No factual allegations as to privilege have been made. We cannot consider an unsupported claim made only in the brief here that the doctrines of privilege apply. That the documents are merely confidential does not protect them against compulsory disclosure. Of course this does not mean such documents must be produced upon [fol. 2765] every demand; good cause for intrusion into confidential files and materiality and relevancy must be shown. The law in that area is well settled.

We must next consider the contention of the Government that the Party has waived its right to the Gitlow memoranda. The Gitlow testimony and its accompanying incidents occurred at the original hearing before the Board. The production of the explanatory memoranda was demanded at that time. In its petition for review in this court the Party asserted error (No. 14 of grounds for relief) in the refusal of the Board to order production of documentary evidence but without specification of that evidence. In its brief the Party asserted the point as question number 5. It does not refer us to any place in the argument portion of its brief on that appeal where the production of the Gitlow memoranda was mentioned, and we find none. The matter seems not to have been mentioned in the Supreme Court.

The Government argues that failure to raise the point in the Supreme Court spells abandonment of the point by the Party. We do not think so. Rule 23(c) of the Rules of the Supreme Court provides for a statement of the questions presented for review. It provides that the statement of a question will be deemed to include every subsidiary question "fairly comprised therein" and that only such questions will be considered by the Court. But that seems to us not to be a basis for concluding that all questions not stated or "fairly comprised" in a statement are abandoned. To be sure, if a judgment is affirmed by the Supreme Court, all questions presented and all which might have been presented are *res judicata*. But, if the judgment is reversed or vacated on a single point (*e.g.*, a constitutional question and the only point presented to the Court), other claims of error are not foreclosed upon a retrial or reconsideration upon a general remand. Of course, if the Supreme Court reverses and directs that a certain final judgment be entered, the whole controversy [fol. 2766] is ended. We are here considering a reversal or vacation with a remand, as, for example, "for further proceedings in accordance with this opinion." Such a remand, or a general unqualified remand, means that the appellate court and trial court are to reconsider the case on all other points. Those points remain open after the Supreme Court's disposition of the case before it. By way of illustration, if an appellant urges six errors in this court, one of which is a constitutional question, and being unsuccessful here goes to the Supreme Court on that one point and is there successful, he is not precluded from urging his view of the correct ruling on his other points when he again tries or argues his case in the appellate or trial court. If this were not so, almost every petition to the Supreme Court would be burdened with a plethora of "questions presented" in which the Court has no interest and should have none. We think the Party did not abandon points raised in this court but not mentioned in the Supreme Court.

So the problem becomes this: Did the Party abandon this point when it stated the point in its petition for review and its brief but did not argue it here? We think

a party in this court does not abandon points noted in both his petition and his brief but not argued. He takes a calculated risk. If the judgment is affirmed here, all points which are raised or which could have ben raised are closed to further controversy. But if the judgment is reversed on one point the other points, preserved by notation, remain available for further contest. We conclude that the Party did not abandon its contention in respect to the Gitlow memoranda.

The Government next argues that, when the Board first refused production of the memoranda, the Party had a remedy and that remedy was exclusive. It was to apply to this court for leave to adduce additional evidence, *i.e.*, the memoranda, under Section 14(a) of the statute.[7] That [fol. 2767] section provides: "If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material, the court may order such additional evidence to be taken before the Board and to be adduced upon the proceeding in such manner and upon such terms and conditions as to the court may seem proper." The Government relies upon *Consolidated Edison Co.* v. *National Labor Relations Board*.[8] We agree that we are bound by that case. The facts there were that when the Government rested its case before the Board the Company announced it would present two witnesses. It did so and then proffered two more witnesses, present in the hearing room, whose testimony would be material but short. The examiner rejected the proffer. In the Court of Appeals for the Second Circuit the Company urged that the rejection was error amounting to denial of due process. That court said:

> "These witnesses were at hand, their testimony would have been short, and would have entailed no appreciable delay in closing the hearings. It was vital testimony on the issue of the petitioners' motive in discharging him. Denial of leave to introduce it ap-

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[7] *Supra* note 2.

[8] 305 U.S. 197, 83 L.Ed. 126, 59 S.Ct. 206 (1938).

> pears to us unreasonable and arbitrary. However, the petitioners have not applied to this court for the taking of additional evidence, as they might under section 10(e), 29 U.S.C.A. § 160(e)." [9]

The court did not consider the point further and directed enforcement of the Board's order. In the Supreme Court the Company again presented the point, *inter alia*. The Court said:

> "* * * An offer of proof was made which showed the testimony to be highly important with respect to the reasons for the discharge. It was brief and could [fol. 2768] have been received at once without any undue delay in the closing of the hearing.
>
> "We agree with the Court of Appeals that the refusal to receive the testimony was unreasonable and arbitrary. Assuming, as the Board contends, that it had a discretionary control over the conduct of the proceeding, we cannot but regard this action as an abuse of discretion. But the statute did not leave the petitioners without remedy. The court below pointed to that remedy, that is, to apply to the Court of Appeals for leave to adduce the additional evidence; on such an application and a showing of reasonable grounds the court could have ordered it to be taken. § 10(e)(f). Petitioners did not avail themselves of this appropriate procedure." [10]

The Court did not discuss the point further and affirmed the Court of Appeals judgment with modification not material here.

As we read the opinion and decision in the *Consolidated Edison* case it means that, when proffered evidence is denied receipt by the trial tribunal in a case in which a statute similar to Section 19(e) of the National Labor

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[9] Consolidated Edison Co. v. National Labor Relations Board, 95 F.2d 390, 397 (1938).

[10] *Supra* note 8, 305 U.S. at 226.

Relations Act[11] applies, the profferor must apply to the appropriate United States Court of Appeals for permission to adduce the additional evidence; if he fails so to move he cannot successfully present the point on appeal. The rule applies even though the evidence is "highly important" and is brief and immediately available and re- [fol. 2769] jection of it is "unreasonable and arbitrary". Other courts have so read that opinion.[12]

It may be said that the ruling we have just outlined creates a right to interlocutory relief in such cases, to multiple appeals to the appellate courts, and gives no effect to the provision of the Labor Relations Act which requires that to secure permission to adduce additional evidence the movant must show "that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board". It may also be, as the Eighth Circuit has held,[13] that the petition for review in such a case should be treated as a motion to adduce the additional evidence. But if that were correct we do not see why the petition was not so treated in the *Consolidated Edison* case. There is much force to these various suggestions, and perhaps we misconstrue the opinion of the Supreme Court. But we are bound by the opinion as we read it.

The statute in the case at bar is substantially identical with the pertinent part of the statute involved in the *Consolidated Edison* case. The Party did not move in

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[11] 49 Stat. 454 (1935), 61 Stat. 148 (1947), 29 U.S.C.A. § 160(e), reading in pertinent part: "If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript."

[12] National Labor Relations Board v. Fairchild Engine & Airplane Corp., 145 F.2d 214 (4th Cir. 1944); National Labor Relations Board v. National Laundry Co., 78 U.S. App. D.C. 184, 138 F.2d 589 (D.C. Cir. 1943); California Lumbermen's Council v. Federal Trade Comm'n, 103 F.2d 304 (9th Cir. 1939).

[13] Mississippi Valley Structural Steel Co. v. National Labor Relations Board, 145 F.2d 664 (1944).

this court for permission to adduce additional evidence in the Gitlow memoranda.

The situation here differs somewhat from that in *Consolidated*. In that case the Company had its evidence ready to proffer. Here the Party must first secure the evidence,—by an order directed to the Government. But the Board on the remand refused to reopen this hearing [fol. 2770] to receive any additional evidence on Gitlow's credibility. The purpose of the request for production was to offer additional evidence of Gitlow's perjury. Without this as its purpose the Party could not obtain an order for production. If the evidence, even if produced, could not be got into the record, it need not be produced. So it seems to us that the right to adduce is a necessary prerequisite to an order of production. Thus we conclude that the rule of *Consolidated Edison* applies here. The converse can be argued, and the argument is not unreasonable. It can be said that the production of the documents is a necessary preliminary to a motion to adduce the evidence into the record; *i.e.*, the evidence cannot be proffered until it is in hand and its relevancy and materiality are shown to the satisfaction of the court, as the statute provides. But it seems to us this latter is not the correct view; it would mean that the Government could be required to produce documents which are not, or may not be, admissible in evidence; *e.g.*, if a record has been closed, an order of reopening ought to be made before an order of production is granted. When the statute says a movant must "show to the satisfaction of the court" that the evidence is material, it does not mean he must actually produce the evidence for the court to see; it means he must show that the evidence is in existence and what he expects to prove by it. We think, as we have indicated, that, where a proceeding is in such state that certain evidence for some reason cannot be put in the record without permission to do so, the permission must be obtained before compulsory process for production of the evidence is issued. We do not consider whether, if the motion to adduce were granted, the Government must then produce, inasmuch as this letter may involve questions of privilege, relevancy, etc.

We are of opinion that under the *Consolidated Edison* case the point respecting the refusal to order production of the Gitlow memoranda is not available to the Party [fol. 2771] upon this petition for review. Its contentions in respect to these memoranda are rejected.

*Budenz.*

Budenz was a prominent member of the Party for ten years (1935-1945), being for part of that time the managing editor of the *Daily Worker*. The Party demanded the production of two alleged reports made by this witness to the F.B.I. The first report is alleged to have dealt with a so-called Starobin letter and the other with an alleged conversation between Budenz and a man named Weiner.

It appears that in May, 1945, Starobin, who was the foreign editor of the *Daily Worker*, sent a letter from San Francisco to that paper in New York. It was said to have disclosed that D. Z. Manuilsky, a representative of the Communist Internationale, conveyed either commands or advice to the American Communists concerning their policy and program. There appears to have been discussion in the letter concerning the attitude of the "French Comrades". After Budenz left the Party he went to the F.B.I. and had many conversations with representatives of that office concerning many matters involving the Party. Among other things he is said to have made an oral statement to the F.B.I. concerning the Starobin letter.

On the witness stand before the Board Budenz testified concerning the Starobin letter. The letter was not produced; the testimony as to its last whereabouts was that it was taken upon receipt to the "top floor" of the offices of the *Daily Worker*. Under cross examination Budenz testified to an account of the letter which he had included in his book, *This Is My Story*. He also said he had testified on the same subject before the Un-American Activities Committee. He could not recall specifically whether the advice transmitted by Starobin originated with the "French Comrades" or with Manuilsky. The Starobin letter was pertinent to the case before the Board [fol. 2772] upon the question whether the Party received directives, etc., from Communist headquarters in Russia.

The Party demanded that the Attorney General produce "all reports made by this witness to the Federal Bureau of Investigation dealing with the so-called Starobin letter."

Budenz was at no time an agent of the F.B.I. There is no evidence or indication that he ever at any time made a written report to the F.B.I. concerning the Starobin letter. The position of the Party is premised upon the assumption that if Budenz talked to an agent of the F.B.I., as he said he did, the agent made some written report of the conversation. It is such a report, if there is one, that is involved here.

The second Budenz report dealt, as we have said, with an alleged conversation between him and one Weiner. Budenz was for a time (1937-1940) editor of the *Midwest Daily Record*, "a Communist-controlled, organized and financed newspaper". The paper had financial problems, and Budenz testified that he and Morris Childs, the leader of the Communist Party in Illinois, made a trip to New York for a conference with Robert William Weiner, who was then in charge of Communist Party funds. Budenz testified before the Board: "Childs asked him if we couldn't get some money from abroad." He testified that, in the terminology used very frequently in the Party, "abroad" meant Moscow. On cross examination Budenz was asked whether in any of his books, writings, or published testimony he had ever related the alleged conversation of Childs, Weiner and himself. Budenz replied that it was his remembrance that he had, somewhere, and then he added, "I certainly have told the Federal Bureau of Investigation about it." Counsel for the Party, cross-examining, said: "I didn't ask you about that. I didn't ask you what you told the Federal Bureau of Investigation. That is private."

The present position of the Party on this point is that, if Budenz did in fact tell the F.B.I. about the conversa- [fol. 2773] tion, the agent to whom he spoke certainly made a written report of it. The Party demands production of that report, if there is one.

In respect to the two written reports sought in connection with the Budenz testimony, a query immediately

arises because it is not shown there were any reports. Could the Attorney General be required to answer whether there were any such reports? Be that as it may, a dispositive fact is that if there were such reports they were not by Budenz; if these documents exist they are reports by agents recounting conversations with Budenz. Is the Party entitled to production, for impeachment purposes, of written accounts made by a third party? Would Budenz be impeached if it were shown that a third party—not presented—had written that he (Budenz) had said so-and-so? We think he would not. Such reports would not be admissible unless the author was put on the stand and subjected to cross examination. This is a classic situation requiring application of the hearsay rule. The reports, if there are any, are statements made by an unidentified third person purporting to show what a witness had said or done. The hearsay rule applies to writings. Still further, even in a criminal case under the new statute[14] the reports here involved are not required to be produced. The new act of Congress requires the production of "statements" but defines statements as those written, signed or approved by the witness himself, or "a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital * * * recorded contemporaneously". Surely the executive files of the Government are not to be invaded more easily and with less basis in a regulatory administrative proceeding of this sort than they would be in a criminal prosecution.

[fol. 2774] We conclude on this point that the action of the Board in refusing to order production of the alleged reports involved in the Budenz testimony must be affirmed.

*Markward.*

Mrs. Mary Stalcup Markward was an active agent for the F.B.I. from May, 1943, until October, 1949. She testified before the Board that she had inquired of the F.B.I. how she as a patriotic American citizen could help the Government in this connection and that an agent told her the way would be to join the Communist Party and fur-

[14] Pub. L. No. 85-269, 71 Stat. 595 (Sept. 2, 1957).

nish information. She joined the Northeast Club of the Party of Washington, D. C., and thereafter held various offices in that organization, including those of press director, treasurer, membership secretary, and chairman.

Markward was a witness for the Government upon the original hearing before the Subversive Activities Control Board. She testified in regard to a so-called Frankfeld statement and in regard to money received by her from the Government. She was vigorously attacked on cross examination. During that hearing the Party moved for production of a report by Markward to the F.B.I. concerning the Frankfeld statement and at the end of the case moved for production of all F.B.I. records relating to payments made to Markward. Both motions were denied.

In its remand the Supreme Court ordered the elimination from the case of the testimony of three witnesses, Crouch, Johnson and Matusow; it did not mention Markward. While the case was pending before the Board on the remand, the Party moved this court to direct a reopening in order that it might present further testimony showing that Markward was a perjurer. We denied the motion but in our order gave permission to the Board to reopen to receive testimony concerning Markward's statements about an Annie Lee Moss. The Board reopened for that purpose. Markward returned to the witness stand [fol. 2775] and was exhaustively cross-examined. The Party moved for production of the transcript of a security hearing in respect to Annie Lee Moss, in which Markward had testified concerning Moss, and of reports by Markward to the F.B.I. concerning Moss.

The Party now presents three issues in respect to the production of F.B.I. reports in connection with the testimony by Markward. The first issue relates to the Frankfeld statement, the second to Annie Lee Moss, and the third to payments to Markward by the F.B.I. The Party also presents an issue concerning the production of the transcript of a Security Board hearing on Annie Lee Moss.

(a) The facts concerning the Frankfeld statement were: Markward testified before the Board that at a meeting of the District Committee of the Communist Party in March, 1949, at Baltimore, Maryland, a statement made by Phil

Frankfeld, District chairman, was discussed. She said: "Phil Frankfeld had made a statement to the Baltimore Sun along the same line, stating that the members of the Communist Party would not bear arms in any conflict between the United States and the Soviet Union." On cross examination the witness was asked the following questions and made the following answers:

> "Q. You stated here on page 5890 that Phil Frankfeld had made a statement to the Press, to the Baltimore Sun, specifically, along the same line, that the members of the Communist Party would not bear arms in any conflict between the United States and the Soviet Union. Now you say he did not make that statement or that he did make the statement to the Baltimore Sun; which is it? A. He made the statement in the meeting in which we were discussing the statement he had made to the Baltimore Sun, and my recollection very evidently has confused the actual statement he made to the Sun and the discussion of the statement he made to the Sun.
>
> "Q. So your recollection was confused on the subject, [fol. 2776] was it not? A. It was confused on the actual wording of what he said to the Sun."

Being asked whether she had made a report in writing to the F.B.I. with respect to what Frankfeld had said regarding possible conflict between the Soviet Union and the United States, the witness replied, "I made a report at that time of exactly what transpired at that meeting."

The Party moved for production of the F.B.I. report, on the ground that "there is a clear conflict between her testimony on direct examination and what she alleges the content of that report is, as well as the exhibits themselves." The motion was denied.

When the Board reopened the hearing after the remand, and pursuant to our order granting that permission, it ordered the Attorney General to produce for inspection *in camera* by the Board Markward's report to the F.B.I. concerning the Baltimore meeting in March, 1949. The report was produced, inspected *in camera* and then sealed. Production to the Party was refused. The Board said:

"Our review of the document revealed that, though the phraseology of the witness' testimony at the hearing was not there contained, it reported statements by Frankfeld which when read in the light of the relevant exhibits, *e.g.*, Pet. Exs. 331 (Foster, Dennis statement), 332 (Frankfeld statement), 333 (Thorez statement), and 334 (Togliatti statement) [statements by Community Party leaders on the subject of force and violence] led us to conclude that production is not warranted. The report also contains other statements substantiating testimony she gave at the hearing on what transpired at the Party meeting, in addition to still other matters not here relevant. In short, from our knowledge of the record we concluded that no substantial credibility question was presented."

This is not a criminal proceeding, nor is it a civil action as that term describes judicial proceedings. It is an administrative action, conducted under the provisions of the Sub- [fol. 2777] versive Activities Control Act.[15] The pertinent section is Section 13 of the Act.[16] The Act requires a verified petition, public hearings, oral testimony, receipt of evidence, subpoenas upon request of the respondent, the right to counsel, cross examination, and a transcript of the testimony taken stenographically. It requires a report in writing by the Board, stating its findings of fact and its order, the latter to be published in the *Federal Register* when it has become final.

The statute clearly describes an adjudication as that term is used in the Administrative Procedure Act.[17] "To be sure, the laws under which these agencies operate prescribe the fundamentals of fair play." Their proceedings must "satisfy the pertinent demands of due process".[18]

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[15] Title I of the Internal Security Act of 1950, 64 Stat. 987; 50 U.S.C.A. § 781 *et seq.*

[16] 64 Stat. 998, 50 U.S.C.A. § 792.

[17] 60 Stat. 237 (1946), as amended, 5 U.S.C.A. § 1001 *et seq.*

[18] Federal Communications Comm'n v. Pottsville Broadcasting Co., 309 U.S. 134, 143-144, 84 L.Ed. 656, 60 S.Ct. 437 (1940).

If this were a civil action in a court, or if it were a criminal case, the Party would be entitled to the production of these reports.[19] The question here is whether production is one of the fundamentals of fair play required in an administrative proceeding. We think it is.

The question is a very narrow one. The Government has not claimed privilege. It was established that Markward did make a report to the F.B.I. at or about the time of the event and that this report related to the subject of her testimony. Her credibility was vigorously attacked at [fol. 2778] precisely the point of this testimony—what Frankfeld said at the Baltimore meeting.[20] The testimony was important: it bore upon the problem, pertinent under Section 13(c)(8) of the Act, whether American Communists would bear arms in a war between the United States and the Soviet Union.

We hold that, where the Government places on the stand a witness who testifies about an event long past, and it is shown that this witness at or about the time of the event made a written report to the Government concerning that event, and the testimony is material, and the credibility of the witness in her testimony upon this precise point is attacked, the Government upon demand must produce the report made by the witness. We think simple justice, the fundamentals of fair play, require no less. The opinion of the Supreme Court in the *Jencks* case,[21] as we read it, is based upon the elementary proposition that the interest of the United States is that justice be done. The same elementary proposition applies here and leads to the same result. We must therefore remand with directions to the Board to direct the production of Markward's report to the F.B.I. concerning the Frankfeld matter.

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[19] Fed. R. Civ. P. 34; Jencks v. United States, 353 U.S. 657, 1 L.Ed.2d 1103, 77 S.Ct. 1007 (1957); Pub. L. No. 85-269; 71 Stat. 595 (Sept. 2, 1957).

[20] Although the request for production of Markward's F.B.I. report on the Frankfeld statement was made at the original hearing, the Party preserved this point on appeal by its motion of August 17, 1956, to adduce additional evidence.

[21] *Supra* note 19.

(b) The facts relating to the Annie Lee Moss issue were: Mrs. Markward had testified in a Security Board hearing involving Moss in the Department of Defense and in the "Foreign Born" case before the Subversive Activities Control Board. In both cases she had said that an Annie Lee Moss was a member of the Northeast Club of the Communist Party in Washington, D.C., during the time the witness herself was a member.

[fol. 2779] In a written motion filed with the Board upon the remand the Party demanded production of the Moss security hearing transcript. The Attorney General filed the transcript under seal for *in camera* inspection by the Board. In its order reopening the hearing the Board denied the motion to produce, saying:

> "We have reviewed the documents in the *Moss* proceeding submitted by petitioner for inclusion in the record and *in camera* inspection by the Board. The review evidences, in the light of its motion, that respondent seeks to retry the *Moss* Security Hearing and probe the actions and mental processes of the Security Board and the Defense Department, and this is not a function of the Board. But even if this were permissible, our review reveals that respondent's showing that witness Markward testified falsely in the *Moss* proceeding and was disbelieved in that proceeding is not supported. The Board will, therefore, not permit testimony to be adduced going to the question of whether witness Markward was disbelieved in the *Moss* Security Hearing."

When the case was reopened and Markward returned to the witness stand, she was questioned on cross examination concerning her identification of Moss as a member of the Party. She said: "I have never recognized her as a person whom I knew as a member of the Communist Party. My testimony has been as to what the records had to say about a person by the name of Annie Lee Moss." The aim of the cross examination obviously was to establish that the witness had identified Moss personally and to lay a foundation for showing that this was perjury. Mrs. Markward answered affirmatively when asked whether she stated in

reports to the F.B.I. that Annie Lee Moss was a member of the Communist Party. Thereupon the Party asked for the production of the F.B.I. report, or reports, on the matter. The Board refused production.

During this reopened hearing the Party renewed its demand for production of the Moss security hearing transcript. The motion was denied. In announcing that ruling [fol. 2780] the Chairman said that Mrs. Markward's identification of Mrs. Moss in the security hearing was confined to "her recollection of that name and an address in party records for certain years, none later than 1946, and that identification was not based on personal identification." The Chairman further said that "Since adequate foundation for production of the Moss transcript does not now exist in our view, it has not been ordered."

Thus the demands for the production of documents in the course of Markward's cross examination respecting the Moss matter were (1) Markward's reports to the F.B.I. concerning Moss and (2) the transcript of the Defense Department security hearing on Moss. The Board denied the first and, after inspecting the second *in camera*, denied its production to the Party.

Pursuant to the principles heretofore recited in this opinion relative to the Frankfeld matter, we are of opinion that we must direct the Board to order the production of the above-mentioned documents, *i.e.*, the witness Markward's report to the F.B.I. and her testimony in the security hearing concerning Annie Lee Moss. The latter (the testimony) may be excised so that only relevant parts need be produced.

(c) The facts respecting the payments of money to Markward by the F.B.I. were: Mrs. Markward testified at the original hearing:

> "Q. While you were supplying the Federal Bureau of Investigation with information, Mrs. Markward, were you paid any salary by them? What sort of financial arrangements did you have with them? A. I was not paid a salary by the Federal Bureau of Investigation. Nothing I did for my government was contingent upon receipt of any money from the Federal

Bureau of Investigation or from any other government agency.

* * * * * * *

"Q. Did you receive any money from them at all? [fol. 2781] A. I did receive contributions to the expense of the work I was doing from time to time.

"Q. What sort of things would they be? Make exactly clear just what sort of arrangements you had. A. In this type of activity I was doing, it was very necessary to pay dues, to make contributions, to buy literature, that type of thing, and other incidental things.

"Q. Transportation to Washington. A. Yes, that was part of it."

After the close of the evidence in the original hearing the Party moved that the Board reopen the hearing in order to permit it (the Party) to prove that Markward testified falsely "in answering questions as to whether they [several witnesses] had been paid for their services as informers and as to the amount of such payments"; and "[i]n order to permit Respondent [Party] to obtain, by subpoena or by order of the Panel, the records of the Petitioner with regard to the amounts paid by or at the direction of Petitioner to each of Petitioner's witnesses." The Board denied the motion.

In a criminal case in the United States District Court for the Southern District of New York, *United States* v. *Flynn, et al.*, a *subpoena duces tecum* had been served upon the Attorney General requiring production of all vouchers, receipts, cancelled checks, and other records, showing all payments ever made by the Department of Justice or any of its constituent divisions and bureaus to Mary Stalcup Markward (and others). In lieu of production of such records the prosecution supplied the defendants with figures setting forth "all payments of which it has knowledge made by United States Marshals to the aforesaid persons." It was stipulated in the *Flynn* case that Mrs. Markward had received a total of $24,026.45 during the years 1943 through 1952. This stipulation became part of the record in that case and thus was public.

This occurred after the original hearing before the Board in the present proceeding.

[fol. 2782] After remand to the Board the Party renewed its request for an opportunity to prove that Markward had testified falsely concerning the receipt of money from the Government. The motion was again denied.

We do not rely upon *Jencks* v. *United States, supra,* or upon Public Law No. 85-269 for our conclusion that the records of Markward's compensation from the F.B.I. must be produced, since these records are not "statements" of the witness but are rather records of an executive department maintained in the course of carrying out its functions. Our conclusion is based on the general proposition, exemplified by Rule 34 of the Federal Rules of Civil Procedure, that, where one party to an action is shown to have documentary evidence contradictory to the testimony of one of its witnesses, production of such documents is required upon request of an opposing party.

(d) The Blumberg matter. The essence of the Blumberg situation is: Markward testified at the trial of one Blumberg, a public proceeding in a United States District Court. Her pertinent reports to the F.B.I. were produced, and she was cross-examined at length upon that foundation. In the present proceeding the Board admitted in evidence proffered portions of the transcript of the Blumberg trial, consisting in large part of the cross examination of Markward. It refused to permit re-cross examination of Markward upon her testimony at the Blumberg trial. It also refused to admit in evidence the F.B.I. reports in that case. It did consider, in evaluating Markward's testimony, the testimonial inconsistencies which could be noted in the Blumberg transcript. We think the action of the Board was not unreasonable. We will not reverse on the point.

## V

The Party says the order of the Board must be set aside because it relied on the tainted testimony of the witness Markward.

[fol. 2783] Since, as we have already said, we are remanding for the receipt of further evidence concerning this

witness, if such evidence be offered after production of the documents involved, we do not now consider this point.

## VI

The Party says the order must be set aside because the Board applied biased standards of credibility, based findings on misrepresentations of the evidence, and relied on tainted testimony. The first two of these allegations do not require discussion, as we find no support for them in the record. The third requires discussion.

The Party says the testimony of the witnesses Honig, Budenz and Gitlow was "tainted" and therefore should have been stricken. It argued this point to us upon the first appeal and also to the Supreme Court. It argues the point at length in its brief now before us. The Board, in its Memorandum Opinion on the motion to strike, says that, while it recognizes that the Supreme Court remanded specifically for the elimination of the testimony of Crouch, Johnson and Matusow and that therefore technically no other allegations of "taint" were before it on the remand, it conceives the spirit of the Supreme Court's opinion to permit its reevaluation of the testimony of the witnesses Honig, Budenz and Gitlow. It made that reevaluation and concluded there was no warrant to strike their testimony.

The Supreme Court did not mean in its opinion in this case that whenever testimony is challenged as perjurious it must be expunged or disregarded. Challenges to veracity and charges of falsity are commonplaces in the courtroom. The customary charge to a jury is that, if a juror believes a witness has consciously lied about a material matter, he is at liberty to disbelieve—may disbelieve, not must—the whole of that witness's testimony.[22] The charge of per- [fol. 2784] jury on the part of Crouch, Johnson and Matusow was not challenged or denied by the Government. The Court specifically gave the Board the option of holding "a hearing to ascertain the truth of petitioner's allegations, and if the testimony of the three witnesses is discredited, it must not leave that testimony part of the record."[23] As

[22] See 3 Wigmore, Evidence § 1010 (3d ed. 1940).

[23] *Supra* note 3, 351 U.S. at 125.

to the witnesses Honig, Budenz and Gitlow the charges of perjury are vigorously disputed by the Government and have been twice examined by the Board. We find no clear error in its conclusions upon the matter. The credibility of witnesses must be left in large part to the hearer of the testimony, a proposition too elementary to require citation of authority. We affirm the Board on this point.

VII

The Party urges that the case must be remanded because the Board in its Modified Report modified its original findings for reasons not arising from expunging the testimony of Crouch, Johnson and Matusow or the additional evidence by Markward. Its argument is that the Board could have done one or the other of two things: (1) It could have simply expunged the tainted testimony and reappraised the evidence in the light of that elimination. This would have been a reexamination under Section 14(a) of the Act, which is what the Supreme Court and this court told the Board to do. But, says the Party, in such a proceeding the ultimate point at issue is the validity of the original order, which means its validity as of the time of its adoption, and subsequent events are not to be considered in support of it. (2) The Board could have embarked upon the consideration of a new order, taking into account all relevant data and events occurring up to the close of those proceedings. In that event, says the Party, the original order would be deemed to be [fol. 2785] abandoned and should be rescinded on the record. This would not have been a mere Section 14(a) proceeding but would have been a new proceeding with new issues. The Party says the Board actually took neither of these two alternative courses but, instead, reconsidered its original order, bringing to its support subsequent events, and made new findings not in its original findings.

We think the basic position of the Party as to the two alternatives is correct, but we do not find that the Board followed the composite course the Party asserts was followed.

The nub of the Party's contention, from a practical point of view, is that the Party upon the remand sought the admission into evidence of certain events which it says took place after the Board's original order and which tend to show the independence of the Party from domination, etc., by those in control of the world Communist movement. The Board rejected the proffer as improper under the remand under Section 14(a) of the Act.

It seems obvious to us that in a Section 14(a) remand proceeding directed by the Supreme Court the Board could expunge the testimony of Crouch, Johnson and Matusow and then make revised findings if it found the expunction required revised findings. Such is the purpose of the remand. It seems equally obvious that the Board, in reexamining its findings after the expunction, could cite additional or other bits of evidence in the record to support its findings. Neither commissions nor courts always cite every bit of evidence in a record supporting the findings, however desirable and commendable that practice may be. Nothing prevents later citation of any or all evidence in the record supporting a given conclusion or finding. We think the Board did no more than what we have described as these proper courses.

The Party refers us to twelve instances as the more important examples of invalid revisions by the Board of its original report. We have examined each of the twelve [fol. 2786] carefully. We find that the record does not support the Party's allegations. The record shows that the revisions (1) followed from the expunction of the Crouch-Matusow-Johnson testimony relied upon in part in the original report, (2) cited in support of a finding some evidence in the original record but not specifically cited in that report, or (3) were mere rearrangements or rephrasings. Thus, for example, the *History of the Communist Party of the Soviet Union* was in the original record as Petitioner's Exhibit 330, the *Programme of the Communist International* was Petitioner's Exhibit 125, and the report by Gilbert Green was mentioned in the original report at page 63 of the Joint Appendix. The findings on "Reporting" (point 3), "Secret Practices" (point 4), "Dis-

cipline and Democratic Centralism" (point 6); "World Communist Movement" (point 7), and "Force and violence" (point 10) were originally based in part upon the testimony of Crouch, Johnson and Matusow. The Party says that, whereas the Board in its first report keyed its findings to the specific criteria in Section 13(c) of the Act, in its Modified Report it keyed some of them directly to the definition in Section 3(3). But, as we have said, the criteria of Section 13(c) are directed to a determination within the bounds of Section 3(3). We find no merit in the point. We find no merit in the point (number 2) concerning the changes in the Board's findings as to "Directives and Policies". The Board certainly retained the substance of its original findings. And the same should be said of point 5, "Marxism-Leninism". As to point 8, "Party name", the Board commented on its significance in the original report. In point 9, "Foreign representatives", the Party complains that the Board dropped a finding as to J. Peters. That original finding was based in part at least upon the testimony of Crouch and Matusow. The Party complains that in the Modified Report the Board said it scrutinized with care the testimony of Honig, Scarletto and Cummings. It did this, as we have [fol. 2787] said, in accordance with the spirit of the remand. We find no error.

The evidence cited by the Board in connection with "Anti-Imperialism" (point 12) was all in the original record, with one exception. It develops that Exhibit 484, referred to by the Party in this point of its brief, was never admitted in evidence; in fact it was denied admission. It is cited and quoted in two places in the Modified Report, pages 94 and 120. Upon the remand, the Board will strike references to that exhibit and eliminate it as support for any findings. This may necessitate reappraisal of the remaining support for some findings. If so, that reappraisal shall be made and the findings revised accordingly. We affirm the Board on point 12 in all other respects questioned by the Party.

With the exception just noted we affirm the Board upon the point discussed under part VII of this opinion.

## CONCLUSION

In summary we remand to the Board for the production of the reports by the witness Markward to the F.B.I. as indicated in the course of this opinion. The remand for this purpose is a remand under Section 14(a) of the statute. On all other points (with the exception noted under part VII) we affirm the Board.

We are authorized to say that Judge Bazelon adheres to the view set forth in his dissenting opinion filed earlier in this case, that the Act violates the Fifth Amendment and hence it is unnecessary for him to reach other issues presented in that connection. He agrees with (1) the remand for the purposes we have outlined in part IV of this opinion, and (2) the denial of the Party's request for discovery with respect to the witness Scarletto. He disagrees with the denial as to (1) reports alleged to have been made to the F.B.I. by the witnesses Gitlow and Budenz, and (2) matters in the *Blumberg* case affecting the witness Markward. On the question discussed in part [fol. 2788] VII—whether the Board's revised report is improper under the mandate of the Supreme Court and this court—it is his position that, since the Board's action in response to the instant mandate may again change the Report, decision should be withheld at this time.

*Remanded.*

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[fol. 2789] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,850

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COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,
Petitioner,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD, Respondent.

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On Petition for Review of Order of the Subversive Activities Control Board and on Further Hearing Following Further Proceedings before the Subversive Activities Control Board on Remand Pursuant to the Judgment of the Supreme Court.

Before: Prettyman, Bazelon and Danaher, Circuit Judges.

JUDGMENT—Dated: January 9, 1958

This case came on for further hearing on the record from the Subversive Activities Control Board following further proceedings before the Board on remand pursuant to the judgment of the Supreme Court, and was argued by counsel.

On Consideration Whereof, It is ordered by this Court that this case be, and it is hereby, remanded to the Subversive Activities Control Board pursuant to Section 14(a) of the Subversive Activities Control Act of 1940, 64 Stat. 1001 (1950), as amended by the Communist Control Act of 1954, 68 Stat. 780 (1954) [50 USCA Sec. 793(a)] for further proceedings in conformity with the opinion of this Court.

Per Circuit Judge Prettyman.

Circuit Judge Bazelon adheres to the view set forth in his dissenting opinion filed earlier in this case (96 U.S. App. D.C. 66, at p. 111; 223 F.2d 531, at p. 576), that the Act violates the Fifth Amendment and hence it is unnecessary for him to reach other issues presented in that connection. He agrees with (1) the remand for the purpose outlined in part IV of the opinion this day filed in this case, and (2) the denial of the Party's request for discovery with respect to the witness Scarletto. He disagrees with the denial as to (1) reports alleged to have been made to the F.B.I. by the witnesses Gitlow and Budenz, and (2) matters in the Blumberg case affecting the witness Markward. On the question discussed in part VII of the opinion filed this day —whether the Board's revised report is improper under the mandate of the Supreme Court and this court— it is his position that, since the Board's action in response to the instant mandate may again change the Report, decision should be withheld at this time.

[fol. 2797] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,850

[Title omitted]

MOTION FOR LEAVE TO ADDUCE ADDITIONAL EVIDENCE—
Filed January 23, 1958

Pursuant to section 14(a) of the Internal Security Act of 1950, petitioner, by its attorneys, moves for leave to adduce the following additional evidence in the administrative proceeding before respondent:

1. All memoranda dictated by the Attorney General's witness, Gitlow, and in the possession of the Department of Justice, purporting to explain or interpret documents which he identified and testified about and which were received in evidence in the administrative proceeding.

2. All transcriptions and memoranda of oral statements made by the Attorney General's witness, Budenz, to the F.B.I. relating to conversations between the witness and Morris Childs and Robert William Weiner during the years 1939 and 1940 concerning the financing of the *Mid-West Daily Record*.

3. All transcriptions and memoranda of oral statements made by Budenz to the F.B.I. concerning a letter allegedly written by Joseph Starobin in the spring of 1945 in San Francisco addressed to the *Daily Worker* describing a conversation between the writer and "the French comrades" or between the writer and Dimitri Manuilsky.

4. Testimony of Budenz, the F.B.I. agent or agents to whom the oral statements mentioned in paragraphs 2 and 3 were made, and the stenographer, if any, who transcribed such statements, on the subject of whether the transcriptions or memoranda referred to in paragraphs 2 and 3 are substantially verbatim recitals of oral statements made by

Budenz to the F.B.I., recorded contemporaneously with the making of such statements.

[fol. 2798] 5. All reports written, signed or approved by Budenz concerning the matters described in paragraphs 2 and 3 and in the possession of the Department of Justice.

In support of this motion, petitioner shows the following:

The additional evidence which petitioner seeks leave to adduce is material to this case. Petitioner believes that the statements contained in the memoranda, transcriptions and reports described above contradict or are inconsistent with testimony of Gitlow and Budenz in this proceeding upon which respondent relied in making numerous findings of fact in its Modified Report. Moreover, petitioner believes that the additional evidence which it seeks leave to adduce will establish, particularly when considered in the light of the record as a whole, that the testimony of Gitlow and Budenz in this proceeding is tainted with perjury and should be stricken in its entirety. Petitioner is entitled to adduce the evidence described above under the principles established by the Court's decision of January 9, 1958 and *Jencks* v. *United States*, 353 U. S. 657.

At the administrative hearing petitioner moved for the production of the Gitlow and Budenz documents. The motions were denied (J.A. 1184-85, S.J.A. 2257-58, S.J.A. 2277-78, J.A. 128). A motion for the production of the same documents was made by petitioner and denied by the Board after the Supreme Court's remand (S.J.A. 2187-89). Later, after respondent, *sua sponte*, had ordered the production of one of Markward's F.B.I. reports for its inspection, petitioner again moved for production or *in camera* inspection of the Gitlow and Budenz documents (S.J.A. 2217-19). This motion was denied by the Board in an order dated December 17, 1956 (S.J.A. 2225).

Petitioner has not heretofore filed a motion in this Court under section 14(a) of the Act to review respondent's order of December 17 and require the production of the Gitlow and Budenz documents in the possession of the F.B.I. because it had reasonable grounds for the belief that this [fol. 2799] Court was of the opinion that section 14(a) was not available to petitioner for that purpose. Petitioner's belief was based on the following facts:

On August 10, 1956, after the remand, the Board denied petitioner's motion to reopen the hearing for the purpose of offering evidence that the Attorney General's witness, Markward (1) testified falsely at the original hearing that she had not been compensated by the F.B.I. for her services as an informer and (2) falsely testified in a security board proceeding of the Department of Defense that Mrs. Annie Lee Moss had been a member of the Communist Party (S.J.A. 2189-90). Thereafter, petitioner filed a motion with the Court pursuant to section 14(a) of the Act for leave to adduce before respondent the evidence with respect to Markward's false testimony including (1) a stipulation entered into by the Department of Justice in another proceeding concerning Markward's compensation for services as an F.B.I. informer and (2) the transcript of the Moss security hearing. Petitioner's motion stated:

> "Respondent's denial of petitioner's motion to reopen the proceeding to take evidence that Markward's testimony was tainted violated the standard established by the Supreme Court in its opinion in this proceeding, 351 U.S. 115, 124.
>
> "Petitioner can doubtless secure review of these errors by the Court at the time when review is had of the new or modified findings and the recommendations of the respondent consequent upon its action in expunging the testimony of Crouch, Johnson and Matusow. We believe, however, that section 14(a) provides an alternative procedure for the correction of these errors and that the granting of this motion will expedite the final disposition of the proceeding."

On November 5, 1956, the Court denied petitioner's motion in an order that, in pertinent part, reads as follows:

> "ORDERED by the Court that the motion for leave to adduce additional evidence be, and it is hereby, denied . . . in so far as it relates to an alleged perjury by the witness Markward in respect to payments made to her by the Federal Bureau of Investigation.
>
> "It is FURTHER ORDERED by the Court that in so far as the motion relates to alleged perjury of Markward,

in respect to Annie Lee Moss, the motion be, and it is hereby, denied . . ."

There was nothing in this order to indicate that the Court [fol. 2800] had considered the merits of petitioner's contention that respondent had erred in denying petitioner's motion. Petitioner therefore understood the order as holding that a motion under section 14(a) was not an appropriate remedy for the correction of the Board's refusal to require the production of documents, and that judicial consideration of the Board's ruling could be obtained only upon review by the Court of respondent's new or modified findings and recommendations. Petitioner's view that the Court's order of November 5, 1956 did not pass upon the merits of petitioner's request has been confirmed by the Court's decision of January 9, 1958 that petitioner is entitled to production of the documents which the motion sought.

Accordingly, when the Board issued its order of December 17, 1956 denying petitioner's motion for the production of the Gitlow and Budenz documents, petitioner had been led to believe by the Court's action of November 5, 1956 that petitioner had no remedy by way of a motion for leave to adduce additional evidence under section 14(a). Therefore petitioner did not file such a motion. It was only when petitioner read the decision of January 9, 1958 herein that it learned that, in the opinion of the Court, a motion for leave to adduce additional evidence is not only an available remedy, but the exclusive remedy for the production of the Gitlow and Budenz documents.

Moreover, the opinion of the Court recognizes that the issue which it so decided presents a close question of law. For the opinion states that "perhaps we misconstrue the opinion of the Supreme Court" in the *Consolidated Edison* case. The opinion also recognizes that, in any event, the Court's holding represents a novel extension of the doctrine [fol. 2801] of that case since, as the opinion states, "The situation here differs somewhat from that in *Consolidated*."

Finally, the filing of this motion now, rather than on an earlier occasion, causes no delay of the proceeding since

the Court has ordered the reopening of the case before the Board for other purposes.

Under all of these circumstances, therefore, this motion should not be rejected as untimely.

Respectfully submitted,

John J. Abt, Joseph Forer, Attorneys for Petitioner.

Certificate of Service (omitted in printing).

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[fol. 2811]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Title omitted]

AFFIDAVIT

District of Columbia, ss:

James T. Devine, being first duly sworn, deposes and says as follows:

1. I am an attorney employed by the Department of Justice, and am one of the attorneys for the Attorney General in the proceedings before the Subversive Activities Control Board entitled *William P. Rogers, Attorney General of the United States* v. *The Communist Party of the United States of America*, Docket No. 51-101. The proceedings are *sub nom. The Communist Party of the United States of America* v. *Subversive Activities Control Board*, No. 11850, in this Court.

2. At the request of the Chief of the Appeals and Research Section, Internal Security Division, which Section was then in the process of preparing replies to petitioner's petition for rehearing and modification of this Court's opinion of January 9, 1958, and petitioner's motion for leave to adduce additional evidence filed at or about the same time as said petition, I requested the Federal Bureau of Investigation, on January 28, 1958, to furnish us if possible with an affidavit or affidavits by the Bureau agent or agents who conducted the interview or interviews at which Louis

[fol. 2812] Francis Budenz, a witness for the Attorney General in these proceedings, made oral statements, if any, concerning (1) the so-called "Starobin letter" (which Mr. Budenz testified he received from San Francisco in or about May of 1945), wherein Joseph Starobin, the then foreign editor of the *Daily Worker*, stated that D. Z. Manuilsky had said that the American Communist Party should observe more carefully the guidance and counsel of "the French Communists," and (2) a 1939 conversation between one Morris Childs and one Robert William Weiner, to which Mr. Budenz also testified, relating to the possibility of obtaining funds from "abroad" with which to finance the Communist Party newspaper *Midwest Daily Record*. I was advised by the Chief of the Appeals and Research Section that the affidavit or affidavits would be desirable in answering the petition for rehearing and modification and motion for leave to adduce additional evidence, in view of Mr. Budenz' testimony that he orally reported to the FBI on the subjects here in issue and that his report on the so-called Starobin letter was made in the absence of a stenographer, with the interviewing agent merely taking longhand notes (this testimony being the only evidence of record as to the circumstances under which these interviews were conducted). I requested that the affidavit or affidavits to be furnished by the Bureau set forth the circumstances under which the interview or interviews referred to were conducted. In particular I asked that the affidavit or affidavits state the circumstances under which the interview or interviews were conducted from the standpoint of the manner in which Mr. Budenz' statements were recorded, if they were (*i. e.*, whether a stenographer was present recording the statements *verbatim* or substantially so, or whether the agents merely took notes, from which they later wrote up reports in their own language, relying on their recollection, as refreshed by their notes, of what Mr. Budenz had said, etc.). I further asked that the affidavit or affidavits state that no such interview, if such was the fact, had been electrically or mechanically recorded.

3. On January 29, 1958, shortly following my inquiry, I was informed that from December 6 to 12, 1945, which was soon after Mr. Budenz' separation from the Communist

[fol. 2813] Party, Mr. Budenz was interviewed by two Bureau agents, who took notes during the interviews (the first which the Bureau had with Budenz), but that, in addition, the interviews had been, without Budenz' knowledge, mechanically recorded on discs, which were still in existence. I was further informed that no subsequent interviews with Budenz, of which there had been many, had been electrically or mechanically recorded.

4. I have been informed by the Bureau that the aforesaid initial series of interviews were broad in the scope of their coverage, since they dealt with the wide range of Mr. Budenz' experiences and activities in the Communist Party, and that some of the subsequent interviews were devoted in large part to more detailed inquiries of Mr. Budenz concerning matters and subjects which he may have only mentioned, or touched on but briefly, in the first interviews.

5. Among the many matters and subjects mentioned by Mr. Budenz in the course of the aforesaid disc-recorded interviews are the general subjects or areas to which the specific subjects hereinabove referred to, *viz.*, the so-called "Starobin letter" and the Childs-Weiner conversation relative to the possibility of obtaining funds from "abroad" for the *Midwest Daily Record*, are germane.

6. The affiant had no knowledge, and upon information and belief neither Mr. Budenz nor any attorney who has participated in the preparation or presentation of this case to the Subversive Activities Control Board or to the courts had any knowledge, prior to January 29, 1958, of the existence of the aforesaid mechanical recordings or of the fact of the making of such recordings.

Further affiant sayeth not.

James T. Devine, Attorney, Department of Justice.

Subscribed and sworn to before me this 5th day of February, 1958.

Emily McC. Ireland, Notary Public, D. C. My commission expires February 28, 1959.

(Seal)

[fol. 2814] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,850

[Title omitted]

SUPPLEMENTAL MOTION FOR LEAVE TO ADDUCE ADDITIONAL EVIDENCE—Filed February 14, 1958

Supplementing its pending motion for leave to adduce additional evidence, petitioner, by its attorneys, moves pursuant to section 14(a) of the Internal Security Act of 1950 for leave to adduce the following additional evidence in the administrative proceeding before respondent:

1. All recordings made by the FBI of interviews with Budenz on December 6-12, 1945, which relate to the subject matter of his testimony in this proceeding.

2. All memoranda and notes made by agents of the FBI of subsequent interviews with Budenz relating to the subject matter of his testimony in this proceeding.

3. Testimony of Budenz and of the FBI agents who interviewed him or prepared recordings, memoranda or notes of the interviews, concerning the recordings, memoranda and notes referred to above and Budenz' testimony in this proceeding.

Petitioner also moves that the Court modify the terms of its remand so as to order the Board to require the Attorney General to make available to petitioner the foregoing recordings, documents and witnesses.

In support of this motion, petitioner shows the following:

The additional evidence sought to be adduced is material to this case. *Jencks* v. *United States*, 353 U. S. 657. Petitioner believes that statements made by Budenz in his FBI interviews will contradict or be inconsistent with [fol. 2815] testimony of Budenz upon which the Board relied in making numerous findings in its Modified Report. Petitioner also believes that the additional evidence, particularly when considered in the light of the record as a

whole, will establish that Budenz' testimony is tainted with perjury and should be stricken in its entirety.

Petitioner has not heretofore sought production of a recording or transcription of Budenz' December 6-12, 1945 interviews with the FBI because it had been led to believe by testimony of Budenz that no such recording or transcription had been made. Moreover, the hearing panel precluded petitioner from adequately exploring the matter in cross-examination of Budenz. And finally, the attorneys for the Department of Justice and the Board have, prior to February 7, 1958, consistently represented to the Court, contrary to the true facts, that there were no verbatim reproductions of Budenz' statements to the FBI.

With regard to Budenz' testimony and the panel's blocking of full exploration as to records of his FBI interviews, we refer to the following excerpts from the cross-examination of Budenz (S.J.A. 2277, R. 14003-4, 14120-22):

"Q. [By Mr. Marcantonio.] Prior to November 22, 1946, how much time did you spend with the FBI? A. I can't say that exactly, but I should say there were visits in New York in 1946. I should say 100 hours or more. • • •

"Q. Can you give us approximately how many interviews and visits this constituted? A. There were a number of days on these first two visits that ran over several days, and then there were intermittent connections with the FBI. Then in the fall I had a number of visits from the FBI.

"Q. During these visits, all of these numerous visits that took place prior to November 22, 1946, which was the date of your first public appearance, did you give any written reports to the FBI? A. No sir.

[fol. 2816] "Mr. Paisley: I object. I think we have had enough latitude on this business now.

"Mr. Brown: I sustain the objection.

"By Mr. Marcantonio:

"Q. Were your talks to the FBI reduced to writing?

"Mr. Paisley: The same objection.

"Mr. Brown: Sustained.

• • • • • • •

"Q. * * * Prior to your appearance before the Un-American Activities Committee, did you tell the FBI about the Starobin letter? A. That I wouldn't recall.

"Q. You don't recall that. You spent 100 hours with the FBI, or more, you said, before you went there? A. Yes, but the FBI asked me a very great number of questions, and I answered their questions. * * *

"Q. Did you give it to them after your appearance before the Un-American Activities Committee? When I say 'them' I mean the FBI. A. I am satisfied I gave it to the FBI. I couldn't say definitely, but the FBI question me about everything I write and say, and also about many other things, and I answer their questions.

"Q. Were your answers reduced to writing? A. As a matter of fact, I do know now, since you mention it, that I did give this to the FBI.

"Q. In writing? A. No, not in writing.

"Q. Was it taken down by a stenographer? A. No, not by a stenographer. They never do that except in rare cases.

"Q. Was a report written up and then shown to you [fol. 2817] afterwards? A. No. That never happens.

"Q. So all you did was simply have an oral conversation about this incident? A. Yes, that is all."

Respondent in its brief to this Court following the remand represented that no verbatim record had been made of Budenz' interviews with the FBI. It stated:

"What petitioner refers to as 'reports' by Budenz were at most written summaries, prepared by an agent or agents of the FBI, relating matters *orally reported* to the FBI *long after the happening of the events reported*[13] (some six years afterward in the case of one of the 'reports'—that relating to his 1939 conversation

"[13] The record does not definitely establish even the existence of such FBI-prepared summaries. Their existence is at most an inference based on the usual practice of the FBI of making written records of matters of significance relating to it by informants." (Br., p. 18. Emphasis in original.)

with Weiner and Childs regarding the interruption of funds from abroad).

"The record is clear that he [Budenz] made no written reports to the FBI during the period of approximately six months when he first gave information, although he spent over a hundred hours in interviews. (S.J.A. 2275-2277.) With respect to the incident of the Starobin Jetter, Budenz testified that he had nothing more than an oral conversation about this incident with the FBI[50] (R. 14122) . . ."

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"[50] Not only does the specific statement upon which petitioner relies (J. A. 1184-1185) show that Budenz testified simply that he 'told' the FBI about this incident, but the record, at pp. 14121-14122, shows that no such thing as a written 'Budenz report' exists." (Br. p. 46.)

For like representations, see Respondent's Brief, p. 48, and respondent's memorandum of August 2, 1957 in opposition to petitioner's memorandum regarding the applicability of *Jencks* v. *United States*.

Accordingly, it was not until after February 7, 1958, the date when respondent filed its memorandum in response to petitioner's petition for rehearing, that petitioner learned that, contrary to Budenz' testimony and respondent's representations, there is a verbatim record of interviews of Budenz with the FBI. Furthermore, the information con- [fol. 2818] tradicting respondents' representations was at all times in the hands of the FBI. Yet, according to the affidavit of James T. Devine appended to respondent's memorandum, the FBI did not inform the attorneys for the Board or the Department of Justice of the true facts, and those attorneys did not attempt to verify the facts before making their representations to the Court.

Petitioner is likewise entitled to production of the FBI memoranda described in paragraph 2 above, because, as the Devine affidavit states, they "were devoted in large part to more detailed inquiries of Mr. Budenz concerning matters and subjects which he may have only mentioned, or touched on but briefly, in the first [recorded] interviews."

Under the peculiar circumstances stated above, and in light of the indications of perjury by witnesses for the Attorney General, including the three whose testimony had to be entirely stricken, the interests of justice require that petitioner be given access to all of Budenz' prior statements to the FBI, recorded or in memorandum form, concerning matters as to which he testified at the administrative hearing, and that petitioner be permitted to explore inconsistencies between such statements and Budenz' testimony by examining Budenz and the FBI agents to whom he talked.

Respectfully submitted,

John J. Abt, Joseph Forer, Attorneys for Petitioner.

Certificate of Service (omitted in printing).

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[fol. 2819] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,850

[Title omitted]

Before: Prettyman, Bazelon and Danaher, Circuit Judges, in Chambers.

ORDER DENYING PETITION FOR REHEARING OR MODIFICATION —April 11, 1958

Upon consideration of the petition for rehearing or modification of the judgment of this Court and of respondent's answer, it is

Ordered by the Court that the petition for rehearing or modification be, and it is hereby, denied.

Per Curiam.

Dated: April 11, 1958

Circuit Judge Bazelon dissents, as per the memorandum filed today.

[fol. 2820]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,850

[Title omitted]

Before: Prettyman, Bazelon and Danaher, Circuit Judges, in Chambers.

ORDER DENYING MOTION FOR LEAVE TO ADDUCE ADDITIONAL EVIDENCE, ETC.—April 11, 1958

Upon consideration of petitioner's motion for leave to adduce additional evidence and of petitioner's supplemental motion for leave to adduce additional evidence, and of respondent's answers, it is

Ordered by the Court that the aforesaid motions be, and they are hereby, denied, except insofar as they pertain to certain statements of Budenz as specifically set forth in the memorandum accompanying this order.

Per Curiam.

Dated: April 11, 1958

Circuit Judge Bazelon dissents, as per the memorandum filed today.

[fol. 2821] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,850

[Title omitted]

MEMORANDUM TO ACCOMPANY ORDERS ON PETITIONER'S MOTIONS TO ADDUCE ADDITIONAL EVIDENCE AND THE PETITION FOR REHEARING—April 11, 1958

Before: Prettyman, Bazelon and Danaher, Circuit Judges, in Chambers.

We have before us two motions of petitioner, the Communist Party of the United States of America. One is for leave to adduce additional evidence and the other is supplemental to the first one.

As far as the motions relate to statements alleged to have been made by the witness Gitlow, we adhere to the views expressed in our opinion promulgated January 9, 1958, and to the ruling there made. We think the denial of the claim for the production of that material was proper.

As far as the motions relate to statements given to the Federal Bureau of Investigation by the witness Budenz, the motions are granted. We adopt for present purposes the definition of "statements" contained in Public Law No. 85-269, 71 Statute 595 (September 2, 1957), not because the statute is binding in this proceeding but because it embodies succinctly the rule of law we think is [fol. 2822] applicable. The Board will therefore direct the Attorney General to produce all statements made by the witness Budenz to the Federal Bureau of Investigation concerning subjects as to which Budenz testified; specifically the Starobin letter and the conversation with Weiner. As to mere memoranda, including those recorded without his knowledge, made by third persons, including Federal Bureau of Investigation agents, not produced as witnesses,

concerning conversations with Budenz, we adhere to the views expressed in the opinion of January 9, 1958.

The Party contends that our opinion of January 9, 1958, is not clear in that in it we said, "On all other points (with the exception noted under Part VII) we affirm the Board", thereby implying, says the Party, that we affirmed the Board's findings of fact. The contention is obviously without merit. We remanded the case for the production of material demanded for cross-examination purposes, and this production clearly might result in a re-evaluation of some testimony and a re-examination of some findings. Under those circumstances we certainly did not intend to affirm at that same time the findings of fact theretofore made. We affirmed the Board on its conclusions of law except insofar as we noted disapproval of those conclusions. No clarification seems necessary.

Petitioner's petition for rehearing and modification of the opinion of the Court will be denied.

Per Curiam.

Dated: April 11, 1958

EB P JAD

Judge Bazelon adheres to his views heretofore expressed in this case.

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[fol. 2831] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,850

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COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,
Petitioner,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD, Respondent.

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Before: Prettyman, Bazelon and Danaher, Circuit Judges, in Chambers.

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PER CURIAM ORDER—June 16, 1958

The Board asks us to clarify our order of April 11, 1958.

The Party is entitled to the production of statements made to the F.B.I. by Budenz, in so far as it demanded such statements at the original hearing before the Board. It could not make a valid blanket demand for any and all statements made to the F.B.I. by Budenz concerning any (unspecified) subject about which he testified. Such a demand would be merely a fishing expedition to see what might turn up, a procedure condemned by the Supreme Court in *Jencks* v. *United States*, 353 U.S. 657 (1957). And, further, the Party could not in subsequent ancillary proceedings make new demands for further material for cross-examination. Proceedings such as these cannot be prolonged indefinitely by successive demands. The F.B.I. statements demanded by the Party at the hearing concerned the Starobin letter and the Weiner conversation. It subsequently developed that such statements existed. We intended to order them produced. We intended to deny the blanket demand for production of any and all other statements by Budenz on any and all topics concerning which he testified.

As to the Defense Department security hearing on Moss, we intended to hold that the Party is entitled to see Markward's testimony, given in that proceeding, concerning Moss. It is not entitled to more. It is not entitled to retry the Moss matter. We meant to direct the Board in accordance with the principles of the Jencks case, and no more than that.

Our order and memorandum of April 11, 1958, are to be deemed to be in accordance with this order.

Per Curiam.

Dated: June 16, 1958.

[fol. 2832] BAZELON, *Circuit Judge*, dissenting: I think our order and memorandum of April 11, 1958, recognized that the Party was entitled to all of Budenz' statements to the F.B.I. upon the subjects of his testimony in this proceeding. It is true that at the original hearing the Party

limited its request to the F.B.I. statements concerning the Starobin letter and the Weiner conversation. But the Party says that "[it] had been misled—by Budenz' testimony, by the hearing panel's blocking of cross-examination seeking to develop the facts, and by representations made by respondent in its brief and a memorandum to this Court—into believing, contrary to the fact, that there did not exist a verbatim record of interviews of Budenz with the FBI." [Petitioner's answer, filed May 29, 1958] This allegation is not denied. Indeed the record supports it. Under the circumstances the Party is now entitled to the Budenz statements, the existence of which has come to light since the original hearing.

I also think that petitioner is entitled to so much of the Moss Security Hearing Record as is necessary for the opportunity to show not only that Markward had given false testimony regarding Mrs. Moss but that the Defense Department believed it to be false.

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[fol. 2833] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,850

[Title omitted]

MOTION FOR LEAVE TO ADDUCE ADDITIONAL EVIDENCE
—Filed April 14, 1959

Pursuant to section 14(a) of the Internal Security Act of 1950, petitioner, by its attorneys, moves for leave to adduce the following additional evidence in the administrative proceeding before the respondent: All statements, as defined in 18 U.S.C. 3500, in the possession of the Attorney General which were made by witnesses who testified for the Attorney General at the administrative hearing and which relate to the subject matters of their testimony.

The grounds for this motion are as follows:

1. Petitioner moved the Board for the production of the foregoing statements upon the second remand of this proceeding, and its motion was denied (2d S.J.A. 2338-39, 2345-47).

2. Petitioner did not move for the production of these statements at the original administrative hearing. If it had done so, it clearly would have been entitled to their production. See the Court's second opinion in this case, 254 F. 2d 314, 328-329.

3. However, the Board's hearing panel, in a ruling thereafter affirmed by the Board, denied petitioner's motion for the production of statements made by the Attorney General's first witness, Gitlow, on the erroneous ground that petitioner was not entitled to the production of such statements, at least unless it first showed a contradiction between the testimony and the statements (S.J.A. 2255-58; J.A. 128; R. 2886).

[fol. 2834] 4. Petitioner submits that it was not required to continue to make fruitless motions for the production of statements once the hearing panel had established the principle of denying such motions. We recognize that a majority of the Court held otherwise in its order of June 16, 1958 in this proceeding. We renew the matter because the question at issue is now pending before the Supreme Court in a case which has been scheduled for argument during the week of April 20, 1959. *Rubin* v. *United States*, No. 437, October Term, 1958, cert. granted December 8, 1958.

5. Petitioner preserved the point in its petition for review and brief in this Court in the proceeding to review the initial order of the Board. See the second opinion of the Court, 254 F. 2d at 321-322. Petitioner again preserved the point by incorporating it in the questions presented and statement of points in its brief in this Court following the first remand. The point is now appropriately

raised by this motion. See the second opinion of the Court, 254 F. 2d at 323.

Respectfully submitted,

John J. Abt, Joseph Forer, Attorneys for Petitioner.

Received service April 14, 1959.
George R. Gallagher, Attorney for Respondent.

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[fol. 2835]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,850

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COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,
Petitioner,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD, Respondent.

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On Petition for Review of Order of the Subversive Activities Control Board and on Further Hearing Following Further Proceedings before the Subversive Activities Control Board pursuant to Remand by this Court on January 9, 1958

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*Mr. John J. Abt*, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, and *Mr. Joseph Forer* for petitioner.

*Mr. George R. Gallagher*, General Counsel of the Subversive Activities Control Board at the time of argument, with whom *Mr. Frank R. Hunter, Jr.* (now General Counsel) and *Mr. Leo M. Pellerzi*, Assistant General Counsel, Subversive Activities Control Board, and *Messrs. Kevin*

*T. Maroney* and *Philip R. Monahan*, Attorneys, Department of Justice, were on the brief, for respondent.

Before Prettyman, Chief Judge, and Bazelon and Danaher, Circuit Judges.

[fol. 2836] OPINION—Decided July 30, 1959

Prettyman, Chief Judge: A Modified Report of the Subversive Activities Control Board following a second remand of this case is now before us for review. We affirmed the original report,[1] but the Supreme Court remanded for reconsideration in the light of allegations that the testimony of three witnesses was perjured.[2] The Board struck the testimony of those witnesses, reexamined its findings and issued a Modified Report. We reviewed that Modified Report and remanded the case for the production of reports made by the witness Markward to the F.B.I. upon certain matters as to which she had testified, and for reexamination of certain findings as to which an exhibit of the Government had been erroneously cited and quoted. Thereafter it developed that the F.B.I. had made recordings of statements made to its agents by the witness Budenz, a fact not known to Government counsel at the time of the earlier proceedings, and in a supplemental order we directed that this matter be included in the remand and that statements made by Budenz to the F.B.I. on certain matters be produced to the Party. The Board followed the instructions upon the remand, reexamined its findings and conclusions, made changes, and issued its Modified Report upon Second Remand, now before us.

The Party iterates all points of law made by it upon the original consideration of the case by us and repeated by it upon our second consideration. Upon those points we adhere to the views heretofore expressed by us. The Party also asserts, as it has consistently asserted in both of the prior considerations, that many of the findings of the Board are not supported by a preponderance of the consideration in the light of allegations that the testimony of three witnesses was perjured.[2] The Board struck the

[1] Communist Party of U. S. v. Subversive Act. Con. Bd., 96 U.S. App. D.C. 66, 223 F.2d 531 (1954).

[2] 351 U.S. 115 (1956).

evidence; and it emphasizes that the present evidence in the record, reduced as it is by the striking of parts of the [fol. 2837] original evidence and by the conclusions of the Board now holding unacceptable certain other testimony, does not show a preponderance in support of the findings. We have examined the Modified Report in the light of these averments and think the findings are amply supported. The Party also makes specific points as applicable to the Report presently under review. We now examine those points.

## I

In our original opinion in this matter we struck,[3] as not supported by a preponderance of the evidence, a finding respecting the purposes of the secret practices of the Party. The Board has let the finding remain in its Modified Report on Second Remand. The Party says the court must therefore again remand to the Board, for an administrative redetermination in the light of the striking of this finding. We do not see why we should do so. We did not find it necessary to reverse the order of the Board, or to remand, when we first struck the finding. No new evidence on the point has been added since then, and so we adhere to our first conclusion, but the necessity for remand is now no greater than it was. And we think the Board is entitled to adhere to its view on the point until our view of it has been tested in the Supreme Court.

## II

Government's witness Gitlow was expelled from the Party in 1929. In about 1940 he delivered to the F.B.I. all documents in his possession respecting the Party. He dictated, over a period of time, memoranda explaining the documents. On the witness stand before the Board he identified and explained the documents. The Party moved for production of the 1940 memoranda. The motion was denied. [fol. 2838] In our opinion of January 9, 1958,[4] our second

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[3] *Supra* note 1, 96 U.S. App. D.C. at 109-110, 223 F.2d at 574-575.

[4] Communist Party of U. S. v. Subversive Act. Con. Bd., 102 U.S. App. D.C. 395, 254 F.2d 314 (1958).

opinion in the matter, being after the proceedings before the Board consequent to the remand by the Supreme Court, we held, in accordance with our reading of the opinion in *Consolidated Edison Co.* v. *National Labor Relations Board*,[5] that the point was not available to the Party, since it had not pursued its remedy when its motion to produce was denied by the Board at the original hearing. That remedy was a motion to adduce additional evidence under Section 14(a) of the Act.[6] After our decision the Party made such a motion in this court. We denied it. The Party now argues the case must be remanded for receipt of the Gitlow memoranda, since, it says, it has remedied the procedural defect we found in its original position. But we think a litigant cannot cure procedural defects *nunc pro tunc* after an appellate court has passed upon his contentions in the matter. Litigants frequently must make tactical decisions in the course of a trial. Also they frequently make mistakes. But, after the resultant judgment has been reviewed upon appeal, they cannot unilaterally cure their mistakes by offering to take some missing step. So to do would be to prolong indefinitely almost all litigation. Analogies are unreliable support for reasoning, but we suggest an illustration. If a litigant in an ordinary lawsuit fails to make a motion, such as to suppress, or for a mistrial, or for a directed verdict, and the appellate court holds he was not entitled to certain relief because he had not asked for it by timely motion, he cannot thereafter proffer the motion and thus correct the defect and acquire a right to retrial. Failure of a trial tribunal to grant a motion not made is not reversible error, and appellate courts rarely [fol. 2839] remand for the correction of such omissions by parties litigant. No circumstance requiring such an extraordinary step by us is present here.

## III

With its brief upon this appeal the Party filed a motion to adduce as additional evidence all statements filed by

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[5] 305 U.S. 197 (1938).

[6] 64 Stat. 1001 (1950), as amended, 50 U.S.C.A. § 793(a).

all witnesses who testified for the Attorney General before the Board. This is the third time this case has been here. The motion comes too late, and in any event it is not supported by any authority respecting the production of such documents. In the *Jencks* case[7] the Supreme Court quoted with approval from its opinion in *Gordon* v. *United States*,[8] disapproving fishing expeditions.

## IV

Upon the remand after our opinion of January 9, 1958, the Board struck the testimony of the witness Budenz in respect to the Starobin letter and the Weiner conversation. The Party says it should have struck all of Budenz's testimony, upon either or both of two grounds, (1) all his testimony was tainted with perjury and (2) Budenz being ill after his statements to the F.B.I. on the two matters mentioned had been produced, the Party was denied the right to cross-examine him in the light of those statements. We agree with the Board on the point. Without elaborating, it is enough to say we have examined Budenz's statements again and think his testimony is not shown to have been false or tainted with perjury. It seems to us that the various accounts given by him upon different occasions, under different questioning, of the Starobin and Weiner incidents bear a solid similarity in essentials and differ no more than truthful accounts under such conditions may well differ—[fol. 2840] indeed, if truthful, do often differ—in details, in expressions of speech, and in passing emphasis.

The disadvantage suffered by the Party, by reason of Budenz's illness and unavailability for cross-examination after the Starobin and Weiner documents (reports to the F.B.I.) had been produced, was cured by the Board's striking Budenz's testimony on those two matters. We see no necessity for striking more of his testimony on account of this shortening of his cross-examination. The Party says if it had been able to cross-examine in the light of the re-

[7] Jencks v. United States, 353 U.S. 657 (1957).

[8] 344 U.S. 414 (1953).

perjury as to destroy all his testimony. We think not. ports it might have been able to develop such a taint of Budenz had already been cross-examined extensively on these subjects. The possible conflicts between his testimony and his F.B.I. reports can readily be discerned, the reports having been produced. Those discrepancies are not such as to indicate perjury, much less the habit of perjury essential to be shown to taint all the witness's testimony. By securing a striking of the testimony on the two matters directly involved, the Party achieved all it could hope to achieve from these reports.

V

The Party says the Board should be required to strike all the testimony of the witness Markward, because her sworn statements concerning the Frankfeld incident and her testimony about her payments from the F.B.I. were false. The Board struck her testimony as to those two matters but declined to strike the rest of her evidence. We think the statements about the Frankfeld matter were not demonstrated to be false. She testified to her understanding of certain statements by one Thorez, by the Americans, Dennis and Foster, and by Frankfeld. In none of these statements were the words "not bear arms against the Soviet Union" used, but she gave that meaning to such expressions as "American Communists would oppose such [fol. 2841] 'an unjust, aggressive, imperialist war' and would work 'with all democratic forces' to bring that war to an end." To us the meaning she gave was a permissible inference from the face of the words.

The Party says Markward's testimony about the payments made to her by the F.B.I. was so false as to taint her entire testimony and to require that all of it be stricken. It was established from the beginning of this case that Markward was a paid informant for the Government. She characterized the payments she received as expense money, including within that term amounts expended by her for certain ordinary living expenses while she was working for the Government. She was vague in her recollection of exact amounts and dates, but she was specific in saying she received no salary and had no formal financial arrangements.

The F.B.I. records of its payments to her were produced to the Party. Upon the basis of those accounts the Board held that Markward's testimony on the matter was "not acceptable", and it took this fact into account in evaluating her entire testimony. The Board concluded that Markward's testimony on all matters "should be assayed with caution." The Board also pointed out that "findings based upon her testimony are minimal; and the effect of her entire testimony upon the Board's Modified Report is inconsequential." We will not disturb these conclusions of the Board. The credibility of witnesses must be left largely to the trier of the facts; this is the rule as to both trial courts and administrative agencies. And in this connection it should be remarked that the definition of "expenses" is a vague and uncertain prescription. An expense under some circumstances is not an expense under others. A businessman's dinner at home or in his home town is not an expense; when he is on a business trip, it is one; and so on *ad infinitum*, as the casebooks readily show.

Moreover, in respect to the striking of both the Budenz testimony and the Markward testimony, we know of no [fol. 2842] rule that the trier of facts is required to disregard all the testimony of a witness whom he finds to have testified falsely in one respect. He may do so, but he is not required to do so. Instructions to juries on the point are commonplace in the courtroom. Such instructions are always that the jury *may*—never that it *must*—disregard the testimony of a witness whom it believes to have testified falsely on a material matter as to which he could not be mistaken. A rule of law compelling the trier of facts to disregard all the evidence of such a witness would not only be a revolutionary doctrine in our jurisprudence but a wholly undesirable doctrine.

## VI

By concentrating on segments of the evidence and expanding their importance by discussion, to the exclusion of all the rest of the evidence, the Party seeks to have us believe there are no other significant features in the record. But the facts beyond dispute are that there is a Commu-

nist Party in Europe, based upon Marxism-Leninism, and in power in Soviet Russia; that our present petitioner was for years a member of the Communist International, and its separation from that organization was not accompanied by a repudiation, either of objectives or of methods; that it is by its own choice named the Communist Party of the United States of America, a self-imposed description not to be ignored without reason; that it once forsook the line laid down by the Communist Party abroad but, upon being severely brought to task by a leading European Communist in an open letter to Communists, reorganized itself, even to the extent of expelling its erring leader, and went back to the line; and that, save for that period of waywardness, it has never differed from the program and policy of the Communist Party abroad and has always adhered to that program and policy even in sharp changes. These major characteristics in the facts cannot be overlooked.

[fol. 2843] Guilt by association is a concept we will not even entertain for consideration, but this proceeding is not to determine guilt. It is to ascertain characteristics, and association is surely one of the best-known sources of information about characteristics. Many proverbs attest to its common acceptance—not as proof of the commission of any certain act but as evidence of character and probable characteristics. Of course such *prima fácie* indications can be readily and conclusively contradicted by facts. But an uncontradicted series of facts such as we have outlined as being in this record is admissible and acceptable evidence of characteristics, policy and program. One who attaches himself by intellectual affiliation to a cause, assumes the name of the cause, puts on the habiliments of the cause, and adheres to the course of the cause is not mistreated if it be inferred *prima facie* he is part of the cause. In the case at bar there is additional specific evidence. The preponderance of all the evidence supports the conclusion of the Board. Its order will be

*Affirmed.*

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Bazelon, Circuit Judge, concurring in part and dissenting in part: Notwithstanding my disagreement with the Court's two earlier opinions in this case and its orders

of April 11, 1956 and June 16, 1958, I treat them as controlling in considering the points discussed by the majority in the present opinion.

As to Point I, I would reverse and remand because of the Board's violation of our original opinion of December 23, 1954, 96 U.S.App.D.C. 66, 109-10, 223 F.2d 531, 574-75 (1954). A finding which we there ordered stricken is now still relied on by the Board.

[fol. 2844] As to Points II, III and V (as to Markward), I concur only in the result reached by the majority.

As to Point IV, I would reverse and remand. By fault of the Government, the Party was precluded from obtaining use of Budenz's statement for purposes of cross-examining him while he was still available. Without such cross-examination the Party is denied its right to show the extent, if any, to which the rest of Budenz's testimony is tainted. If, upon the remand I would order, Budenz were not available, his entire testimony would have to be stricken.

In light of my disposition of Points I and IV, I do not reach consideration of Point VI—namely, whether the Board's order is supported by a preponderance of the evidence.

[fol. 2845] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,850

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,
Petitioner,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD, Respondent.

On Petition for Review of Order of the Subversive Activities Control Board and on Further Hearing Following

Further Proceedings before the Subversive Activities Control Board pursuant to Remand by this Court on January 9, 1958.

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Before: Prettyman, Chief Judge, and Bazelon and Danaher, Circuit Judges.

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JUDGMENT—July 30, 1959

This case came on to be heard on the record from the Subversive Activities Control Board and on the Modified Report issued by the Board following the second remand of this case by this court on January 9, 1958, and was argued by counsel.

On Consideration Whereof, it is ordered and adjudged by this court that the order of the Subversive Activities Control Board on review herein is affirmed.

Per Chief Judge Prettyman.

Dated: July 30, 1959.

Separate opinion by Circuit Judge Bazelon concurring in part and dissenting in part.

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[fol. 2849]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,850

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COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,
Petitioner,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD, Respondent.

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Before: Prettyman, Chief Judge, Bazelon and Danaher, Circuit Judges, in Chambers.

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ORDER DENYING PETITION FOR REHEARING AND AMENDING OPINION—August 27, 1959

Upon consideration of the petition for rehearing, it is

Ordered by the court that the petition for rehearing is denied.

It is Further Ordered by the court that the words "the foreign leaders" appearing in the sixteenth line of the complete paragraph on page eight of the opinion of this court entered herein July 30, 1959 are stricken and that the words "a leading European Communist in an open letter to Communists" are substituted therefor.

Per Curiam

Dated: August 27, 1959

Circuit Judge Bazelon did not participate in the portion of the order amending the opinion of this court.

[fol. 2853] Clerk's Certificate to foregoing transcript (omitted in printing).

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[fol. 2854] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,850

[Title omitted]

MOTION TO REMAND PROCEEDING TO BOARD—
Filed January 11, 1957

The petitioner, by its attorneys, moves that the Court remand the proceeding to the Board with directions that the Board either (1) issue findings and recommendations in conformity with section 14(a) of the Subversive Activities Control Act of 1950, or (2) vacate the Board's registration order of April 20, 1953 and reopen the administrative proceeding.

In support of this motion, petitioner shows the following:

1. The registration order of the Board was affirmed by this Court (96 App. D. C. 66, 223 F. 2d 531). The Supreme Court reversed (351 U. S. 115), holding that this Court had erred in denying petitioner's motion under section 14(a) of the Act for leave to adduce additional evidence that three of the Attorney General's witnesses, Crouch, Johnson and Matusow, were perjurers. The case was remanded to the Board either to hold a hearing on petitioner's allegations with respect to the three witnesses or to assume the truth of the allegations and expunge the witnesses' testimony, and in either event to "reconsider its original determination in the light of the record as freed from the challenge that now beclouds it."

[fol. 2855] 2. While the case was pending on remand, the Board and this Court denied motions by petitioner for leave to introduce evidence of events which occurred after the registration order had been issued (and, for the most part, after the case had been submitted to the Supreme Court), such evidence having been offered to prove that petitioner was not a Communist-action organization at the time of the administrative hearing. The Board, in denying petitioner's motion, stated that "the proceeding is remanded pursuant to section 14(a) of the Act" (p. 17244 of Record now in this Court) and ruled: "As the nature of the Board's function under this Act affords no basis to act beyond the terms of the remanding opinion [of the Supreme Court], we are of the view that the reopening of the hearing to take the proffered additional evidence is beyond our authority in the premises" (Record, p. 17245).

3. The Board expunged the testimony of Crouch, Johnson and Matusow without a hearing on petitioner's allegations concerning these witnesses. It has now issued and filed with the Court a Modified Report, accompanied by a recommendation that the Court affirm the Board's original registration order of April 23, 1953. The recommendation recites that it is made pursuant to section 14(a) of the Act. Section 14(a) provides that after a remand for the taking of additional evidence, "The Board may modify its findings as to the facts *by reason of the additional evidence so taken*, and it shall file such modified or new findings . . . and its

recommendations, if any, with respect to action in the matter under consideration."

4. A comparison of the Modified Report demonstrates that the Board has not complied with section 14(a). It has not confined itself to modifying its findings or making new findings "by reason of the additional evidence" (con-[fol. 2856] sisting of the allegations of petitioner, assumed to be true, which resulted in the expunging of the testimony of Crouch, Johnson and Matusow). Nor has the Board confined itself to the terms of the Supreme Court mandate which directed it only to "reconsider its original determination in the light of the record freed from the challenge that now beclouds it." Instead, the Board has made a wholesale modification and revision of its findings for reasons not connected to or required by the expunging of the stated testimony. Though the Modified Report itself states (p. 5) that "the expunction left no substantial gaps in the evidence," the Modified Report is a new document which differs from the original Report in many vital respects. These differences include the following which are not connected to or required by the additional evidence or the expunging of the testimony of the three tainted witnesses:

A. The omission of findings and evidence on which the original Report relied. To list only a few examples: The Modified Report omits the Board's earlier finding that petitioner's policies are formulated and its activities conducted pursuant to Soviet directives. (Compare original Report, J. A. 79, with Modified Report, p. 149). The findings of the Modified Report as to "reporting" and "secret practices" are materially different from those originally made by the Board. (Compare original Report, J. A. 98, 117, with Modified Report, pp. 178, 180 ftn. 1, 193.) The Modified Report omits the subsection of the original Report (J. A. 77-8) entitled "Ideological Versus Political Aims," including the finding of the original Report (J. A. 77) that, "The record shows that [petitioner] has campaigned for and championed reforms such as shorter working hours, nonmilitarization of youth and Negro rights" (J. A. 77).

B. Reliance on evidence and findings which were not con-[fol. 2857] tained in the original Report. For example: The

Modified Report contains a finding on "the role of the vanguard Communist Party" (p. 40) and an entire section entitled "Effectiveness of World Communist Movement" (pp. 82-90), neither of which appeared in the original Report. The Modified Report's treatment of "secret practices" relies on numerous evidentiary items not relied on in the original Report (Cf. Modified Report, pp. 179-193, with original Report, J. A. 105-117). The Modified Report relies on certain events which occurred after issuance of the registration order and original Report, namely certain convictions under the Smith Act (Modified Report, p. 197, ftn.).

C. The Modified Report revises the Board's original analysis and constructs new theories of the case. The ultimate finding of the original Report was supported exclusively by evidence assembled and findings made under the eight criteria of section 13(e). In the Modified Report, on the contrary, the Board places primary reliance on evidence and findings which it does not claim are relevant to the 13(e) criteria, but which it advances as direct proof of the ultimate fact to be determined, i.e., whether petitioner is a Communist-action organization within the section 3(3) definition. The Board's new approach to the case is embodied in sections 1, 3 and 4 of the Modified Report. Its present theory of the case, expressed in the "Summary" at pages 203-4 of the Modified Report, is not that of the original Report. The reaching of this new theory was achieved by analyses of evidentiary material and by findings thereon that are vastly different from the original analyses and findings and also involves the use of evidentiary material not relied upon in the original Report. To cite but one example, the original Report treated the subject of "Marxism-Leninism" as proof that the "directives and policies" criterion of section 13(e)(1) was met. It found that "Marxism-Leninism . . . has been promulgated and issued by the Soviet Union as the overall philosophy, authoritative rules, di-
[fol. 2858] rectives and instructions governing the world Communist movement" (J. A. 78). It was primarily on the basis of this finding that the Board concluded that petitioner acted pursuant to Soviet directives within the meaning of section 13(e)(1) (J. A. 79). The Modified Report discards

both this finding and the thesis that Marxism-Leninism is a series of Soviet directives to petitioner. Instead, it treats Marxism-Leninism not as relevant to the "policies and directives" criterion of section 13(e)(1), but as a subject which, by a new analysis, is direct evidence that petitioner meets the section 3(3) definition.

5. We do not question the power of the Board to revise its Report and findings in any way it chooses, provided that it employs the appropriate procedure to do so and conforms to the requirements and consequences attendant upon the appropriate procedure. The only modifications of Board findings that are authorized by section 14(a) are such modifications as are required by additional evidence taken pursuant to that section. If the Board desires to modify its findings in other respects, as it has modified them in its Modified Report, then the appropriate procedure requires the Board first to vacate its original registration order. The Act does not authorize the Board to attempt to support an order entered in 1953 on the bases of analyses, findings, conclusions, and afterthoughts newly constructed in 1956.

6. Our objections to the Board's procedure involve important jurisdictional and substantive questions.

The Court acquired jurisdiction to review this proceeding by virtue of a petition for review filed by petitioner under section 14(a) of the Act on June 17, 1953. This petition, in accordance with the Court's rules, set forth the grounds on which petitioner sought relief. The Board has [fol. 2859] now extensively revised its findings, conclusions and theories, but petitioner has not filed, and in the absence of a new registration order cannot file, a new petition for review. The Board has created a new case, whereas the Court has jurisdiction only of the old case.

Furthermore, as noted above, the Board denied petitioner's motion to adduce additional evidence of subsequent events on the grounds that it had no power to go beyond section 14(a) and the Supreme Court's mandate. If the Board now desires to exercise jurisdiction beyond such confines in an effort to correct errors and inadequacies of its original Report, it is at liberty to do so. But, as we have shown, it is then first required to vacate its registration

order of April 23, 1953, and thereafter to enter a new order based on the new report, which can be judicially reviewed by a new petition for review. The vacation of the original order would require the Board to permit petitioner to introduce relevant evidence of events subsequent to the original administrative proceeding. For sections 13 (g) and (h) of the Act provide that an order of the Board shall be based on the character of the organization as of the date the order is made. We submit that the Board may not on the one hand treat the proceeding as a limited remand under section 14(a) for the purpose of preventing petitioner from adducing relevant subsequent evidence, while on the other going beyond 14(a) by issuing new findings and a new Report not based on or required by the remand.

Respectfully submitted,

John J. Abt, Joseph Forer

[fol. 2860] Certificate of Service (omitted in printing).

[fol. 2861]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,850

[Title omitted]

Before: Prettyman, Bazelon and Danaher, Circuit Judges, in Chambers.

ORDER DENYING MOTION TO REMAND PROCEEDING TO BOARD WITHOUT PREJUDICE TO RENEWAL—January 24, 1957

This case came on for consideration on petitioner's motion to remand, and said motion was argued by counsel.

Upon consideration whereof it is Ordered by the Court that the aforesaid petitioner's motion be, and it is hereby, denied without prejudice to renewal at the time of the argument on the merits.

Per Curiam.

Dated: January 24, 1957.

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[fol. 2862] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,850

[Title omitted]

RENEWED MOTION TO REMAND PROCEEDING TO BOARD—Filed April 18, 1957

The petitioner, by its attorneys, hereby renews its motion that the Court remand the proceeding to the Board with directions that the Board either (1) issue findings and recommendations in conformity with section 14(a) of the Subversive Activities Control Act of 1950, or (2) vacate the Board's registration order of April 20, 1953 and reopen the administrative proceeding.

Petitioner's original motion to remand was denied by order of the Court of January 24, 1957, "without prejudice to renewal at the time of the argument on the merits." This renewed motion is intended to bring the matter before the Court at the time of the argument on the merits, which is scheduled for May 27, 1957.

The grounds for this motion and the argument in support of it are set forth in petitioner's brief, heretofore filed with the Court, at pages 88-99.

John J. Abt, Joseph Forer, Attorneys for Petitioner.

Certificate of Service (omitted in printing).

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[fol. 2863] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,850

[Title omitted]

Before: Prettyman, Bazelon and Danaher, Circuit Judges, in Chambers.

ORDER DENYING PETITIONER'S RENEWED MOTION TO REMAND
—May 17, 1957

Upon consideration of petitioner's renewed motion to remand and of respondent's opposition, it is

Ordered by the Court that the aforesaid petitioner's motion be, and it is hereby, denied.

Per Curiam.

Dated: May 17, 1957.

Bazelon, Circuit Judge: I would defer consideration of this motion until the hearing.

[fol. 2864] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,850

[Title omitted]

MOTION FOR SUMMARY REMAND—Filed February 17, 1959

The petitioner, by its attorneys, moves that the Court summarily remand the case to the respondent with directions that the respondent (1) conform its finding on "secret practices" under section 13(e)(7) of the Internal Security Act to the finding and holding heretofore made by the Court on that subject, and (2) reconsider its conclusions, order and recommendation in the light of the conformed finding.

Section 13(e)(7) of the Act provides:

> "(e) In determining whether any organization is a 'Communist-action organization,' the Board shall take into consideration—
>
> • • • • • • •
>
> (7) the extent to which, for the purpose of concealing foreign direction, domination, or control, or of expediting or promoting its objectives, (i) it fails to disclose, or resists efforts to obtain information as to, its membership (by keeping membership lists in code, by instructing members to refuse to acknowledge membership, or by any other method); (ii) its members refuse to acknowledge membership therein; (iii) it fails to disclose, or resists efforts to obtain information as to, records other than membership lists; (iv) its meetings are secret; and (v) it otherwise operates on a secret basis;"

In its original Report the Board made the following finding on this criterion, adverse to petitioner:

"Upon the basis of the foregoing and on the whole record, we find that Respondent [i.e., the Communist Party] engages in extensive secret practices, within the meaning of the Act, for the purpose of promoting its objectives and thereby to advance those of the world Communist movement; and for concealing its direction, domination and control by the Soviet Union." (J. A. 117.)

[fol. 2865] The importance of this finding may be gathered in part from the fact that the original Report devotes 13 closely printed pages (J. A. 105-117) to the subject of "secret practices," or more than one-tenth of the entire findings of fact of the original Report (J. A. 4-128).

On review of the Board's findings and order, this Court differed with the Board's finding on "secret practices." The Court held (emphasis supplied):

"With respect to operations on a secret basis, referred to in Section 13(e)(7) of the Act, the Board made findings on a number of such practices . . . . There is no serious dispute as to the facts in respect to these operations. Indeed the Party's witnesses testified to many of them, and the amended answer impliedly admits them. The dispute centers about the purposes of the practices. The Party contended, and now contends, that it was forced into these practices in order to protect the constitutional rights of its members to speak and to assemble, and to safeguard them from social and economic persecution. The Government says that these practices were for the purpose of concealing an unlawful conspiracy. The Board concluded that the practices were undertaken for the purposes of concealing the true nature of the Party and of promoting its objectives.

"The question, whether the secret practices of the Party are for the purpose of protecting the liberties of the members or are for the purpose of promoting the objectives of the Party, is a nebulous one. The two purposes may well overlap. In so far as protection of its members from public identification as Com-

munists also promotes the objectives of the Party, both purposes could exist together. In a doubtful situation such as that on this point, *we strike the finding as to purpose.* At the same time we are of opinion that the Party's view of the limited purpose of secrecy is not shown by a preponderance of the evidence. On this point *we conclude simply that a defined purpose is not proven.*" (*Communist Party* v. *Subversive Activities Control Board*, 223 F. 2d 531, 574-5.)

It is apparent that under this holding of the Court the "secret practices" criterion of the Act can not be relied upon to support a registration order against petitioner.

Following remand of the case to the Board pursuant to the decision of the Supreme Court (*Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115), the Board expunged the testimony of the three challenged witnesses, Crouch, Johnson and Matusow, as well as documents received through them (Mod. Rep. 5), and issued a Modified Report. On this remand, of course, there was no additional evidence received on the merits, still less on the subject of "secret practices." The record on the merits, including evidence adverse to petitioner on "secret prac-[fol. 2866] tices," was substantially diminished by the expurgation of testimony.

The Modified Report, however, disregarded and contradicted the Court's finding on "secret practices," quoted above. Contrary to the Court's action in striking the finding as to purpose and in holding that "a defined purpose is not proven," the Modified Report found (p. 193, emphasis supplied):

> "Upon the basis of the foregoing and on the whole record, we find that respondent engages in extensive secret practices within the meaning of the Act, *for the primary purpose of promoting its objectives and thereby to advance those of the world Communist movement.*"

This passage obviously retains a "purpose" finding expressly stricken by this Court. Thereby the Board, con-

trary to this Court's holding, has relied on section 13(e)(7) of the Act to support issuance of a registration order against petitioner.

The case was again remanded to the Board for the limited purpose of requiring production of certain documents and striking a finding regarding an exhibit. *Communist Party* v. *Subversive Activities Control Board*, 254 F. 2d 314. In its opinion on that occasion, this Court stated (at 318): "Upon reexamination we adhere to, and now reaffirm, the views we expressed in our [previous] opinion in that case."

The Board has now filed its "Modified Report on Second Remand." This strikes a few passages from the first Modified Report, which otherwise is retained intact. The finding quoted above on "secret practices" is not disturbed.

It follows that the Board's ultimate conclusion and order rest in part on an unpermissible finding made in defiance of this Court's finding. Accordingly, the case should be returned to the Board for administrative redetermination on a correct basis, even if it were true that the order might be sustained without the incorrect finding. *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 [fol. 2867] U.S. 469; *S.E.C.* v. *Chenery Corp.*, 318 U.S. 80; *Colorado Wyoming Gas Co.* v. *F.P.C.*, 324 U.S. 626, 634; *Democrat Printing Co.* v. *F.C.C.*, 91 App. D.C. 72, 202 F. 2d 298; *Mississippi River Fuel Corp.* v. *F.P.C.*, 82 App. D.C. 208, 163 F. 2d 433; *Kutcher* v. *Gray*, 91 App. D.C. 266, 199 F. 2d 783.

In *Chenery* the Supreme Court stated: "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." (At 87.) "We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." (At 95.) In the *Mississippi River Fuel Corp.* case, *supra*, this Court (per Prettyman, J., stated:

> "It [the Supreme Court] has also held that the grounds upon which an administrative order must be judged are those upon which the record discloses that

> the action was based, and that where the decision of a Commission is explicitly based upon the applicability of certain principles, its validity must likewise be judged on that basis." (163 F. 2d at 449.)

In the *Democrat Printing Co.* case, *supra*, this Court (per Bazelon, J.) said: "Our review is limited to the reasons which the Commission relied upon for its action." (202 F. 2d at 303.)

Since there can be no dispute that the Board has relied upon a finding stricken by this Court, and since that fact requires remanding the case, no useful purpose would be served, and only unnecessary delay, effort and expense incurred, by having the case go to briefing and argument on the numerous other points involved.

Respectfully submitted,

John J. Abt, Joseph Forer, Attorneys for Petitioner.

[fol. 2868] Certificate of Service (omitted in printing).

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[fol. 2869] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,850

---

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,
Petitioner,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD, Respondent.

---

Before: Prettyman, Chief Judge, and Bazelon and Danaher, Circuit Judges, in Chambers.

ORDER DENYING PETITIONER'S MOTION FOR SUMMARY REMAND —March 3, 1959

Upon consideration of petitioner's motion for summary remand and of respondent's memorandum in objection, it is

Ordered by the court that the motion for summary remand is denied.

Per Curiam.

Dated: March 3, 1959

[fol. 2871] Clerk's Certificate to foregoing transcript (omitted in printing).

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[fol. 2872]

SUPREME COURT OF THE UNITED STATES

No. 537, October Term, 1959

---

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA, Petitioner,

vs.

SUBVERSIVE ACTIVITIES CONTROL BOARD

---

ORDER GRANTING MOTION FOR LEAVE TO USE AS PART OF THE RECORD THE PRINTED RECORD IN NO. 48, OCTOBER TERM, 1955—February 5, 1960

On Consideration of the motion for leave to use as part of the record the printed record heretofore filed with this Court in No. 48, October Term, 1955, in this case,

It Is Ordered by this Court that the said motion be, and the same is hereby, granted.

February 5, 1960

[fol. 2873]

SUPREME COURT OF THE UNITED STATES

No. 537, October Term, 1959

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COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,
Petitioner,

vs.

SUBVERSIVE ACTIVITIES CONTROL BOARD

---

ORDER ALLOWING CERTIORARI—February 5, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceeding below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED
NOV 23 1959
JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

October Term, 1959

No. 537 12

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,

*Petitioner,*

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, AND MOTION FOR LEAVE TO USE PREVIOUS RECORD

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IN THE

# Supreme Court of the United States

**October Term, 1959**

**No.**

---

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,
*Petitioner.*

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD.

---

## MOTION FOR LEAVE TO USE PREVIOUS RECORD

Petitioner moves for leave to use as part of the record on petition for certiorari, and on certiorari if granted, the printed record heretofore filed with the Court in No. 48, October Term, 1955, *Communist Party of the United States of America* v. *Subversive Activities Control Board.*

That case involved the same litigation to which the appended petition for certiorari is addressed. The certified record prepared below for the present petition supplements the previous printed record, commencing with proceedings subsequent to this Court's remand in its decision in No. 48, October Term, 1955, 315 U. S. 115.

Respectfully submitted,

JOHN J. ABT,
JOSEPH FORER,
*Attorneys for Petitioner.*

IN THE

# Supreme Court of the United States

**October Term, 1959**

**No.**

---

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,
*Petitioner,*

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD.

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Communist Party of the United States of America petitions that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia Circuit (R. 2845; Appendix B),[1] which affirmed (Judge Bazelon dissenting) an order of the Subversive Activities Control Board (R. 138) that the petitioner register as a Communist-action organization under section 7 of the Subversive Activities Control Act of 1950, 64 Stat. 993, 50 U. S. C. 786.[2]

---

[1] Pages 1-2170 of the record are in the printed record filed with the Court when this case was here before (No. 48, Oct. Term, 1955), Pages 2171-2853, containing proceedings after the Court's' remand, are in a certified supplemental record. The appendices to this petition are printed in a separate volume.

[2] The Subversive Activities Control Act, as amended, is Title 1 of the Internal Security Act of 1950, 64 Stat. 987, and is hereafter referred to as the Act.

## Opinions Below

The initial opinion and dissenting opinion below (R. 2078) are reported in 223 F. 2d 531.

The second opinion below (R. 2758), followed proceedings before the Board after a remand by this Court, and is reported in 254 F. 2d 314, Judge Bazelon again dissenting. This decision was modified by an unreported memorandum dated April 11, 1958 (R. 2821).

The third opinion below (R. 2835) followed additional proceedings before the Board in accordance with the second decision below, and is not yet reported. Judge Bazelon dissented in part.

All the opinions appear in Appendix A hereto.

## Jurisdiction

The judgment below is dated and was entered on July 30, 1959 (R. 2845). A timely petition for rehearing (R. 2846) was denied on August 27, 1959 (R. 2849). Jurisdiction of this Court is conferred by section 14(a) of the Act, 64 Stat. 1001, 50 U. S. C. 793, and 28 U. S. C. 1254.

## Questions Presented

1. Whether the provisions of the Subversive Activities Control Act of 1950, as amended, and as supplemented by section 5 of the Communist Control Act of 1954, relating to Communist-action organizations and their members, are unconstitutional on their face or as applied in this case.

2. Whether the order of the Board and the decision below rest on an erroneous construction of the Act's definitions of a Communist-action organization and the world Communist movement and on an erroneous construction and application of the Act's standards of proof.

3. Whether the order of the Board is unsupported by the preponderance of the evidence.

4. Whether all testimony of the Attorney General's witness Budenz should have been stricken because prior statements relating to his testimony, demanded by petitioner while he was on the stand, were not produced until he was no longer available for cross-examination.

5. Whether the Board and the court below erred in refusing to require production to petitioner of prior statements made by witnesses of the Attorney General on subjects concerning which they testified.

6. Whether the court below, having stricken one of the key findings on which the Board based its order, erred in refusing to remand the proceeding for administrative redetermination.

## Statutes Involved

The pertinent provisions of the Subversive Activities Control Act, as amended, the Immigration and Nationality Act, the Communist Control Act of 1954, and the Social Security Act, are set forth in Appendix C.

## Statement of the Case

This case is before the Court for the second time. See *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115.

On April 20, 1953, following an administrative hearing, the Board issued its order that petitioner register as a Communist-action organization and a Report containing its findings (R. 1-138). On review, the court below struck two key findings of the Board as not supported by the evidence. These were (1) that petitioner engaged in secret practices for the purpose of promoting its objectives and concealing foreign control and (2) that petitioner reported to the Soviet government. Nevertheless, the court proceeded to hold the Act constitutional and to affirm the findings and order of the Board in all other respects. Judge Bazelon dissented on the ground that the Act violates the

Fifth Amendment privilege against self incrimination. *Communist Party* v. *Subversive Activities Control Board,* 223 F. 2d 531 (R. 2078).

This Court reversed, without reaching the other questions presented, because of the denial below of petitioner's motion for leave to adduce evidence that three of the Attorney General's witnesse were perjurers. *Communist Party* v. *Subversive Activities Control Board,* 351 U. S. 115.

Upon the remand, the Attorney General did not controvert petitioner's allegations of perjury by the three witnesses, and the Board therefore expunged their testimony (R. 2174-75). On December 18, 1956, the Board issued a Modified Report (Mod. Rep.; R. 2403) and a recommendation (R. 2610) that the court below affirm the registration order.

On January 9, 1958, the court below ordered the case again remanded to the Board, and on April 11, 1958, it enlarged the scope of the remand. See *Communist Party* v. *Subversive Activities Control Board,* 254 F. 2d 314 (R. 2578), as modified by court's memorandum at R. 2821. This decision ruled that the principles of the "Jencks" statute (18 U. S. C. 3500) were applicable to administrative proceedings. Accordingly, it held that the Board had erred in refusing to require the production of certain documents involving the Attorney General's witness Markward and statements made by the witness Budenz to the FBI on two matters ("the Starobin letter" and "the Weiner conversation") concerning which he had testified. The court, however, refused to require the production of Budenz' FBI statements on other matters concerning which he had testified. It also refused production of a memorandum which the Attorney General's witness Gitlow had furnished the FBI concerning the subject of his testimony. Judge Bazelon dissented from the latter two rulings.

In the ensuing administrative proceeding, the Board furnished petitioner with excerpts from Budenz' FBI state-

ments which it considered relevant to the Starobin and Weiner matters. The recall of Budenz for cross-examination with the aid of these statements proved impossible because of his ill health. Petitioner's motion to strike all of his testimony because of his unavailability was denied, but the Board struck the testimony on the Starobin and Weiner matters (R. 2387-91). Petitioner also moved for production of statements made to the FBI by all the Attorney General's witnesses on matters relating to their testimony. The motion was denied (R. 2338, 2344-46).

On February 9, 1959, the Board issued its Modified Report on Second Remand (2d Mod. Rep.; R. 2375), in which it readopted the first Modified Report with certain amendments [3] and again recommended affirmance of the registration order (R. 2399). The Second Modified Report retained a finding of the First Modified Report regarding the purpose of petitioner's secret practices (R. 2398), notwithstanding that the finding had been stricken by the court below in its initial review.

The court below affirmed the order of the Board (R. 2835) although it adhered to the view that the finding on secret practices was unsupported by the evidence (R. 2837). Judge Bazelon dissented on the grounds (1) that the invalidity of the Board's finding on secret practices required a remand of the proceedings for administrative redetermination and (2) that all of Budenz' testimony should have been stricken (R. 2843).

**The Act**

The Act was passed on September 23, 1950, over the President's veto, shortly after the outbreak of the Korean war. It provides for administrative proceedings before the Board, on petitions of the Attorney General, to determine

[3] These are listed in an appendix to the Second Modified Report (R. 2400) and indicated in an appended text of the first Modified Report (R. 2379, 2403).

whether accused organizations shall be required to register as "Communist-action" or "Communist-front" organizations (sec. 13) or shall be declared "Communist-infiltrated" organizations (sec. 13A, added by sec. 7 of the Communist Control Act of 1954). The latter, although not required to register, are deprived of the benefits of the National Labor Relations Act (sec. 13A(g)).

A Communist-action organization is defined as one "which (i) is substantially directed, dominated or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title" (sec. 3(3)). Section 2 finds that there is a world Communist movement, controlled by the Communist dictatorship of an (unnamed) foreign country, which seeks, by treacherous and terroristic methods and through the medium of a world-wide Communist organization, to overthrow capitalist governments and establish in their place totalitarian dictatorships subservient to the foreign dictatorship. Section 2(15) recites that, "The Communist movement in the United States is an organization" which pursues the stated objectives and presents a clear and present danger to the security of the United States. Section 13(e) of the Act establishes eight criteria for the Board to consider in determining whether an organization is a Communist-action organization.[4]

[4] A Communist-front organization is defined, in substance, as one which is controlled by a Communist-action organization and is primarily operated to aid a Communist-action organization, a Communist foreign government, or the world Communist movement (sec. 3(4)). A Communist-infiltrated organization is defined, in substance, as one which is controlled by individuals who are, or have been within three years, engaged in giving support to a Communist-action organization, a Communist foreign government or the world Communist movement, and is serving, or within three years has served, as a means for giving support to any such organization, government, or movement, or for the impairment of the military or industrial strength of the United States (sec. 3(4A)).

A Communist-action organization is required to register as such with the Attorney General. The registration statement must show the names and addresses of the organization's officers and members, give a detailed accounting of all moneys received and expended, and list all printing and duplicating facilities. Annual reports must be filed to keep the registration up to date. The registration statement is open for public inspection. (Sec. 7.)

When a registration order becomes final, as it does on exhaustion of judicial review (sec. 14(b)), the officers of the organization have an individual duty to register the organization and to list its members (sec. 7(h)). Members not so listed are under a duty to register themselves after an administrative determination of their membership (secs. 8, 13(a)). Failure to comply with these duties is punishable by imprisonment up to five years and fine up to $10,000, for each day of default. Each falsity in a registration statement is punishable by a similar penalty. (Sec. 15.)

The listing or self-listing of members of petitioner in compliance with a registration order is affected by section 5 of the Communist Control Act, 68 Stat. 777, 50 U. S. C. 844, which enumerates thirteen criteria for determining "membership" in the Communist Party. These are extremely vague and depend on facts which cannot be ascertained by petitioner, its officers, or individuals seeking to determine if they are liable to registration as "members." (See *infra*, pp. 46-47.)

Any person whose name is listed on a registration statement as an officer or member of, or a contributor to, the organization is in jeopardy of prosecution under the broad sedition provisions of section 4(a) of the Act [5] as well as under the Smith Act.

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[5] Section 4(a) makes it criminal to conspire "to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship" under foreign control.

In addition, the entry of a final registration order automatically makes operative crippling sanctions against the organization and its members. These sanctions apply *whether or not* the organization registers.

The sanctions are the following:

(1) The organization must label publications and literature which it distributes by mail or in interstate or foreign commerce as being disseminated by a Communist organization, which, by definition, is a participant in a seditious conspiracy. Its radio and television broadcasts must be announced as sponsored by a Communist organization. These requirements appl, without regard to the nature and content of the publications and broadcasts. (Sec. 10.)

(2) Members of the organization may not hold nonelective federal employment, employment in any privately owned "defense facility," or office or employment in labor unions; nor may they represent employers in matters arising under the National Labor Relations Act (sec. 5). A "defense facility" is any establishment listed by the Secretary of Defense on his *ex parte* determination that the security of the United States requires such listing (secs. 3(7), 5(b)). Accordingly, what employment is open to members of the organization rests in the unreviewable discretion of the Secretary of Defense.

(3) Government employees and employees of "defense facilities" are prohibited from contributing funds or services to the organization (sec. 5(a)(2)), and even from subscribing to its publications (sec. 3(6)). Accordingly, the *ex parte* determination of the Secretary of Defense limits the sources from which the organization can obtain funds or services or find readers of its material.

(4) Members of the organization may not hold or apply for passports (sec. 6).

(5) Alien members of the organization are excluded from admission into the United States; if already in the country, they must be deported. An alien may not be naturalized if he was a member of the organization within ten years preceding the filing of his naturalization petition. Naturalized citizens who join or affiliate with the organization within five years after naturalization are subject to revocation of citizenship.[6]

(6) Contributions to the organization are not tax deductible, and the organization itself is denied tax exemptions (sec. 11).

(7) Service in the employ of the organization after the order becomes final is not considered employment for social security purposes (42 U. S. C. 410(a)(17)).

The prohibitions described in the first four paragraphs above are enforceable by criminal penalties of up to five years imprisonment and $10,000 fine (sec. 15).

The sanctions on members apply regardless of their personal innocence and lack of knowledge of alleged illegal or conspiratorial actions or purposes, and though their activities are confined to constitutionally protected areas.

**The Evidence**

Under section 14(a) of the Act, the Board's findings are required to be supported by "the preponderance of the evidence."

In the administrative proceeding the Attorney General called twenty-two witnesses (R. 134). As already stated,

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[6] Originally contained in secs. 22 and 25 of the Act, these sanctions have been carried forward by secs. 212(a)(28)(E), 241(a)(6)(E), 313(a)(2)(G), and 340(c) of the Immigration and Nationality Act, 66 Stat. 163, 8 U. S. C. 1182, 1251, 1424, 1451.

the testimony of three of these (Crouch, Matusow and Johnson) was stricken following the first remand of the Board. Two of the other witnesses merely translated or identified documents. Another, a university professor, testified that petitioner and the Soviet Union held similar views on a number of international questions. (R. 135-36.)

The remaining sixteen witnesses had once held membership in the Communist Party. Twelve had left or been expelled from the Party prior to the date of the Act, six of them for periods ranging from five to twenty years before the Act. (R. 134-35.) None of the twelve testified as to the character or activities of petitioner subsequent to the termination of his membership.

The testimony of the four witnesses who had remained members after the date of the Act was meagre and related almost exclusively to the period before that date. These witnesses had been rank and file members or minor officers of local units (R. 134-35). Two of them had become inactive prior to the date of the Act (R. 1034-35; Tr. 12360). The four produced little evidence on which the Board relied.

The original Report of the Board (R. 1) credited all testimony introduced by the Attorney General and made no adverse comment on the credibility of any of his witnesses. The Second Modified Report shows the following changes in this situation: (1) The testimony of Crouch, Johnson and Matusow was expunged (R. 2175); (2) The most important testimony of Budenz (on the Starobin letter and Weiner conversation) was stricken because of his unavailability for cross-examination (R. 2391). (3) The Board, finding that the credibility of four witnesses of the Attorney General was dubious, eliminated original findings based on the only material testimony of Scarletto, Markward and Cummings, and the most significant testimony of Honig (R. 2528, ftn., 2384, 2573 ftn., 2497 ftn.).

The Modified Report acknowledges that "the really vital part of [the Attorney General's] case is documentary evidence, which to a considerable extent needs relatively little oral illumination" (R. 2409, ftn. 2). The great bulk of this documentary evidence consisted of Communist writings which long antedated the Act (R. 2413). These included the *Communist Manifesto* of 1848, writings in the 1920's or earlier of Lenin and Stalin, and resolutions and reports of the Communist International (dissolved in 1943, R. 2474), of which the most recent is dated 1935.

The case of the petitioner was presented through three witnesses. Two (Elizabeth Gurley Flynn and John Gates) had for many years been members of the petitioner's national committee. The third, Dr. Herbert Aptheker, a historian, author, and member of the Communist Party, testified as an expert on Communist doctrine. (R. 136.) The testimony of these witnesses and the documentary evidence introduced through them portrayed petitioner's purposes, policies and activities from the time of its reconstitution as a political party in 1945. This evidence shows petitioner as a self-governing, independent American political party which is an adherent of Communism and seeks by peaceful means to persuade the American people that they should adopt a socialist system. (R. 2128-31, 1199-1241, 1257-97.) The Board either rejected or ignored all of petitioner's oral and documentary evidence, although much of it was uncontradicted.

It is undisputed that petitioner, soon after its formation in 1919, joined the Communist International, a world-wide organization of Communist Parties. In 1940, petitioner disaffiliated from the Communist International in order to avoid registration under the then newly-enacted Voorhis Act. In 1943, the Communist International dissolved. (R. 2137-42.) As the court below acknowledged (R. 2142), petitioner has had no foreign affiliation since 1940.

There is no evidence that at any time after the 1940 disaffiliation petitioner received any directives or orders from abroad, and the Board found none. In fact, the record discloses only a few insignificant and innocuous contacts and communications of any kind between petitioner and the Soviet Union or its citizens since 1940—as, for example, that in December 1950, the Communist Party of the Soviet Union sent a telegram of greetings to petitioner's national convention (see *infra*, pp. 50-51).

The Board's findings on the eight criteria of a Communist-action organization, specified in section 13(e) of the Act, were as follows:

*"Financial aid"* (sec. 13(e)(3); *"Instruction and Training"* (sec. 13(e)(4)). The Board's own findings show that these criteria are not satisfied by the evidence. The Modified Report found: "The record contains no evidence of substantial financial aid subsequent to 1940 and none after 1944" (R. 2568).[7] It also found: "There is no credited evidence showing training of [petitioner's] members in the Soviet Union subsequent to the outbreak of World War II" (R. 2573).[8]

*"Reporting"* (sec. 13(e)(5)); *"Discipline"* (sec. 13(e)(6)). The Board's ultimate findings on these criteria are contradicted by its own evidentiary findings.

The Board found that petitioner "upon occasion reports to the Soviet Union and its representatives" (R. 2583). But

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[7] The only evidence of post-1940 financial aid cited by the Modified Report rests on Budenz' testimony that the Daily Worker received dispatches from a Moscow news service up to 1944 at a nominal cost (R. 2564).

[8] The latest instance of foreign instruction and training cited by the Modified Report occurred in 1936 (R. 2570).

the last instance of reporting cited by the Modified Report occurred in 1935 (R. 2575).[9]

The Board found that petitioner's "principal leaders and a substantial number of its members are subject to and recognize the disciplinary power of the Soviet Union and its representatives" (R. 2519). But the Board cites no instance of discipline imposed at the behest of any foreign source after 1934. The claimed evidence of foreign discipline after 1934 consists of the following irrelevancies: (a) That petitioner, like other Communist Parties, believes that Party members should be held to strict adherence to Party decisions, and (b) instances in which petitioner, of its own accord and without any evidence of Soviet direction, disciplined some of its members. (R. 2510-19.)

*"Secret Practices"* (sec. 13(e)(7)). The subsection makes these practices relevant only if they are engaged in for the purpose of concealing foreign control or to promote the organization's objectives. The Modified Report found that petitioner "engages in extensive secret practices within the meaning of the Act, for the primary purpose of

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[9] The Modified Report also contains an undated reference to reporting through Soviet agents in the United States (R. 2577). In the cross-referenced subsection on "Foreign Representatives in the United States," the only person found to have been a foreign representative after 1940 was Eisler, who is found to have been acting as such in 1945 (R. 105). This finding, based on discredited testimony of Budenz (R. 1187-91), obviously cannot support a finding of reporting after 1945. Moreover, it does not support a finding of reporting up to 1945 because the evidence and findings fail to show what, if anything, Eisler did as a representative to petitioner. The Modified Report's section on "reporting" also refers to a congratulatory telegram sent by petitioner to Stalin on his 70th birthday. It is not clear whether the Board found this to be a "report." In any event, it is clear from the text of the telegram, as well as the testimony cited by the Board on its "significance," that it was not a "report" under any intelligible meaning of the term. (R. 2580-81.)

promoting its objectives and thereby to advance those of the world Communist movement" (R. 2598). The court below held that this finding was not supported by the evidence (R. 2837).[10]

*"Non-deviation"* (sec. 13(e)(2)). The Board found that petitioner's "views and policies do not deviate from those of the Soviet Union" (R. 2562). This finding was based primarily on testimony that petitioner and the Soviet Union, as shown by their respective public statements, held similar views on each of 44 different questions relating to international affairs, such as criticizing the League of Nations in 1919, favoring a second-front in World War II, characterizing the Chiang Kai Shek regime as a corrupt dictatorship, and advocating an armistice in the Korean War (R. 2555).

In reaching this finding, the Board held that it was irrelevant whether petitioner had formulated its view on a given subject before the Soviet Union (R. 2555-56). It precluded petitioner from introducing evidence that the similarities of its views and those of the Soviet Union were attributable to the independent application by each of the premises and approach supplied by Marxist principles (R. 842-44, 836), and then held that the weight of the evidence was to the contrary (R. 2562). It excluded proof of the truth, reasonableness and general acceptance of the views, and that the views were calculated to promote the best interests of the United States (R. 2566, 836-37, 839, 840, 844-45, 861, 862-64).

*"Directives and Policies"* (sec. 13(e)(1)). The Modified Report found: "* * * [petitioner] is still pursuing policies enunciated by the Soviet Union through the Communist International. [Petitioner's] policies, programs,

[10] The Board abandoned the finding of its original Report that an additional purpose of the "secret practices" was to conceal foreign control (cf. R. 117 with R. 2585 ftn. 1).

and activities regarding trade unions, youth, and national minorities have as their fundamental purpose to effectuate the policies of the Soviet Union and to further the world Communist movement" (R. 2554).

As these findings indicate, the record contains no evidence of any foreign directive to petitioner at least since petitioner's disaffiliation from the Communist International in 1940, and the Modified Report found none.[11] The findings are based on the following analysis: (a) Marxist theory emphasizes the importance of winning the support of trade unions, youth, and national minorities for achieving Socialism; (b) petitioner adheres to this theory and "likewise attaches extreme importance to work among" these groups. (R. 2536, 2536-54.)

"*Allegiance*" (sec. 13(e)(8)). The Modified Report found that petitioner's "leaders and a substantial portion of its membership consider the allegiance they owe to the United States as subordinate to their loyalty and obligations to the Soviet Union" (R. 2607). This finding is based primarily on the Board's view (R. 2599-2607) of Communist theory as developed in the works which were examined in *Schneiderman* v. *United States*, 320 U. S. 118, and from which this Court concluded that belief in Communist doctrine was not incompatible with attachment to the principles of the Constitution and being well disposed to the good order and happiness of the United States.

The evidence and reasoning on which the court below affirmed the Board's order were summarized by the court, as follows:

> "But the facts beyond dispute are that there is a Communist Party in Europe, based upon Marxism-

[11] The quoted findings supersede a finding under sec. 13(e)(1) in the Board's Original Report, that petitioner's "policies are formulated and carried out and its activities are performed pursuant to directives of, and to effectuate the policies of, the Soviet Union, which directs and controls the world Communist movement" (R. 79).

> Leninism, and in power in Soviet Russia; that our present petitioner was for years a member of the Communist International, and its separation from that organization was not accompanied by a repudiation, either of objectives or of methods; that it is by its own choice named the Communist Party of the United State of America, a self-imposed description not to be ignored without reason; that it once forsook the line laid down by the Communist Party abroad but, upon being severely brought to task by a leading European Communist in an open letter to Communists, reorganized itself, even to the extent of expelling its erring leader, and went back to the line;[12] and that, save for that period of waywardness, it has never differed from the program and policy of the Communist Party abroad and has always adhered to that program and policy even in sharp changes." (R. 2842.)

The summary of the Modified Report is to the same effect (R. 2608-09).

## REASONS FOR ALLOWING THE WRIT

In granting the former petition for certiorari in this case, the Court accepted for review all the questions then presented by petitioner (No. 718, Oct. Term, 1954). These included the questions now presented as 1, 2, 3 and 6. Questions 4 and 5 arise as a result of rulings made by the

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[12] The reference is to the following events. In 1944, petitioner dissolved and constituted itself as the Communist Political Association. In 1945, petitioner reconstituted itself as the Communist Party. The reconstitution followed the appearance in a French Communist journal of an article by Jacques Duclos, a leading French Communist, which criticized the dissolution of the Party and the policies of Browder, then chairman of the Association. The evidence is uncontradicted that the Duclos article was not written to bring petitioner "to task," but was directed to French Communists in answer to questions raised by many of them regarding developments in America, and that petitioner's reconstitution, though undoubtedly influenced by Duclos' analysis, was the product of its own independent decision (A. G. Ex. 208, p. 656; R. 1280, 1292-96).

court below after this Court's remand.[13] In remanding the case because of the denial below of petitioner's motion for leave to adduce additional evidence, the Court stated that "we must avoid any intimation with respect to the other issues raised by the petitioner." *Communist Party* v. *Subversive Activities Control Board, supra,* at 122-23.

It is clear, therefore, that this case presents issues which have not been, but should be, decided by the Court. However, in view of the time which has elapsed, the changes in the composition of the Court, and the presence of two new questions, we believe it appropriate to state in full the reasons for granting the writ.

## I. The decision below, if allowed to stand, will have immediate and far-reaching consequences of great public importance.

A. If the decision below is allowed to stand, the Communist Party will be outlawed and its members subjected to intolerable civil sanctions and criminal prosecutions.

1. Petitioner's members will be denied private and public employment, deprived of the right to travel abroad, subjected to loss of naturalized citizenship, and, if aliens, deported. These sanctions will be imposed whether or not petitioner registers and regardless of the member's personal innocence and lack of knowledge of any illicit activities by petitioner (see *supra,* pp. 10-11).

2. Petitioner's officers will be confronted with this alternative: If they register, they incriminate themselves by signing the registration statement, and they also become informers on the members, whom they must list. If they do not register, they will be prosecuted for failing to do so.

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[13] Questions 8, 9 and 10 of the earlier petition are not now presented. The other questions of the earlier petition are repeated or subsumed in the present questions.

3. If petitioner registers, each member and contributor will be publicly listed as belonging to or supporting a group which has been officially branded as a seditious foreign agent. The members and contributors will thus be subjected to public opprobrium and ensuing social and economic reprisals. They will also be identified as candidates for prosecution under the extravagantly vague provisions of section 4(a) of the Act, as well as under the Smith Act and other criminal laws.

4. If the officers do not register the organization, the individual members are faced with this alternative: If they register, they expose themselves to onerous penalties and public odium and invite criminal prosecution. If they do not register, they become liable to heavy criminal penalties.

5. Petitioner will suffer catastrophic consequences whether it registers or not. For the reasons already surveyed, its members and contributors will be under compulsion to withdraw their support. The sources from which it can lawfully obtain contributions and subscriptions to its publications will be dried up by ex parte determinations of the Secretary of Defense. It will be officially branded as a seditious foreign agent, and will have to label its publications and broadcasts accordingly (*supra*, p. 10). It will thus be denied an audience for its views. It will be quarantined, since any other organization which associates with it or supports its views will risk condemnation as a front or infiltrated organization under the Act's evidentiary standards (secs. 13(f) and 13A(e)). And individuals can have contracts or dealings with petitioner or its members only at the risk that under the sweeping criteria of section 5 of the Communist Control Act they will thereby become "members" of petitioner and incur the drastic consequences of that status.

The impact of the Act is such, therefore, that if petitioner registers, it will destroy itself and jeopardize the

livelihood and liberty of its members. If a member registers, he destroys himself. On the other hand, if there is no registration, petitioner, its officers and members will be subject to severe criminal penalties which cumulate for each day of non-registration. The choice, in short, is between suicide by registration or governmental execution for non-registration.

This will be the first time in our history that the Communist Party or any other political party has been outlawed by federal legislation. Yet Marxist groups and parties have been active in this country as lawful political organizations since the middle of the last century,[14] and the Communist Party has been a legal political party since its inception in 1919.

It is undeniable that the Communist Party has frequently played a seminal role in our social and economic life. Many reforms advanced by it have been adopted when the American people were convinced, with the aid of Communist agitation, that these were in their best interest. To name only a few: social security, minimum wage legislation, the organization of labor unions on industrial lines, and measures against racial discrimination.

No other Western democracy outlaws the Communist Party.[15] Only the United States asserts that such a measure

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[14] American Marxists helped in the formation of the Republican Party, backed Lincoln's candidacy in 1860, made significant contributions to the cause of the federal government in the Civil War, helped form the first national federation of American trade unions, and played a leading role in organizing the American Federation of Labor. See R. 1262-65, 1270-71; Gompers, Seventy Years of Life and Labor (N. Y. 1925), v. 1, pp. 51-60. Marx once observed, "Socialism and Communism did not originate in Germany, but in England, France and North America." Selected Essays (N. Y. 1926), p. 140.

[15] Legislation to outlaw the Communist party of Australia was held unconstitutional by the High Court. *Australian Communist Party* v. *The Commonwealth*, 83 C. L. R. I.

is necessary for its safety and compatible with a free society.

B. If the order of the Board becomes final, it will supply the foundation for governmental proscription of many other organizations and for the imposition of the Act's sanctions against their members.

The Board has already ordered twelve organizations to register as "Communist-fronts". All these cases are pending in the United States Court of Appeals for the District of Columbia Circuit and have been awaiting disposition of the present case. Another "front" case is pending before the Board. One case pending before the Board charges that an international labor union is an "infiltrated" organization. The alleged "front" organizations include two schools for social studies and groups promoting such causes as civil liberties, Soviet-American amity, the interests of the foreign born, economic security for the aged, and the defense of individuals charged under the Smith Act.[16]

The number of front and infiltrated organizations can be multiplied almost indefinitely in the light of the com-

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[16] The organizations ordered to register as "fronts" are Jefferson School of Social Science, California Labor School, Civil Rights Congress, National Council of American-Soviet Friendship, Veterans of the Abraham Lincoln Brigade, United May Day Committee, Washington Pension Union, Labor Youth League, American Peace Crusade, Colorado Committee to Protect Civil Liberties, Connecticut Volunteers for Civil Rights, California Emergency Defense Committee. The "front" case pending before the Board is against the American Committee for the Protection of the Foreign Born. The "infiltrated" case before the Board is against the International Union of Mine, Mill and Smelter Workers.

prehensive criteria of sections 13(f) and 13A(e).[17] Moreover, if the present categories of "front" and "infiltrated" organizations turn out to be too restricted, new ones can be created. Having moved from "action" and "front" organizations to "infiltrated" organizations, the Act could next be extended to groups which are "contaminated" and, finally, "politically unreliable".

If the Constitution can be held to authorize the premises which underlie the proscription of petitioner, there remains little room for constitutional objections to the application of the Act to these other organizations. Moreover, the techniques and interpretations of the Act used against petitioner by the Board and the court below, if allowed to stand, can be applied so as to destroy virtually any group whose views are not governmentally approved.

C. If the order of the Board becomes final, the civil and criminal penalties which the Act imposes on individuals for membership in petitioner will be extended far beyond those who are its members by any conventional or rational standards. The all-embracing criteria of membership contained in section 5 of the Communist Control Act will

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[17] An illustration of these criteria in operation is supplied by the following typical allegation made by the Attorney General in a petition to require an organization to register as a front: "The Committee supported the views, policies and objectives of the Communist Party by opposing the enactment of certain legislation regarded by the Party as inimical to its interests such as the Mundt-Nixon Bill, the Hobbs Bill, and the Internal Security Act of 1950." Paragraph III(4)(c) of Amended Petition in *Rogers* v. *American Committee for Protection of Foreign Born*, Docket No. 109-53, Subversive Activities Control Board. In another case, the gravamen of the Board's findings in support of a registration order was that the organization "came into existence at Denver, Colorado, in the fall of 1954, that it was created by the Communist Party to raise defense and bail funds for the Colorado seven and to mobilize public opinion for them and against the Smith Act and prosecutions thereunder." Report of the Board, p. 17, in *Rogers* v. *Colorado Committee to Protect Civil Liberties*, Board Docket No. 120-57.

jeopardize the liberty of countless non-Communists. The Court should not wait until the axe has fallen on some of these victims before determining whether it may be constitutionally wielded.

D. President Truman declared in his veto message (H.R. Doc. No. 708, 81st Cong., 2d Sess., pp. 6-7):

> "Obviously, if this law were on the statute books, the part of prudence would be to avoid saying anything that might be construed by someone as not deviating sufficiently from the current Communist-propaganda line. And since no one could be sure in advance what views were safe to express, the inevitable tendency would be to express no views on controversial subjects."

For this reason the President stated that the registration provisions of the legislation "represent a clear and present danger to our institutions" (*id.*, p. 5). On this and related grounds, passage of the Act was opposed by numerous trade unions, religious and community organizations, more than twenty major newspapers, and many prominent lawyers and laymen.[18]

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[18] Hearings before House Committee on Un-American Activities, H.R. 81st Cong., 2d Sess., on H.R. 3903 and 7595; Hearings before Senate Committee on the Judiciary, 80th Cong., 2d Sess., on H.R. 5852; Cong. Rec., 81st Cong., 2d Sess. pp. A6135, A6220-21, A6724-26, A7397, A7266, A7275-81. See R. 185. Organizations opposing the bills included: A.F. of L., C.I.O., Brotherhood of Railway Trainmen, National Farmers Union, Society of Friends, American, Unitarian Association, National Fraternal Council of Negro Churches, American Civil Liberties Union, Americans for Democratic Action, American Association of University Professors, National Association for Advancement of Colored People, Council for Social Action, Congregational Christian Churches, United Council of Church Women, American Jewish Congress, Women's International League for Peace and Freedom, National Council of Jewish Women, American Veterans Committee, National Community Relations Advisory Council.

This proceeding immediately involves the rights of Communists. But events of recent years have once more proved that repression cannot be contained. What began as a drive against Communists inexorably led to the victimization of thousands of non-Communists, who were prosecuted, dismissed from their jobs, blacklisted, ostracized, barred from public platforms, deported, denied the right to leave or enter the country, and otherwise persecuted. A climate of fear was created and American prestige was lowered throughout the world. The climate has somewhat improved, but it will become worse than ever if the repressive measures of the Act come into operation.

## II. This proceeding presents important constitutional questions which should be decided by the Court.

### A. The First Amendment

1. As we have seen, a final registration order and its concomitant sanctions will exact a prohibitive price for membership in, support of, or association with petitioner. The Act thus invades the area of the First Amendment, which guarantees "freedom to engage in association for the advancement of beliefs and ideas." *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449, 460.

Statutes affecting speech, press and assembly must be narrowly drawn to meet a substantive evil which the legislature has power to control. A statute penalizing conduct or advocacy which lies outside the area protected by the First Amendment is nevertheless invalid if it is so broad as to include protected expression or assembly. *De Jonge* v. *Oregon*, 299 U. S. 353; *Stromberg* v. *California*, 283 U. S. 359; *Cantwell* v. *Connecticut*, 310 U. S. 296, 308; *Winters* v. *New York*, 333 U. S. 507. Cf. *Australian Communist Party* v. *Commonwealth*, 83 C. L. R. 1, 187-88, 225-27.

The Act violates this principle. Although its justification, stated in section 2, is the alleged misconduct of Com-

munist-action organizations, its controls are not limited to misconduct. Instead, the Act and the order suppress all of petitioner's activities, including its admittedly extensive peaceable advocacy and assembly. As the President said in a special message to Congress, the Act "proscribe[s] for certain groups such as the Communists, certain activities that are perfectly proper for everyone else" (H. R. Doc. No. 679, 81st Cong., 2d Sess., p. 6). Indeed, it is precisely peaceable advocacy and innocent association which the Act is designed to reach, since there is a plethora of other laws which punish seditious advocacy and provide for the registration of foreign agents.

In *American Communications Association* v. *Douds*, 339 U. S. 382, the Court sustained a statute only because it "did not restrain the activities of the Communist Party as a political organization" (at 404) or proscribe or severely burden Party membership. The Act does the very things condemned by *Douds*.

Like the Act as a whole, the individual sanctions apply indiscriminately to innocent and harmful conduct. For example, the restrictions on employment of members go far beyond any reasonable protection of the government service and defense establishments. They are not limited to sensitive positions, and they apply notwithstanding the member's personal innocence, absence of criminal propensities, and lack of guilty scienter. Cf. *Cole* v. *Young*, 351 U. S. 536. Similarly, the passport bar takes no account of personal innocence; instead of merely preventing foreign travel in pursuit of illegal enterprises, it applies regardless of the purpose of the travel. Cf. *Kent* v. *Dulles*, 357 U. S. 116.

In short, the function of the sanctions, even when considered individually and apart from their setting in the Act as a whole, is not to protect the national security. Such protection, if needed, could have been provided by narrowly-drawn legislation addressed to that purpose. The Act's

sanctions serve a different purpose, to make registration impossible, destroy petitioner, and deny its members their livelihood and liberties merely because of their membership.

2. The Act imposes prior restraints on protected speech, press and assembly. The Act and the order require petitioner to register as a criminal conspiracy as a condition to its lawful existence. They require the public listing of petitioner's members as participants in the conspiracy as a condition of their membership. They require petitioner to list its printing and duplicating facilities and proscribe subscriptions to its publications. Petitioner must also identify its publications and broadcasts with an invidious label whether or not it registers and regardless of the content of the expression. Petitioner's exercise of the rights of speech and press is licensed not because its words are seditious or create a clear and present danger, but solely because they emanate from petitioner. The members' exercise of their First Amendment rights is licensed solely because of their association with petitioner.

The decision below therefore conflicts with this Court's condemnation of prior restraints on First Amendment rights. *Thomas* v. *Collins*, 323 U. S. 516, 540, invalidated "the device of requiring previous registration as a condition for exercising" the rights of free speech and assembly. *Kingsley Corp.* v. *Regents*, 360 U. S. 684, set aside censorship not justified by content.

The registration and labelling requirements of the Act are not comparable to simple disclosure statutes like those requiring registration of lobbyists and foreign agents. Those statutes are non-discriminatory and non-invidious, whereas the Act's registration and labelling requirements are armband measures condemned in *American Communications Association* v. *Douds, supra*, at 402, and *N. A. A. C. P.* v. *Alabama, supra* at 462. Moreover, in construing those statutes, this Court has for constitutional reasons confined the controls to strictly limited areas. *United*

*States* v. *Harriss*, 347 U. S. 612; *Viereck* v. *United States*, 318 U. S. 236. The Act is not, and cannot be, so confined.

3. The Act imposes sanctions upon an organization and its members for lawful and peaceable political advocacy and views.

The standards of section 13(e) focus on views and policies and their expression. Thus the first standard refers to the source and the purpose of policies, the second to "nondeviation" of views and policies, the fourth to teaching, and the fifth to reporting. The views and policies need not be seditious or even false. Nor does the section require proof that the organization advocates violent or unconstitutional means for the effectuation of its policies.

Congress cannot control even the advocacy of violence unless it amounts to incitement in a clear and present danger situation. *Dennis* v. *United States*, 341 U. S. 494; *Yates* v. *United States*, 354 U. S. 298. Much less, therefore, can it punish an organization or its members upon evidence that the former advocates peaceable action as to which no clear and present danger can arise.

Passing to the Act as applied, it is clear from the Board's Modified Report and from the summary of the evidence in the last opinion below (*supra*, pp. 17-18), that the order rests on findings that petitioner and the Soviet Union are adherents of Communism and that petitioner has always agreed with the Soviet views. There was no finding that petitioner engages in or incites to violent or other unlawful action. In holding that the evidence established that petitioner is a Communist-action organization, the court below stated:

> "One who attaches himself by intellectual affiliation to a cause, assumes the name of the cause, puts on the habiliments of the cause, and adheres to the course of the cause is not mistreated if it be inferred *prima facie* he is part of the cause" (R. 2843).

This case, therefore, presents the question whether the First Amendment permits outlawing an organization and

penalizing its members because of "intellectual affiliation" to Communism and agreement with Soviet views.

If the decision below is allowed to stand, there remain no effective limitations on Congress' control over political expression. If Congress can punish "non-deviation" from Soviet views, it can penalize "non-deviation" from other views. In fact, the Communist-front provisions of the Act already punish "non-deviation" from petitioner's views (sec. 13(f)).

### B. The Privilege Against Self-Incrimination

If the order of the Board becomes final, the officers of petitioner will have the duty of registering it under the Act (sec. 7(h)).[19] In the event there is no registration by petitioner or its officers, or if the registration statement omits the names of any members, the members must register themselves (sec. 8). Failure to register as required is punishable by severe criminal penalties (sec. 15).

The legislative scheme therefore culminates in coercing confessions of membership in the Communist Party and participation in the criminal conspiracy described in section 2 and punished by section 4(a). This is a crass violation of the privilege against self-incrimination. *Blau* v. *United States*, 340 U. S. 159.

Congress attempted to save the Act by including a so-called immunity provision (sec. 4(f)).[20] This provision,

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[19] Regulations of the Attorney General issued under the Act require the registration statement to be signed by the registrant's principal officers and all the members of its governing board. 28 C. F. R. 11.205.

[20] Sec. 4(f) provides: "Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. The fact of the registration of any person under sections 7 or 8 of this title as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute."

however, does not exclude prosecution of an officer or member for offenses in which office-holding or membership is an ingredient of or clue to the offense and is proved by evidence other than the fact of registration. Hence the provision does not afford the accused "complete immunity from prosecution for any act concerning which he testifies," and is "not a sufficient substitute for the constitutional privilege of refusing to answer self-incriminating questions." *United States* v. *Bryan*, 339 U. S. 323, 336; *Counselman* v. *Hitchcock*, 142 U. S. 547.

The majority below reasoned that the privilege is not available because *United States* v. *White*, 322 U. S. 694, holds that the privilege does not protect an officer against production of incriminating records of his organization (R. 2093-94). This reasoning is unsound in three respects.

First, as Judge Bazelon pointed out (R. 2155), incrimination here arises not out of the contents of the records but from the fact that by signing the registration statement the signatories identify themselves as officers of the Communist Party and persons familiar with its affairs. These are the identical admissions which *Blau* v. *United States, supra*, held could not be compelled.

Second, the Act does not require production of the records, but the furnishing of information which may or may not be obtainable from the records. As held in *Curcio* v. *United States*, 354 U. S. 118,[21] *White* applies only to the production of the records themselves, and the privilege protects an officer from revealing their whereabouts, let alone from giving information as to their contents.

Third, the information which section 7(d) requires must be furnished by the officers even though it nowhere appears in the records of the organization.

The majority below also held that adjudication of the constitutional question is premature because petitioner's

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[21] Decided after the initial decision below sustaining the constitutionality of the Act.

officers (1) may never assert the privilege, (2) may have done something to waive the privilege, or (3) may be granted immunity under 18 U. S. C. 3486 (R. 2096-2100).

(1) The familiar principle that the privilege is lost if not asserted is applicable where the person from whom incriminating information is demanded has an opportunity to claim the privilege before he is prosecuted for refusing to answer. If there is no opportunity to assert the privilege, it cannot be lost for non-assertion. The Act affords petitioner's officers no such opportunity. If they were to submit a claim of privilege to the Attorney General as a reason for non-compliance with the registration requirement, they would thereby identify themselves as officers of petitioner and make the same incriminating admission that registration entails. On the other hand, if they do not claim it, they will be indicted for failure to file the registration statement. It follows that this proceeding provides the only opportunity to secure to the officers the benefit of the privilege. Hence, the issue is not premature.

The effect of the holding below is that legislation which compels incriminating testimony can never be declared unconstitutional but merely unenforceable in individual cases against persons who assert the privilege. This is not the law. *Boyd* v. *United States*, 116 U. S. 616. That case involved a statute which, like the Act, afforded the accused no meaningful opportunity to assert the privilege. Accordingly, the Court (at 638) held the statute "unconstitutional and void" without reference to the doctrine that the privilege must be asserted to be availed of.[22]

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[22] Similarly, state courts have invalidated state statutes compelling self-incrimination on their face. *In re DeWar*, 148 Atl. 489 (Vt.); *People* v. *Reardon*, 90 N. E. 829 (N. Y.); *State* v. *Simmons Hardware Co.*, 18 S. W. 1125 (Mo.); *People* v. *McCormick*, 228 P. 2d 349 (Calif.); *Maryland* v. *Perdew*, 19 U. S. L. Week 2357 (Md. C. C., Alleghany Cty.). The last two cases involved statutes requiring Communist Party members to register.

(2) The court below also held petitioner's constitutional attack premature because the privilege, if and when asserted by some of petitioner's present officers, might be found to have been waived by them (R. 2099). This is contrary to the rule that the privilege is not waived by admissions made extra-judicially, or in another proceeding, or even at a different stage of the same proceeding. *Re Neff*, 206 F. 2d 149; *United States* v. *Field*, 193 F. 2d 109; 8 Wigmore on Evidence (3rd ed.) sec. 2276(4). Moreover, there is no warrant for the court's assumption that the persons in question will be petitioner's officers at the time registration is required.

Furthermore, the issue of waiver cannot arise until a claim of privilege is made. Since the Act accords the officers no effective opportunity to make the claim, a refusal to adjudicate the issue in this proceeding because of the speculative possibility of waiver deprives petitioner's officers of the only chance they have to vindicate their privilege. As in the *Boyd* case, therefore, the privilege can be protected only by declaring the statute void on its face.

(3) The suggestion below that 18 U.S. C. 3486 might be invoked by the Attorney General to give immunity to petitioner's officers (R. 2099-2100) overlooks the fact that this statute is applicable only to testimony or the production of documents before Congressional committees, federal grand juries and federal courts, and has nothing to do with the filing of registration statements under the Act.

Obviously, the Act on its face and as applied to petitioner presents novel and important questions relating to the constitutional privilege against self-incrimination which have probably been erroneously decided below.

### C. Denial of Due Process to Petitioner's Members

As we have seen, a final registration order against petitioner will bar its members from public and private employment, deprive them of other important privileges, including the right to obtain passports, and defame them by public listing. The members suffer these onerous sanctions regardless of their personal innocence and lack of knowledge of the alleged character of petitioner. Furthermore, they are afforded no opportunity to demonstrate at a hearing that they are fit persons to enjoy the privileges denied them. Instead, the bare fact of membership establishes a conclusive presumption of unfitness. In these respects, the Act violates due process. *Wieman* v. *Updegraff*, 344 U. S. 183; *Adler* v. *Board of Education*, 342 U. S. 485.[23] *Wieman* held that an individual may not be excluded even from public employment because of organizational membership, in the absence of his personal knowledge of the organization's alleged evil objectives. *Adler* held that membership with such knowledge can give rise only to a *prima facie* presumption of unfitness for public employment which the member must be given an opportunity to rebut. An individual's interest in private employment is obviously entitled to at least as much protection. Cf. *Greene* v. *McElroy*, 360 U. S. 474.

The court below disregarded *Adler*. It held that the *scienter* requirement of *Wieman* was satisfied on the grounds that (a) a member has knowledge of his membership; and (b), "The statute before us requires that before these sanctions apply a member must have 'knowledge or notice' that the organization has registered or been finally ordered to register" (R. 2103). These grounds are both irrelevant and untrue.

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[23] It is clear that petitioner has standing to challenge the Act for imposing sanctions on petitioner's members. *N.A.A.C.P.* v. *Alabama*, *supra*, at 459; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123.

As *Wieman* makes abundantly clear, the *scienter* required by due process is knowledge that the organization has evil purposes. The requirement is not satisfied by knowledge of membership or knowledge or notice that the organization has been governmentally condemned.

Furthermore, in view of the vague criteria of membership established by section 5 of the Communist Control Act, it is not correct that "members" have knowledge of their "membership" (see *infra*, pp. 46-47). And it is a misreading of the statute to assume that knowledge or notice of a registration order[24] is a prerequisite to the imposition of the sanctions. Under the Act, such knowledge or notice is necessary to support criminal prosecutions for applying for a forbidden job or a passport or for a member's failure to register himself if the organization failed to list him (secs. 5(a), 6(a), 8(b), 15(a)(2)). But even this limited "scienter" is not necessary to the imposition of the civil sanctions and disabilities of the Act. For employers must deny a member employment, the government must withhold a passport from him, and, if he is an alien, the government must deport him and may not naturalize him, all without reference to any kind of knowledge or notice on his part. (See secs. 6(b) and 5(a)(2) of the Act, and sections 241(a)(6)(E) and 313(a)(2) of the Immigration and Nationality Act.)

Clearly the decision below that the Act does not deny due process to petitioner's members conflicts with applicable decisions of this Court and with fundamental principles of due process.

### D. Predetermination of Guilt

Since the order of the Board deprives petitioner and its members of liberty and property, it may not be entered without a hearing. *Joint Anti-Fascist Refugee Committee*

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[24] Under section 14(k), notice of a registration order is given to members by publication in the Federal Register of the fact that the order has become final.

v. *McGrath*, 341 U. S. 123; *Morgan* v. *United States*, 304 U. S. 1. If any of the elements requisite to a finding that petitioner is a "Communist-action" organization have been determined by legislative fiat rather than by a free adjudication of the facts, the due process requirement of a hearing has been violated. *Manley* v. *Georgia*, 279 U. S. 1; *Western and Atlantic Railroad* v. *Henderson*, 279 U. S. 639; *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79; *Tot* v. *United States*, 319 U. S. 463.

The Act denies due process because facts essential to guilt are found legislatively and are not subject to administrative adjudication by the Board.

1. Section 3(3) of the Act defines a Communist-action organization in terms of its relationship to "the world Communist movement referred to in section 2." If there is no such movement, there can obviously be no Communist-action organization. Yet the existence and nature of the world Communist movement are not issues left to adjudication by the Board. Instead, these "facts" are found by Congress in section 2. The findings are then incorporated into sections 3(3) and 13(e) as assumptions of fact which the Board is not authorized to reexamine, but is required to accept as the foundation of its decision.

The court below agreed that the section 2 findings on the existence and nature of the world Communist movement are binding upon the Board and the courts and are not subjects for adjudication (R. 2132-33). The court nevertheless held that this did not constitute a denial of due process.

2. In addition, section 2 finds that "the Communist organization in the United States" engages in practices which satisfy the definition of a Communist-action organization (secs. 2(15) and 2(12)). It also finds that this organization has characteristics which satisfy at least four of the eight criteria which the Board is supposed to apply under section 13(e). (Cf. 2(5) with 13(e)(6); 2(6) with 13(e)(1); 2(7) with 13(e)(7); 2(9) with 13(e)(8).)

These findings, unlike those regarding the world Communist movement, are not expressly incorporated into the section 3(3) definition of a Communist-action organization and the evidentiary standards of section 13(e), and hence are ostensibly open for administrative determination. But obviously the Board is not free to overrule legislative findings on the identical issues it is supposed to determine.

Accordingly, the Act left nothing for the Board but to supply the name of the organization which Congress had in mind as "the Communist organization in the United States." This detail was furnished by the House and Senate reports accompanying the legislation,[25] as well as by the rest of the legislative history. Then, while this case was pending in the court below on the first review, Congress enacted the Communist Control Act, section 4 of which expressly identifies petitioner by name as a Communist-action organization. Thus the Board could not decide in petitioner's favor without overruling Congress.

The Act's built-in verdict against petitioner presents a major due process question, which should be reviewed.

### E. The Act as a Bill of Attainder

"A bill of attainder is a legislative Act which inflicts punishment without judicial trial." *Cummings* v. *Missouri*, 71 U. S. 277, 323. As stated in *United States* v. *Lovett*, 328 U. S. 303, 315, and repeated in *Garner* v. *Board of Public Works*, 341 U. S. 716, 722:

> "* * * legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution."

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[25] The reports stated: "There is incontrovertible evidence of the fact that the Communist Party of the United States is dominated by such totalitarian dictatorship and that it is one of the principal instrumentalities used by the world Communist movement in its ruthless and timeless endeavor to advance the world march of Communism." H. Rep. 2980, 81st Cong., 2d Sess., on H. R. 9490, pp. 1-2; S. Rep. 1358, 81st Cong., 1st Sess., on S. 2311, p. 5.

The Act, as we have seen, determines petitioner's guilt by legislative fiat and identifies petitioner and its members as the objects of statutory sanctions. But even if it is assumed, arguendo, that the Board was free to make an independent determination, the Act denies petitioner a judicial trial and imposes sanctions on "easily ascertainable members of a group." For petitioner is accorded only an administrative hearing, not a judicial trial, and the Act imposes various sanctions on the organization identified by the registration order and on its members. Accordingly, if the registration order and the sanctions "inflict punishment," the Act meets the definition of a bill of attainder and is invalid. Cf. *Lipke* v. *Lederer*, 259 U. S. 557.

The disabilities which the Act imposes on petitioner and its members are civil in form. Since *Cummings*, however, it has been clear that the deprivation of privileges constitutes punishment if the grounds for the deprivation have no reasonable relation to the individual's fitness to enjoy the privileges. *Garner* v. *Board of Public Works*, *supra*; *Dent* v. *West Virginia*, 129 U. S. 114; *United States* v. *Lovett*, *supra*. As stated in *Trop* v. *Dulles*, 356 U. S. 86, 95-96:

> "Each time a statute has been challenged as being in conflict with the constitutional prohibitions against bills of attainder and ex post facto laws, it has been necessary to determine whether a penal law was involved, because these provisions apply only to statutes imposing penalties. In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose. The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a non-penal effect. The controlling nature of such statutes normally depends on the evident purpose of the legislature."

The "evident purpose" and effect of the Act are the imposition of punishment, not the accomplishment of some "legitimate governmental purpose."

(1) The Act makes compliance with a registration order impossible, since registration requires self-defamation, self-incrimination of the registrants, and identification of the persons registered as objects of onerous sanctions and possible prosecution. Hence, though posing as a regulatory disclosure statute, the Act insures that there will be no disclosure. Its true purpose and effect is not to secure registration, but to lay a foundation for mass prosecutions of petitioner's members and officers for not registering.

(2) The legislative history of the Act demonstrates that its purpose was not to regulate conduct of petitioner and its members, but to outlaw petitioner and permit prosecutions of all its members.[26]

In testifying on the parent Mundt-Nixon bill, Attorney General Clark advised the legislative subcommittee of the House Un-American Activities Committee that the Department of Justice had been unable to find evidence on which to prosecute petitioner or its members under the Smith Act or for not registering under the Voorhis Act and the Foreign Agents Registration Act.[27] It was this inability to prosecute petitioner and its members under existing legislation which the Act's sponsors cited as the justification for the Act. The Senate Report stated:

> "Congress has passed several laws which were directed specifically at curbing the subversive activ-

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[26] Legislative history is relevant, and may be crucial, in determining whether disabilities are penal or legitimately regulatory. *United States* v. *Lovett*, *supra*.

[27] Hearings before Subcommittee on Legislation of House Committee on Un-American Activities, 80th Cong., 2d Sess., on H. R. 4422 and H. R. 4581, pp. 20-22 (Feb. 5, 1948).

> ities of communism in the United States, but they have proved largely ineffectual in accomplishing their purpose. As has been cited above, the Attorney General on February 5, 1948, testified before a committee of Congress that present laws were inadequate to deal with the subversive activities of the Communist threat in the United States." (Sen. Rep. 1358, 81st Cong., 1st Sess., on S. 2311, p. 7.)

Passages to the same effect appear in the House Committee Reports (H. Rep. 2980, 81st Cong., 2d Sess., on H. R. 9490, p. 2; H. Rep. 1844, 80th Cong., 2d Sess., on H. R. 5852, p. 5). Then-Representative Richard Nixon, one of the authors of the parent bill, made a similar explanation when testifying before the Senate Committee (Hearings before Senate Committee on the Judiciary, 80th Cong., 2d Sess., on H. R. 5852, pp. 41-43).

The House and Senate Committees made explicit the fact that the legislation was designed to outlaw petitioner. They explained in their reports why the bill used the registration scheme and did not illegalize petitioner by name:

> "To make membership in a specifically designated existing organization illegal *per se* would run the risk of being held unconstitutional on the ground that such an action was legislative fiat." (H. Rep. 2980, *supra*, at p. 5; Sen. Rep. 1358, *supra*, at p. 9.)

This purpose was later confirmed by the Congress when, abandoning its previous constitutional scruples, it specifically declared in sections 2 and 4 of the Communist Control Act that petitioner, by name, "should be outlawed" and that each member of petitioner "shall be subject to all the provisions and penalties of the Internal Security Act, of 1950, as amended, as a member of a 'Communist-action' organization."

(3) A regulatory statute would be confined to prevention of future deleterious conduct. But a registration order

proscribes the organization from engaging in any future activity, however innocent and beneficial. It is thus as obviously penal as execution of an individual. There are already available numerous penal statutes against the kind of guilty conduct ascribed to petitioner and its members by section 2 of the Act. The purpose and effect of the Act is not to control such conduct, for which the Act is unnecessary, but to suppress all the organization's activities, including those which are blameless.

(4) The Act's requirements and sanctions are penal individually as well as in their cumulative impact. Compelling self-defamation has the punitive function of the pillory and arm band. Requiring the invidious labelling of literature and broadcasts is punitive because it stigmatizes the organization and denies it an audience regardless of the content of the material. Non-punitive regulation would be based on content, as when obscene or lewd literature is barred. Cf. *Donaldson* v. *Read Magazine*, 333 U. S. 178, 191-92. The limitation on financial contributions to the organization is similarly punitive, not regulatory, because it applies regardless of the purpose and use to be made of the contributions. Under the Act, members of petitioner are conclusively determined unfit and ineligible to hold public office, a wide range of private employment, passports, and, if recently naturalized, citizenship. The number and destructive impact of these sanctions demonstrates their penal nature. The members suffer much more than the single, limited "loss of position" which *American Communications Association* v. *Douds*, 339 U. S. 413, 414, held was intended merely "to forestall future dangerous acts." These sanctions, moreover, are imposed solely because of association, without reference to the fitness of the individuals to enjoy the denied privileges if judged on their own merits as individuals, and without regard to their lack of guilty knowledge.

### F. The Imposition of Criminal Liability Without Judicial Determination of Facts Essential to Guilt

Once the administrative determination that an organization is a Communist-action organization becomes final, it is conclusive in criminal prosecutions of officers and members for failure to register, for holding employment forbidden to members, or for applying for passports. Membership in a Communist-action organization is an element of each of these offenses. But the determination that the organization is an action organization has been conclusively made in the administrative proceeding, and cannot be relitigated in the criminal trial. Moreover, if the prosecution is for failure of an individual to register himself as a member upon default of the organization, the issue of his membership is also adjudicated administratively (secs. 8, 15).

Accordingly, the Act presents the major constitutional problem which the Court did not reach in *United States* v. *Spector*, 343 U. S. 169, but which Justices Jackson and Frankfurter, dissenting, considered to invalidate the self-deportation statute there involved. The dissent, relying on *Wong Wing* v. *United States*, 163 U. S. 228, pointed out that an administrative (or, as in *Wong Wing*, a non-jury) adjudication of a status may not constitutionally be made conclusive in a criminal prosecution for a failure to perform duties consequent on the status.

The objections to the *Spector* statute, raised in Justice Jackson's opinion, clearly apply to the present Act. Justice Jackson stated (at 177-78):

> "This Act creates a crime also based on unlawful residence in the United States. The crime consists of two elements: one, an outstanding order for deportation of an alien; the other, the alien's willful failure to leave the country or take specified steps toward departure. The Act does not permit the court which tries him for this crime to pass on the illegality of his presence. Production of an outstanding administrative order for his deportation becomes

> conclusive evidence of his unlawful presence and a consequent duty to take himself out of the country, and no inquiry into the correctness or validity of the order is permitted.
>
> "The subtlety of the present Act consists of severing the issue of unlawful presence for administrative determination which then becomes conclusive upon the criminal trial court. * * * And if vital elements of a crime can be established in the manner here attempted, the way would be open to effective subversion of what we have thought to be one of the most effective constitutional safeguards of all men's freedom."

The Act is even more vulnerable than the statutes involved in *Wong Wing* and *Spector*. In those cases the accused had been a party to the administrative or non-jury proceeding. But under the Act, the member accused of not registering, applying for a passport, or holding a forbidden job, is not a party to the administrative proceeding which determines that the organization is a Communist-action organization. Nevertheless, this determination, made without benefit of judge or jury, is conclusive in a prosecution against him.

### G. Denial of an Impartial Tribunal

Due process requires "a tribunal which meets at least currently prevailing standards of impartiality" (*Sung* v. *McGrath*, 339 U. S. 33, 50) and is "not biased by an interest in the event." *Fay* v. *New York*, 332 U. S. 261, 288; *Re Murchison*, 349 U. S. 133, 136; *Tumey* v. *Ohio*, 273 U. S. 510.

In violation of this principle, the Act exerts compelling pressure on the Board to decide against petitioner and gives the Board members a personal stake, financial and otherwise, in so deciding.

The Board is set up as a permanent agency, which, at the time the order against petitioner was issued, had the

sole function of identifying Communist-action organizations, their members, and Communist-front organizations. Since Communist-front organizations are by definition tools of a Communist-action organization, they can exist only if the Board finds that there is an action organization.[28]

The Act (see sec. 2(15)) and its legislative history contemplate the existence in the United States of only one Communist-action organization, the petitioner. And even if Congress had considered that there might be more than one, it is certain that it believed petitioner to be the principal organization of that character.

Both the Board and the Attorney General have recognized that a Board holding in favor of petitioner would put the Board out of business. The first two chairmen of the Board informed Congressional appropriations committees that the continued functioning of the Board depended entirely upon the entry of a registration order adverse to petitioner.[29] The Attorney General instituted no proceeding under the Act against any other organization during the two years that the case against petitioner was pending before the Board. But two days after the Board issued its decision against petitioner, the Attorney General filed twelve petitions with the Board, all charging that the organizations named were Communist-front organizations and that petitioner was the Communist-action organization which controls them. All subsequent peti-

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[28] After the registration order was issued, the Communist Control Act gave the Board the additional function of identifying Communist-infiltrated organizations. The definition of the latter also presupposes the existence of a Communist-action organization (Sec. 3(4A)).

[29] Hearings before Subcommittee of Comm. on Appropriations: On 2d Suppl. Appropriations Bill for 1951, H. R., 81st Cong., 2d Sess., p. 263; On Independent Offices Appropriations for 1953, H. R., 82d Cong., 2d Sess., pp. 245, 248; On Independent Offices Appropriations for 1954, H. R., 83d Cong., 1st Sess., pp. 188, 190, 196-198.

tions filed by the Attorney General have charged the accused organization with being "fronts" of or "infiltrated" by petitioner. In the nine years since the Act was passed, only one organization, the petitioner, has been charged before the Board with being a Communist organization.

It is clear, therefore, that if the Board had decided that petitioner was not a Communist-action organization, there would be no other organization which could be proceeded against under the Act. Thus the Board would have rendered itself *functus officio*, deprived the Board members of the perquisites of office, and effectively repealed the Act. The Board, therefore, could not be the impartial tribunal required by due process.

### H. The Irrationality of Section 13(e)

Legislation violates due process if it permits liability to be determined on the basis of criteria which are irrelevant to the ultimate issue or are too vague to supply an ascertainable standard of judgment. *Tot* v. *United States*, 319 U. S. 463; *Manley* v. *Georgia*, 279 U. S. 1; *Western & Atlantic R. R.* v. *Henderson*, 279 U. S. 639; *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79; *Bailey* v. *Alabama*, 219 U. S. 219; *Winters* v. *New York*, 333 U. S. 507; *Musser* v. *Utah*, 333 U. S. 95; *Connally* v. *General Construction Company*, 269 U. S. 385.

In conflict with this principle, section 13(e) requires the Board to apply standards which have no rational relation to the ultimate issue to be determined under section 3(3) and are vague and indefinite.[30]

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[30] John W. Davis, Charles Evans Hughes, Jr. and Seth W. Richardson advised the Senate Judiciary Committee that in their opinion the vagueness of the similar section of the Mundt-Nixon bill, the antecedent of the Act, rendered the entire bill unconstitutional. *Hearings before Senate Judiciary Committee*, 80th Cong., 2d Sess., on H. R. 5852, pp. 417, 421, 445.

Section 3(3) defines a Communist-action organization in terms of (a) Soviet control and (b) advancement of the seditious objectives attributed by section 2 to the world Communist movement. However, none of the criteria which section 13(e) establishes for the Board's determination has any relevance whatsoever to the advancement of seditious objectives, and still less to the specific seditious objectives attributed by section 2 to the world Communist movement. Only the first two standards of section 13(e) have anything to do with objectives, and neither of these requires proof that the objectives referred to are seditious or evil. The court below recognized that the second standard ("non-deviation") had no relevance to the objectives element of the 3(3) definition (R. 2122).

As to the foreign-control component of the definition, section 13(e) supplies criteria which are nebulous, circumstantial, and largely irrelevant. For example, the "non-deviation" standard (sec. 13(e)(2)), as applied in this case (*supra*, p. 16), permits foreign control to be inferred from a similarity of the organization's views to those of the Soviet Union even though the views were adopted by the organization in advance of the Soviet Union, and are demonstrably true, widely held by non-Communists, reasonably deducible from the facts, or independently arrived at by the organization. Similarly, as the court below recognized (R. 2123), the "financial aid" standard (sec. 13(e)(3)) is satisfied merely by evidence of receipt of aid, without regard to the considerations which determine whether the aid is an instrument of control, namely, the terms and conditions, if any, on which the aid is extended. And section 13(e)(5) makes "reporting" proof of foreign control without regard to the nature of the "report", the purpose for which it was given, and its use, if any, by the recipient.

### I. Denial of Due Process by Section 5 of the Communist Control Act

The Act makes it necessary for petitioner and its officers to determine who are members of petitioner. If the order of the Board becomes final, petitioner and its officers will be required to list the names of all the members in petitioner's registration statement (sec. 7(d)(4)). Other persons must determine whether they are members of petitioner in order to know whether they may lawfully hold certain jobs or apply for passports. They must make the same determination in order to know whether they must register themselves upon the failure of the organization to file a registration statement listing their names.

Section 5 of the Communist Control Act (50 U. S. C. 844) sets forth thirteen criteria for determining membership in the Communist Party. In preparing a registration statement, petitioner and its officers must apply these criteria if they are to avoid the criminal penalties of section 15 of the Act for failure to list a member or for making a false listing. Other persons must similarly apply the section 5 criteria if they are not to incur the penalties of the Act for engaging in conduct forbidden to members of Communist-action organizations and for failure to register themselves if petitioner does not list their names.

The criteria of section 5, however, are both irrational and vague. Furthermore, they require persons seeking to apply them to have knowledge which they can neither have nor obtain.

For example, the twelfth criterion of membership is whether an individual has ever "indicated by word, action, conduct, writing or in any other way a willingness to carry out in any manner and to any degree the plans, designs, objectives or purposes of the organization." Besides being intolerably indefinite, this criterion requires an officer seeking to list all members to be aware of every "word, action,

conduct, writing" of every individual in the United States, and it requires an individual seeking to determine whether he is a member to know all the organization's "plans, designs, objectives, or purposes."

We need not dwell on the other criteria, since they palpably share the same vices. A further irrational feature of the section is the fact that it establishes identical criteria for such different relationships to petitioner as "membership", "participation" and "knowledge" of petitioner's purpose or objective.[31]

## III. The decision below erroneously decided basic questions concerning the interpretation and application of the Act.

This petition raises major issues, never considered by the Court, regarding the construction and application of the Act by the Board and the court below. In what follows we demonstrate that the issues were incorrectly decided below. As a result, a political party has been outlawed on the basis of evidence and standards which do not satisfy the provisions of the Act. Moreover, the rulings below, if allowed to stand, will be applied in pending and future "front" and "infiltrated" cases.

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[31] It is arguable that the criteria of section 5 can be construed to apply only to cases where the membership of the accused is in issue, and hence would not apply in a prosecution of petitioner's officers for failure to list all of the members. Such a reading seems unsound, since it would establish a dual test of membership under which an individual could be found to be a member for the purposes of self-registration but not a member for the purposes of registration by the organization. In any event, the criteria of the section are plainly applicable in prosecutions of alleged members. Hence petitioner is presently injured by the fact that the criteria make it dangerous for any person to associate or have business dealings with petitioner or to express views similar to those held by it. This circumstance alone gives petitioner standing to litigate the validity of the section. (See cases cited, *supra*, p. 33, ftn. 23.)

### A. The Meaning of Foreign Control

The section 3(3) definition of a Communist-action organization requires the presence of two components, the first of which is that the organization be "substantially directed, dominated, or controlled" by the Soviet Union.

This postulates a relationship in which the Soviet Union exercises a power to exact compliance with its demands from a domestic organization. It is not satisfied by an organization's voluntary adherence to Soviet policies or objectives. "The requirement of control, in the absence of legal title or beneficial ownership, is not satisfied by acquiescence or by business considerations without binding force." *Atlantic City Electric Co.* v. *Commissioner*, 288 U. S. 152, 153-54. "Control" means "power or authority to manage, direct, superintend, restrict, regulate, direct, govern, administer, or oversee." Black's Law Dict. (4th ed.) p. 399; *Pacific Employer Ins. Co.* v. *Hartford Accident & Indemnity Co.*, 228 F. 2d 365, 368; *American Auto Trimming Co.* v. *Lucas*, 37 F. 2d 801.

Control, therefore, presupposes the existence of some significant means whereby the superior can compel compliance with its requirements or at least impose sanctions for non-compliance. Absent any such means, control is not present. If conformity nevertheless exists, it is voluntary, not the product of control.

Control exists in the relationships of superior officer and soldier, employer and employee, principal and agent, controlling stockholder and corporation, because in each instance there is a mechanism for exacting conformity. But control does not exist in the cases of the parishioner who attempts to live in accordance with the principles preached by his minister, the economist who is a disciple of Keynes, the man who out of friendship mows the lawn of his vacationing neighbor, or the boy who imitates the batting stance of a baseball star. These involve no control

because there is no significant mechanism to enforce compliance, even though there is adherence to another's precepts, the serving of another's interests, or the copying of another's actions.

The Act requires not merely a latent power to control, but its exercise. This necessarily means that the subordinate must act on orders from the superior. Ordinarily, too, a control situation involves features designed to insure satisfactory compliance with the orders, such as the supervision of an employee by an employer or the reporting by a soldier to his commander.

This principle, that the first component of section 3(3) involves compliance which can be exacted rather than voluntary conformity, derives not only from the natural meaning of the terms "direction, domination or control," but also from their context in the Act. An organization will meet the second component of section 3(3) of the Act, i.e., will operate primarily for the purpose of advancing Soviet objectives, either because it has to or because it wishes to. That is, the second component involves voluntary conformity at a minimum. Accordingly, if the first component requires no more, it is redundant.[32]

That section 3(3) refers to an enforceable control also appears from section 2(5), which describes Communist-action organizations as "organizations which are not free and independent organizations, but are sections of a world-wide Communist organization and are controlled, directed, and subject to the discipline of the Communist dictatorship of such foreign country." Finally, imposition of the Act's

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[32] On the other hand, the second component cannot be considered redundant on the theory that a controlled organization will necessarily promote the objectives of the controller. For the second component is satisfied only if the organization promotes *certain* objectives of the controller, i.e., the seditious objectives described in section 2, as distinguished from other possible objectives, including those which are innocent.

severe sanctions for a conformity which stems from nothing more than ideological agreement would magnify the First Amendment objections to the Act.

It is clear that the Board did not, and could not, make findings of the essential elements of control, namely, (a) that the Soviet Union has any means of exacting compliance from petitioner and (b) that it gives orders to or supervises petitioner.

There was, of course, no showing or finding that the Soviet Union can exercise physical or police power over petitioner. Neither was there a showing or finding of any other means by which the Soviet Union can enforce conformity by petitioner to Soviet desires. If there had been any evidence that the Soviet Union subsidizes petitioner, the withdrawal or threatened withdrawal of financial aid might supply a lever of control. As the Modified Report acknowledges, however, "The record contains no evidence of substantial financial aid subsequent to 1940 and none after 1944" (R. 2568). Thus we are left with no means of enforcement, and therefore with no control.

Secondly, there was no evidence of Soviet directives or orders to petitioner. The Modified Report makes no finding that petitioner receives directives from abroad, and cites no instance of claimed Soviet directives after petitioner's disaffiliation from the Communist International in 1940 (*supra*, p. 14).

Finally, the record contains no evidence that petitioner is supervised by or reports to the Soviet Union. The Modified Report cites no instance of reporting or supervision after 1945 at the latest. In fact, there is no evidence of either after petitioner's disaffiliation from the Communist International. (See *supra*, pp. 14-15.)

Indeed, the record shows no significant contacts between petitioner and the Soviet Union after petitioner's disaffiliation from the Communist International. The only contacts

shown after the disaffiliation were these: (1) In 1945, while on a trip to France, Elizabeth Gurley Flynn, a member of petitioner's National Committee, met some Russian women at an international women's conference and conversed with them about child care, post-war reconstruction, and the rights of women (R. 2576, 1298). (2) In 1949, petitioner sent Stalin a telegram congratulating him on his 70th birthday and praising the Soviet Union (R. 2580-81). (3) In December 1950, the Communist Party of the Soviet Union sent a telegram of greetings to petitioner's national convention (R. 2582-83). (4) Petitioner's publications sometimes reprinted articles from Soviet publications, and its leaders and members sometimes read the publication of the now-defunct Communist Information Bureau (R. 2522). (5) The Daily Worker had a correspondent in Moscow (*ibid.*).[33]

The court below affirmed the Board's order only by emasculating the foreign control component, eliminating, consecutively, both of its elements. In its second opinion it acknowledged that "there is no showing that the Soviet has any means of enforcing conformity by the Party with Soviet desires" (R. 2760). It held that the Act required no such showing, stating:

> "An organization or a person may be substantially under the direction or domination of another person or organization by voluntary compliance as well as through compulsion * * *. If the Soviet Union directs a line of policy and an organization voluntarily follows the direction, the terms of this statutory definition would be met." (R. 2761.)

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[33] Moreover, petitioner's witnesses Gates and Flynn testified that during their tenure on petitioner's National Committee (since 1938 and 1946, respectively), there were no foreign representatives to petitioner, and petitioner received no foreig directives or aid, did not report, and was not under foreign supervision or control (R. 1211-16, 1223-24; Tr. 15783-96).

For reasons already stated, this is an erroneous interpretation of the control component. But even this interpretation requires evidence that there were Soviet directives which petitioner could voluntarily follow. The Board, however, found none; the court below cited none; and, in fact, there is no evidence of any such directions since petitioner's disaffiliation from the Communist International in 1940.

In its latest opinion, the court below summarized the facts which induced its decision against petitioner. So far as petitioner's current relationship with the Soviet Union is concerned, these facts amount to nothing more than petitioner's "intellectual affiliation" to the cause of Communism. (R. 2842-43.) Whether "intellectual affiliation" satisfies the requirement of foreign control and justifies the harsh measures of the Act presents a major question for this Court.

### B. The Reliance on Pre-Act Conduct

Under the Act, the Board must determine whether an accused organization is a Communist-action organization at the time of the proceeding (secs. 12(e), 13(e), (g), (h)). Accordingly, the Board was required to base its findings and order upon current conduct of petitioner. Petitioner's practices prior to the date of the Act were relevant, if at all, only to the extent that they served to show or explain the purposes or character of post-Act activities. *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 705.[34]

The opinion below and the Modified Report show on their face that this principle was violated. They base the finding that petitioner is under foreign control on claimed practices of petitioner which were concededly discontinued at least ten years prior to enactment of the Act. This ap-

[34] This decision states (at 706) that evidence of past transactions is not admissible even for this limited purpose where, as here, the effect of the proceeding is "to punish or to fasten liability on respondents for past conduct."

pears from the Summary of the Modified Report (R. 2608-09), whose dominant theme is as follows:

1. Petitioner, by joining and assuming the obligations of membership in the Communist International, thereby subjected itself to Soviet control.

2. Petitioner's disaffiliation from the Communist International in 1940 and the dissolution of the Communist International in 1943 were of no consequence because both the Soviet Union and petitioner continued to believe in and practice the principles of Communism.

3. Ergo, the Soviet control of petitioner which existed while petitioner was a member of the Communist International continues.

As the Board summarized its Summary (R. 2609):

> "The short of it is this * * * the Communist Party began its history by voluntarily sumitting to the control of the Soviet Union and adopting that nation's international program for the Communist movement. The record shows that neither the basic program or objectives of the Soviet led world Communist movement nor those of [petitioner] have changed."

This theory was not visible in the original Report and was plagiarized from the first opinion of the court below (R. 2141-42). The court adhered to the theory in its latest opinion when it emphasized that petitioner "was for years a member of the Communist International, and its separation from that organization was not accompanied by a repudiation, either of objectives or of methods" (R. 2842).

The failure of petitioner to repudiate the objectives or methods of the Communist International cannot serve as evidence that petitioner is currently under Soviet control. If petitioner was controlled by the Soviet Union through the International, this was because petitioner received instructions from and was supervised by the International,

and was liable to expulsion and the loss of financial subsidies for disobedience of International decisions.

But petitioner withdrew from the International in 1940, and the International dissolved in 1943. There is no evidence that subsequent to the disaffiliation petitioner received foreign directives or supervision. The means of exacting compliance also vanished. Petitioner could not be expelled from an organization to which it no longer belonged or which no longer existed. Withdrawal of financial aid could not be an instrument of control because petitioner no longer received any. Hence, with the disaffiliation from the International (not to mention the latter's subsequent dissolution), there disappeared all the means and incidents of control, and necessarily control itself. That petitioner continued to adhere to its previous views was irrelevant, because the adherence was its voluntary choice, not a product of control.

It is clear, therefore, that the Board and the court below violated the *Cement Institute* rule (at 705), that "prior transactions" are relevant only "to show the purpose and character of the particular transactions under inquiry." The only "transactions" relevant to control were discontinued after 1940. There were no subsequent "transactions" to be illuminated by evidence of the discontinued ones.

The evidence of current practices here is far weaker than in *United States* v. *Oregon Medical Society*, 343 U. S. 326, where the Court reversed an anti-trust injunction, saying (at 334):

> "Striking the events prior to 1941 out of the Government's case, except for purposes of illustration or background information, little of substance is left. The case derived its coloration and support almost entirely from the abandoned practices."

### C. The Construction and Application of Section 13(e)

Novel questions of importance to the administration of the Act are presented by the construction and application given in this case to the evidentiary criteria of section 13(e).

(a) The major instance is the Board's construction of the "non-deviation" standard (sec. 13(e)(2)). The dictionary definition of "deviation" is a variation from an already established position. Furthermore, coincidence of views has no rational tendency to prove the foreign control component of section 3(3) unless the alleged foreign principal formulated the view first. Accordingly, the standard requires a showing that the Soviet view on a particular subject antedated the petitioner's view. Moreover, an identity of views is not a rational test of foreign control if the view of the alleged principal is demonstrably true or is widely held by those who are concededly not under its control. Likewise, a similarity of non-seditious views has no tendency to prove advancement of seditious objectives, the second component of section 3(3).[35]

The Board and the court below construed "non-deviation" contrary to its dictionary definition and so as to make it an irrational test of a Communist-action organization as defined by section 3(3). As we have seen (*supra*, p. 16), the Board ruled that it was irrelevant whether petitioner reached its views in advance of the Soviet Union;[36] whether the similarity of views arose out of the

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[35] The court below held that the non-deviation standard is relevant only to the foreign control component of section 3(3), and not to the objectives component (R. 2122).

[36] The Court below held, in affirming the Board on this point: "The statutory phrase ['do not deviate from'] refers to identity or coincidence and not to chronological adoption" (R. 2146). At the hearing, counsel for the Attorney General stated that he was not required, and would not attempt, to show that the Soviet view antedated petitioner's view (R. 81-82, 836; Tr. 10934-35) and resisted petitioner's attempts to show that it had reached certain of the views first (R. 836; and see Tr. 10903).

independent application by each of common principles;[37] and whether the views were true, reasonable, generally accepted, and calculated to promote the best interests of the United States.[38]

The significance of these misconstructions of the non-deviation standards extends beyond this case, since "non-deviation" from petitioner's views is one of the tests of a Communist-front organization (sec. 13(f)(4)).

(b) The Board made a finding under section 13(e)(5) that petitioner "upon occasion" reports to the Soviet Union (R. 2583). Aside from the total absence of evidence to support the finding (*supra*, pp. 14-15), it is clear that the Board misapplied the standard. "Reporting" has a rational tendency to prove foreign control only if the report is made to facilitate supervision of the accused organization. Reports may also be made for the purpose of exchanging information between equals, as, for example, when a scientist reports on his research to a convention of his fellows. The Board made no finding on the contents, purposes, or use of the alleged occasional reports. It thus assumed, contrary to reason, that any kind of "reporting" is evidence of foreign control.

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[37] R. 842-44. The Attorney General stated that, "We have not made any attempt to show how the Communist Party reached the views that it did" (R. 836). The Attorney General's expert witness on "non-deviation" testified that he was unable to conclude that petitioner had not arrived at its views independently (R. 837-38). Nevertheless, the Board ruled in its Modified Report (R. 2562) that "the great weight of the evidence is to the contrary" of petitioner's contention that it had reached its views independently.

[38] R. 2556; and see, e.g., R. 864; 836-37; 844-45; 839, 840, 845, 861-64, 1274-75. A typical example was the exclusion of evidence designed to support the validity of the view that the Chiang Kai-shek regime was corrupt (R. 836-37). The Attorney General's stated position was that "it does not matter whether the Soviet view on these issues which were raised were [sic] right or wrong, or whether the Soviet view was held by many people, by some people, or by all the people" (Tr. 8878).

(c) The Board's finding under the "allegiance" criterion (sec. 13(e)(8)) conflicts with this Court's decision in *Schneiderman v. United States*, 320 U. S. 118 (*supra*, p. 17).

(d) In applying the "directives and policies" test (sec. 13(e)(1)), the Board found that certain of petitioner's policies have "as their fundamental purpose to effectuate Soviet policies and further the world-Communist movement" (R. 2554). It is unclear from the Modified Report whether the Board supposed that this finding helped establish the foreign-control component of a Communist-action organization. Obviously it cannot, there being no finding of foreign directives.

The Board must have relied on this finding to support its holding that the evidence satisfies the "objectives" component of the section 3(3) definition. This component, however, is limited to the advancement of the objectives "referred to in section 2," all of which are seditious. If section 13(e)(1) is to furnish a rational test of section 3(3), the policies to which it refers must be similarly confined. The Board, however, relied on petitioner's alleged forwarding of policies which are not, and were not found to be, seditious (see *supra*, pp. 16-17).

(e) The Board's "discipline" finding (sec. 13(e)(6)) was erroneously based on evidence of disciplinary measures adopted by petitoner on its own initiative, there being no evidence of discipline imposed by or at the behest of the Soviet Union (*supra*, p. 15).[39]

In sum, the absence of meaningful evidence against petitioner compelled the Board to interpret and apply section 13(e) so as to magnify and add to the irrationalities apparent from the text of the subsection.

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[39] It is unnecessary to discuss the remaining three criteria of sec. 13(e). The court below struck one ("secret practices") as unsupported by the evidence, and the Board found that the practices referred to in the others ("financial aid" and "training") had been discontinued long before enactment of the Act. See *supra*, pp. 5, 7, 14.

### D. The Meaning of "World Communist Movement"

As we have seen (*supra*, p. 35), the court below held that the findings of section 2 of the Act with reference to the existence and nature of a world Communist movement were conclusive upon the Board and the courts. Nevertheless, it reviewed and sustained the finding of the Board that on the evidence, "there exists a world Communist movement, substantially as described in section 2 of the Act" (R. 2138, 2495). This conclusion was based on the court's finding that there is a world Communist movement in the sense that the various Communist parties throughout the world have a common outlook and work in their respective countries for the revolutionary attainment of a "classless, stateless society ruled by the proletariat of the world" (R. 2137).

The movement found by the court below is palpably not *the* world Communist movement postulated in section 2 of the Act. The key characteristics of that movement are a highly centralized organization, rigid Soviet control, and use of violent and criminal means. Thus subsections (1), (5) and (8) of section 2 describe the movement as operating "through the medium of a world-wide Communist organization," of which the Communist parties of the various countries are "sections" and "affiliated constituent elements." Subsections (4) and (5) find that the control of the world Communist movement is vested in the "Communist dictatorship of a foreign country" through the medium of "action organizations" which are "sections of a world-wide Communist organization." And subsections (1) and (11) find that the world Communist movement employs espionage, sabotage, terrorism and treachery.

Neither the court below nor the Board found, or could have found from the evidence, the existence of a movement having these characteristics. The only organization which was a "world-wide Communist organization" was the

Communist International, dissolved in 1943.[40] In the absence of such an organization, there could be no foreign control of the movement "through the medium" of the organization. Furthermore, the record is devoid of evidence of the means employed by the Communist parties of other countries to achieve their objectives. It is equally devoid of evidence that petitioner has committed or advocated acts of terror, sabotage or espionage.

## IV. The order of the Board is not supported by the evidence.

Section 14(a) requires that the Board's order be supported by the preponderance of the evidence. It is clear that this standard has not been satisfied. Our previous discussion has shown the following:

(1) There is no evidence that petitioner is under Soviet direction, domination or control, as required by the first component of the section 3(3) definition (*supra*, pp. 48-52).

(2) There is no evidence that the practices described in section 13(e) are engaged in by petitioner (*supra*, pp. 55-57).

(3) There is no evidence that there is a world Communist movement which meets the description of section 2 (*supra*, pp. 58-59).

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[40] The now-defunct Communist Information Bureau, mentioned by the court below (R. 2137), was not, and was not found to be, the organization described in section 2. Its membership was not worldwide, but was confined to the Communist parties of eight European countries (R. 17; 1592). It was not a centralized organization; as the Board's Original Report stated, and a witness for the Attorney General testified, it was a medium for "mutual consultation and voluntary coordination of action" among the member parties (R. 7; 937-38; 971). Moreover, the court below acknowledged (R. 2142) that petitioner was not affiliated with the Communist Information Bureau, and the uncontradicted evidence shows that petitioner never had dealings with it (R. 1205-10; 1286-89).

In addition, the evidence does not satisfy the second component of the section 3(3) definition, namely, that petitioner operates primarily to advance the objectives of the world Communist movement referred to in section 2.

Apart from the fact that there is no movement which meets the section 2 description, the evidence fails to show that petitioner operates to advance the objectives described in that section. These are: (1) the overthrow of all existing capitalist governments by any means deemed necessary, including espionage, sabotage, terrorism, force and violence (sec. 2(1), (6)), and (2) the establishment in all countries of "Communist totalitarian dictatorships" (sec. 2(1), (2), (3)), which (3) "will be subservient to the most powerful existing Communist totalitarian dictatorship" (sec. 2(1), (6)).[41]

1. The first objective excludes organizations which seek to establish socialism or Communism by peaceful means or which advocate forcible overthrow only as abstract political doctrine, divorced from present incitement to action. Such organizations could not present the "clear and present danger" which Congress found in section 2(15), and a contrary reading of section 2 would magnify the constitutional vices of the Act. Cf. *Yates* v. *United States*, 354 U. S. 298. Yet the evidence on which the Board relied to find that petitioner advocates violent overthrow is the same as that which *Schneiderman* held to be insufficient to prove non-attachment to the Constitution and which *Yates* held (at 329) did not meet the incitement standard. (See *supra*, p. 13.)

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[41] The element of subservience also appears from section 2(15), which states that the Act is required "to preserve the sovereignty of the United States as an independent nation." Section 4(a) likewise makes clear that the Act was not directed against the establishment in this country of an autonomous "totalitarian dictatorship," but only one under foreign control.

2. Section 2(2) spells out the second objective of the world Communist movement by describing "totalitarian dictatorship" as a form of government that "results in the suppression of all opposition to the party in power, the subordination of the rights of the individual to the state, the denial of fundamental rights and liberties which are characteristic of a representative form of government, such as freedom of speech, of the press, of assembly, and of religious worship, and results in the maintenance of control over the people through fear, terrorism and brutality." Section 3(15) defines "totalitarian dictatorship" in similar terms.

The Modified Report finds from its examination of Marxist writings that the primary objective of Communism is to supplant capitalist governments "by socialist states under dictatorships of the proletariat (working class), which we find is a dictatorship [sic] of a Communist party" (R. 2444, and see also R. 2494, 2495, 2607). The court below held this to be a finding that it is petitioner's objective to establish a totalitarian dictatorship within the meaning of the Act (R. 2761). This seems doubtful. But in any event, a finding which equates a "dictatorship of the proletariat" with the "totalitarian dictatorship" described in section 2, is contrary to the plain meaning of the texts on which the Board relied as well as to this Court's reading of the same texts. *Schneiderman* v. *United States, supra,* at 142, described the dictatorship of the proletariat as follows:

> "In the general sense the term may be taken to describe a state in which the workers or the masses, rather than the bourgeoisie or capitalists are the dominant class. Theoretically it is control by a class, not a dictatorship in the sense of absolute and total rule by one individual. So far as the record before us indicates, the concept is a fluid one, capable of adjustment to different conditions in different countries. There are only meager indications of the form the 'dictatorship' would take in this country. It does

not appear that it would necessarily mean the end of representative government or the federal system."

The uncontradicted testimony of petitioner's witness Aptheker establishes that petitioner understands and used the term dictatorship of the proletariat in the sense defined by the Court (R. 2437).

It is thus apparent that the term, as understood by the Court and petitioner, has nothing in common with the "totalitarian dictatorship" which section 2 postulates as an objective of the world Communist movement. Accordingly, if the Board found to the contrary, its finding is without evidentiary support.

3. There is no evidence, and the Modified Report makes no finding, that petitioner has the objective of establishing a government in this country that will be subservient to the Soviet Union. Moreover, the Modified Report seems to recognize that existing Communist governments outside of the Soviet Union are not Soviet puppets. For it finds that the governments of China and the Communist countries of Eastern Europe are "dictatorships of the proletariat controlled by a *national* Communist Party *in alliance with* the Soviet Union" (R. 2487, emphasis supplied, and see R. 2493-94).

Review of the preponderance questions is demanded by the manifest errors of the Board and the court below and the unprecedented effect of the order in outlawing a political party. It is also required because the finding against petitioner concludes the rights of other organizations. The Act contemplates that once petitioner is finally found to be a Communist-action organization, this issue cannot be relitigated by organizations accused of being "fronts" or "infiltrated" or by individuals required to register themselves as members of "action" organizations. In issuing

the first registration order against an organization accused of being a Communist-front, the Board held that "the prior determination by the Board that the Communist Party is a Communist-action organization is conclusive and applicable in this proceeding without further proof." Report of the Board, *Rogers* v. *Labor Youth League*, No. 102-53, Feb. 15, 1955, pp. 54-55. The Board has applied the same rule in all subsequent cases.

**V. The refusal to strike all of Budenz' testimony because of his unavailability for cross-examination presents a novel and important question.**

This case presents the question whether all the testimony of Budenz should have been stricken because petitioner was deprived, through the fault of the Attorney General and the Board, of the opportunity to cross-examine him with the aid of his prior statements on two key matters. The circumstances which give rise to this question had their origin at the original Board hearing in 1952. Budenz then testified, *inter alia*, about two supposed incidents which are referred to in the litigation as the Starobin letter and the Weiner conversation.

Budenz' testimony about the Starobin letter was as follows. In May, 1945, before the Duclos article criticizing the dissolution of the American Communist Party was known in this country (see *supra*, p. 18, ftn. 12), Budenz hastily read part of a letter from Starobin, a Daily Worker correspondent at the United Nations conference in San Francisco. The letter reported that Manuilsky, a Soviet delegate, had told Starobin that "the American Party should observe more carefully the guidance and counsel of the French Communists." (R. 1135-37, 1182.) The obvious inference from this testimony is that the Duclos article was a Soviet-inspired directive to petitioner, and the court below so regarded it in its initial opinion (R. 2143).

Budenz' testimony concerning the Weiner conversation was that in 1939 he and Morris Childs had a talk with Weiner, then treasurer of petitioner, about securing funds for the Midwest Daily Record, which Budenz edited. Childs asked Weiner "if he couldn't get some money from abroad".[42] Weiner replied that "we could normally, but the channels of communication abroad had been broken for the time being, and perhaps could be reestablished so money could come." (R. 1124-25.) The original Report and First Modified Report cited this testimony in support of the finding that petitioner had received Soviet financial aid (R. 88, 2564).

On cross-examination, Budenz stated that he had orally reported these incidents to the FBI (R. 1184-85; 1180-82). He conveyed the impression that no recording or transcription of any of his oral reports had been made. Objections interposed by the Attorney General and sustained by the Board precluded petitioner from exploring the matter further (Tr. 14003-04, 14120-22). Petitioner moved for the production of any FBI reports of interviews with Budenz concerning the Starobin letter and the Weiner conversation. The Attorney General objected to the motions, and the Board denied them. (R. 1184-85, 2277-78, 128.)

Following the remand by this Court, petitioner again moved the Board for the production of the FBI reports on the Starobin and Weiner matters or for their *in camera* inspection by the Board. Again the Board sustained objections interposed by the Attorney General. (R. 2187-89; 2217-18, 2225.) The court below initially affirmed this ruling on the ground that there did not appear to be any statements[43] on the two matters in the possession of the FBI

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[42] Budenz testified that "abroad" meant "Moscow" (R. 1126).

[43] As defined by 18 U. S. C. 3500, which was enacted after the conclusion of the proceedings before the Board on this Court's remand.

(R. 2733), counsel for the Board having so represented in their brief (Respondent's Brief following Remand, pp. 18, 46). However, in response to a petition for rehearing filed by petitioner, the Board disclosed for the first time that the FBI had in its possession disc recordings of a five-day interview with Budenz in 1945, which contained statements pertinent to the Starobin and Weiner matters (R. 2804-05, 2813). As a consequence, the court below ordered the production to petitioner of statements made by Budenz to the FBI concerning the two matters (R. 2820-22).

In the Board proceedings that followed, statements by Budenz relating to the Starobin letter and the Weiner conversation were excerpted from the recorded interview and from FBI memoranda of later interviews [44] and furnished to petitioner (R. 2387-89).[45] Budenz' ill health made it impossible to recall him for cross-examination on these statements. Petitioner therefore moved to have all of the testimony of the witness stricken because of his unavailability for cross-examination. The Board struck Budenz' testimony on the Starobin and Weiner matters but refused to strike anything else. (R. 2301-02, 2387-89.) The court below affirmed (R. 2839-40), Judge Bazelon dissenting on the ground that Budenz' unavailability required that all of his testimony be stricken (R. 2844).

The decision below presents an important question, not heretofore passed on by the Court, concerning the consequences of a deprivation of cross-examination because of the supervening death or illness of a witness. Wigmore states the applicable principle to be that where the party calling a witness is responsible for the deprivation, all of his testimony must be stricken. And even where the call-

[44] The Attorney General agreed that the Board might treat the memoranda as statements within the meaning of 18 U. S. C. 3500 (R. 2389).

[45] The unexcised documents were made part of the record as sealed exhibits. See Bd. Exs. 2, 5, 6, 7.

ing party is without fault, all the testimony must nevertheless be stricken if the loss of cross-examination is a material loss. Wigmore on Evidence (3rd ed.), sec. 1390.

It is clear, and the majority below did not dispute, that the Attorney General and the Board were responsible for depriving petitioner of its right to cross-examine Budenz with the aid of the FBI statements. First, the Attorney General's objections and the Board's rulings denied petitioner access to the statements at a time when the witness would have been available for cross-examination. Second, the Attorney General withheld the fact that the FBI had the statements in its possession until it was too late to recall Budenz.[46] Under Wigmore's rule (never mentioned by the majority below), these facts alone required that all of Budenz' testimony be stricken, without considering whether the deprivation of cross-examination was a material loss to petitioner.

In addition, the deprivation of petitioner's right to cross-examine Budenz with the aid of the prior statements was a material loss, which was not repaired by striking his testimony on the Starobin and Weiner matters. As the dissenting opinion points out (R. 2844), "Without such cross-examination the Party is denied the right to show the extent, if any, to which the rest of Budenz' testimony is tainted." And a showing of taint would have required the Board to strike all of his testimony.[47] *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115; *Mesarosh* v. *United States*, 352 U. S. 1.

The majority below held that cross-examination could not have established any taint because Budenz' testimony

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[46] His health would have permitted his recall when petitioner renewed its motions for production of the statements after this Court's remand (R. 2187, 2191, 2225; Tr. 18122; Bd. Ex. 3-C).

[47] The 2d Mod. Rep. relies on Budenz' testimony for a number of important findings, e.g., that petitioner reported to and received financial aid from the Soviet Union after 1940 (see *supra*, p. 14, ftn. 7).

and prior statements on the Starobin and Weiner matters "bear a solid similarity in essentials and differ no more than truthful accounts under such conditions may well differ" (R. 2839). This defeats the principle that "only the defense is adequately equipped to determine the effective use" of a witness' prior statements for the purpose of impeachment. *Jencks* v. *United States*, 353 U. S. 657, 688-89. Furthermore, the court's characterization of the statements flies in the face of the facts, as an examination of the statements (R. 2358-72) shows. We limit ourselves to one example, which relates to the supposed conversation with Weiner.

In the 1945 recorded interview, Budenz made several references to his efforts to raise money for the Midwest Daily Record. But he did not mention a conversation with Weiner on this or any other subject. On the contrary, he stated in response to repeated questions that he had no knowledge or "indication" of the availability of Soviet or other foreign funds to petitioner or its publications. (R. 2358, 2361-64.) When pressed further, Budenz added:

> "Now the only thing I think is indicative is Weiner's position because I can't see any reason, never did, for Weiner's being sort of a super, ahhh—*that's just surmise you understand.* You must be very careful on that. But I can't see why he's a super financial person. See, unless there's something." (R. 2364; emphasis supplied.)

Thus in 1945, Budenz knew of no indication that petitioner had received funds from abroad and could only surmise that, if it did, Weiner was somehow involved. Yet, as we have seen, when Budenz took the stand seven years later, he was able to "recall" a 1939 conversation in which Weiner acknowledged that petitioner had received Soviet financial aid. Far from bearing "a solid similarity," the prior statement and the testimony are contradictory. Similarly, Budenz' testimony on the Starobin

letter (R. 1135-37, 1182) is contradicted by his 1945 and 1946 statements (R. 2360, 2365-66). In both cases, the inference is almost inescapable that Budenz either deliberately concocted his testimony or is incapable of distinguishing fact from fantasy. In any event, this might have been established by cross-examination.

The Board found that Budenz' testimony on the Starobin and Weiner matters was not deliberately false and evaluated the remainder of his testimony accordingly (R. 2390-91). Cross-examination with the aid of the impeaching statements might have established deliberate falsity even to the Board's satisfaction, and required it to disregard or substantially discredit all the Budenz testimony. Hence the deprivation of cross-examination was a material loss to petitioner. Under the Wigmore rule, therefore, all of Budenz' testimony should have been stricken even if the Attorney General and the Board had not been responsible for the deprivation.

## VI. The refusal to order the production of relevant prior statements of witnesses is inconsistent with or misapplies decisions of this Court.

### A. The Gitlow Memorandum

In 1940, Gitlow gave the FBI a quantity of minutes and other Communist Party documents which he had collected during his membership, together with a memorandum he prepared interpreting them (R. 2253-55; 2257). On his direct examination as a witness for the Attorney General, Gitlow identified these documents and "explained" their contents. Petitioner's motion for production of the memorandum was denied (R. 2763-64, 2257-58, 128).

After the remand by this Court, petitioner renewed its motion for the production of the memorandum, which the Board again denied (R. 2191, 2225). A majority of the

court below, Judge Bazelon dissenting, affirmed this ruling in its second decision (R. 2763-71, 2787). It held, citing *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U. S. 197, 225-26, that although the Board had erred in denying petitioner's production motions, the error could not be corrected upon review of the Board's order, and that petitioner's exclusive remedy was a motion for leave to adduce the memorandum as additional evidence pursuant to section 14(a) of the Act.

In accord with this ruling, petitioner promptly moved under section 14(a) of the Act for leave to adduce the Gitlow memorandum as additional evidence (R. 2797). As the motion pointed out: (1) The court's earlier denial of a motion by petitioner under section 14(a), which sought review of the Board's refusal to order production of impeaching documentary evidence relating to another witness, had led petitioner to believe that the court did not consider such a motion available for that purpose. (2) The court had recognized that its ruling was a novel extension of the *Consolidated Edison* rule, and petitioner could not, therefore, have reasonably anticipated it. (3) Since the court had remanded the proceeding for other reasons, allowance of the motion would not materially delay ultimate disposition of the case (R. 2798-2801).

The court denied petitioner's motion (R. 2820), stating (R. 2821), "We adhere to the views expressed in our opinion promulgated January 9, 1958." But those views, as we have seen, were that petitioner was entitled to get the Gitlow memorandum by such a motion. Petitioner called this paradox to the attention of the court in its brief following the second remand (pp. 14-15) and asked for reconsideration of the earlier ruling. In its opinion of July 30, 1959, the court adhered to its position, but this time on the ground that "a litigant cannot cure procedural defects *nunc pro tunc* after an appellate court has passed upon his contentions in the matter" (R. 2838).

The *Consolidated Edison* case, *supra*, on which the court below relied in holding that petitioner had mistaken its remedy, at most holds that an administrative exclusion of testimony can be reviewed only by a motion for leave to adduce additional evidence under standard statutory review provisions like those contained in section 14(a) of the Act.[48] The court below extended this rule to apply to an administrative refusal to order the production of statements for use in impeaching a witness on cross-examination. Moreover, as the court below recognized (R. 2769), its decision conflicts with the holding of the Eighth Circuit in *Mississippi Valley Structural Steel Co.* v. *N.L.R.B.*, 145 F. 2d 664, that the rule may be satisfied by assigning the exclusionary ruling as error in a petition for review. Furthermore, as the court below realized (R. 2769), its decision will hamper the efficient administration of justice by necessitating multiple interlocutory appeals to review exclusionary rulings of administrative agencies operating under statutes containing standard review provisions.

For these reasons, the decision below presents questions of general importance concerning the review of administrative rulings. Moreover, under the circumstances of this case, the denial of petitioner's motion for leave to adduce the Gitlow memorandum as additional evidence violated accepted standards of fair play.

### B. Budenz' Statements to the FBI

As we have seen (*supra*, p. 65), the Attorney General first disclosed the existence of disc recordings of Budenz' 1945 interview with the FBI after petitioner had petitioned for a rehearing following the decision below of January 9, 1958. Petitioner then moved under section 14(a) for the production of so much of the recordings and of FBI

[48] The case involved the refusal of the Labor Board to hear testimony tendered by an employer contrary to an agreement restricting the number of witnesses it would call.

memoranda of subsequent interviews with Budenz as related to the subject matter of his testimony (R. 2797, 2814). The court below, Judge Bazelon dissenting, denied the motion except insofar as it related to statements of Budenz concerning the Starobin letter and the Weiner conversation. The court held that petitioner was not entitled to statements concerning other matters on which Budenz had testified because it had not moved for their production at the original hearing and because the blanket demand made in its 14(a) motion was "a fishing expedition" and untimely (R. 2820-22, 2831).

The court below was wrong on all three counts.

(1) At the original hearing, the Board denied petitioner's motions for prior statements relating to the Starobin and Weiner matters (R. 1184-85, 2277-78, 128). These rulings were based on the erroneous premise, adopted by the Board in denying petitioner's motion for the Gitlow memorandum,[49] that prior statements to the FBI were producible only upon a showing that they were inconsistent with the testimony of the witness (R. 2255-57, 128; Tr. 2886).[50] Obviously petitioner was not required to make futile motions for prior statements of Budenz on other subjects, once the Board had established a principle which required their denial.

(2) Petitioner's motion under section 14(a) for all prior statements relating to the subject matter of Budenz' testimony was not a "fishing expedition," but conforms to the procedure specified in 18 U. S. C. 3500.

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[49] Gitlow was the first witness called by the Attorney General (R. 216).

[50] Bowing to this ruling, petitioner confined its subsequent production motions to situations in which, as it contended, such a showing had been made. It was on this ground that it moved for Budenz' statements on the Starobin and Weiner matters (R. 1184-85; 2275; Tr. 14076-80).

(3) As Judge Bazelon found (R. 2832), and as the record discloses (R. 2815-18), Budenz' testimony at the original hearing, the action of the Board in cutting off cross-examination, and representations made by the Board to the court below, had misled petitioner into believing that there were no verbatim transcriptions of FBI interviews with Budenz. Since petitioner moved for the relevant portions of the transcriptions as soon as it learned of their existence its motion was not untimely.

If upon review the Court holds that all of Budenz' testimony should have been stricken (see *supra*, pp. 63-68), the question now under discussion will, of course, drop out of the case. However, since the question is important and may be reached, a grant of certiorari should be broad enough to include it.[51]

### C. Statements to the FBI by Other Witnesses for the Attorney General

In its decision of January 9, 1958, the court below held (R. 2777-78) that the principles of *Jencks* v. *United States*, 353 U. S. 657, and 18 U. S. C. 3500 were applicable to the proceeding before the Board. Accordingly, after the case had been remanded to the Board by the court below, petitioner moved for the production of all statements, as defined in 18 U. S. C. 3500, which had been made by witnesses for the Attorney General at the original Board hearing and which related to the subject matter of their testimony (R. 2338). After the Board denied the motion (R. 2346-47), petitioner sought production of the statements

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[51] Budenz' unavailability at the time of the last Board hearing does not moot the question. He may have recovered sufficiently to take the stand by the time the case gets back to the Board. If not, the Board, consistently with its ruling on the Weiner and Starobin matters, would be required to strike Budenz' testimony on all subjects to which the prior statements relate.

by a motion in the court below for leave to adduce them as additional evidence pursuant to section 14(a) (R. 2833).[52]

The court below denied the motion, stating (R. 2839), "The motion comes too late, and in any event it is not supported by any authority," and that the *Jencks* case disapproved "fishing expeditions." These are the same grounds on which the court refused to order production of the Budenz statements and which, as we have shown, are fallacious. The question presented by the denial of petitioner's motion for the relevant FBI statements of all of the Attorney General's witnesses should therefore be reviewed.

## VII. The action of the court below in sustaining the order of the Board after striking a key finding conflicts with decisions of this Court.

One of the eight criteria of a Communist-action organization under section 13(e) is the organization's use of secret practices "for the purpose of concealing foreign direction, domination, or control, or of expediting or promoting its objectives." The Board, in its original Report, found that petitioner engages in secret practices for both of the stated purposes (R. 117). In the first decision below, the court struck the purpose findings as not supported by the evidence (R. 2151). This holding made the subsection inapplicable. Nevertheless, the court affirmed the order of the Board.

The Modified Report, issued by the Board after the first remand, eliminated the original finding that one of the purposes of the secret practices was concealment of foreign control (R. 2585 ftn.). However, it retained the other purpose finding stricken by the court below, namely, that the secret practices were engaged in for the purpose of

[52] Petitioner's brief in the court below also assigned the Board's ruling as error.

promoting petitioner's objectives (R. 2598). The court below in its latest opinion adhered to its former ruling that this purpose finding was unsupported by the evidence (R. 2837). Nevertheless the court affirmed the Board's order.

The importance of the secrecy finding is clear. It relates to one of the eight standards of section 13(e). The Board devoted to it a fifteen-page subsection of the Modified Report (R. 2584-98). It is also the only one of the 13(e) standards on which the Board was able to cite evidence more current than 1940. The importance attached to the subject by the Board further appears from its retention of the finding even after the court below held it unsupported by the evidence.

The decision below thus affirmed the order of the Board while setting aside one of the major bases for the Board's action. This violated an important principle of administrative law established by the decisions of this Court. The function of a reviewing court is to determine whether the administrative findings are adequately supported by the evidence and whether the administrative order is supported by the findings. Once the court decides that the order rests in part on an unsupported finding, it must remand the case for administrative redetermination without considering whether the order could be sustained on other grounds. *S.E.C.* v. *Chenery Corp.*, 318 U. S. 80; *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469; *Colorado Wyoming Gas Co.* v. *F.P.C.*, 324 U. S. 626, 634; *F.P.C.* v. *Idaho Power Co.*, 344 U. S. 17, 20.

The court below justified its action on the ground that "the Board is entitled to adhere to its view on the point until our view of it has been tested in the Supreme Court" (R. 2837). Obviously, this eliminates the *Chenery* rule. The decision below, therefore, departs from a basic principle governing judicial review of administrative action.

## CONCLUSION

Certiorari should be granted, and the judgment below reversed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

October Term, 1959

No. ~~587~~ 12

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,

*Petitioner,*

*v.*

SUBVERSIVE ACTIVITIES CONTROL BOARD,

*Respondent.*

## APPENDICES TO PETITION FOR A WRIT OF CERTIORARI

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# APPENDIX A: OPINIONS BELOW

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 11850

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA, PETITIONER

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD, RESPONDENT

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On Petition for Review of Order of the Subversive Activities Control Board

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Decided December 23, 1954

*Mr. Vito Marcantonio* (who died subsequent to the argument), *Mr. John J. Abt*, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of Court, and *Mr. Joseph Forer* for petitioner.

*Miss Beatrice Rosenberg*, Attorney, Department of Justice, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of Court, *Mr. George R. Gallagher*, General Counsel, Subversive Activities Control Board, and *Mr. David B. Irons*, of the bar of the Supreme Court of Texas, *pro hac vice*, by special leave of Court, with whom *Mr. Frank R. Hunter, Jr.*, Assistant General Counsel, Subversive Activities Control Board, *Messrs. Harold D. Koffsky* and *Carl H. Imlay*, Attorneys, Department of Justice, and *Messrs. Leo M. Pellerzi* and *Ned O. Heinish*, Attorneys, Subversive Activities Control Board, were on the brief, for respondent. *Mr. William A. Paisley*, Attorney, Department of Justice, entered an appearance for respondent.

Before PRETTYMAN, BAZELON and DANAHER, Circuit Judges.

PRETTYMAN, *Circuit Judge:* This is a petition to review an order of the Subversive Activities Control Board, which holds that petitioner is a Communist-action organization within the meaning of the Subversive Activities Control Act of 1950[1] (Section 3)[2] and as such must register pursuant to the provisions of that Act.[3] The proceeding before the Board was initiated by a petition filed by the Attorney General. Testimony was received by a panel of the Board, the Attorney General presenting twenty-two witnesses and the Party-respondent three witnesses. Documentary evidence was introduced, briefs, proposed findings, and reply briefs were filed, and oral argument was heard. The panel issued a recommended decision, and exceptions to it were filed. Oral argument was had before the full Board, and the Board issued a report and the order here under review.

Petitioner's attack is in three parts, one on the Act itself, one on the order of the Board, and the third on "other reversible errors". In Part One of petitioner's brief the Act is asserted to be invalid upon four grounds. These are: The Act is an outlawry statute, designed to outlaw the Communist Party by legislative fiat; the Act violates the due process clause and is also a bill of attainder; the Act violates the constitutional prohibition against compulso · self-incrimination; and the Act violates the First Amendment. In Part Two of the brief the order of the Board is said to be invalid upon three grounds. The first ground is that the Board so applied the pro-

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[1] This Act is Title I of the Internal Security Act of 1950, 64 STAT. 987 *et seq.*

[2] 64 STAT. 989, 50 U.S.C.A. § 782.

[3] 64 STAT. 993, 50 U.S.C.A. § 786.

visions of Section 13(e)[4] of the Act as to magnify their irrationality. The second ground is that the Board violated the First Amendment. The third ground is that the Board members were subjected to extra-legal pressures and were biased. Part Three of the brief presents six additional assertedly reversible errors. They are: (1) The order is based upon conduct prior to the Act; (2) the Board's findings as to petitioner's pre-Act conduct are based upon incompetent and discredited evidence; (3) the findings with reference to the world Communist movement are not supported by evidence; (4) the findings with reference to the facts are not supported by a preponderance of the evidence; (5) the order must be set aside if it is invalid upon any ground; and (6) the appointments to the Board were made in violation of the Constitution.

We shall not follow petitioner's arrangement of its contentions, but in the course of our consideration we will deal with them all. Because this is a case of first impression, involving a new statute of importance, and because the points of both law and fact are many and vigorously pressed, our discussion will be at some length.

We look first at the statute. It opens with findings of the existence and the nature of "a world Communist movement" in a long recitation of fifteen paragraphs dealing with the nature of the movement abroad and in the United States. The Act defines a Communist-action organization. It declares certain actions to be unlawful. These actions are three in number: (1) for any person to agree with another person to contribute to the establishment in this country of a totalitarian dictatorship controlled by a foreign organization (except by constitutional amendment); (2) for an officer or employee of the United States to communicate to any agent of a foreign government or of any Communist organization any in-

[4] 64 STAT. 999, 50 U.S.C.A. § 792(e).

formation classified as affecting the security of this country; and (3) for any foreign or Communist agent to receive such information. The next two sections of the Act contain certain prohibitions directed to members of organizations registered under the Act. Then the Act requires the registration of Communist-action and Communist-front organizations, annual reports from such organizations, and registration of members of Communist-action organizations. It provides that the Attorney General keep public registers of Communist organizations. The Act prohibits certain privileges to registered organizations. It establishes the Board and provides for proceedings before it. It delineates a series of considerations which must be made by the Board. It provides for judicial review. Penalties for violation of the Act are provided. A series of amendments to other statutes, such as the Nationality Act of 1940 and the Alien Registration Act of 1940, are made. The last section of the Act is a separability provision.

## I

We reject the Government's contention that we must consider the statute as a registration measure only. The argument is that: The several statutory provisions are separable; the Board's power is to require registration and no more; its order does no more than that; therefore the statute and the order must be treated by us as involving registration and no more. It is true that the provisions of this statute are separable. The Act contains a separability section[5] reading:

> "SEC. 32. If any provision of this title, or the application thereof to any person or circumstances, is held invalid, the remaining provisions of this title, or the application of such provision to other persons or circumstances, shall not be affected thereby."

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[5] Sec. 32, 64 STAT. 1019.

And so, if one provision of this Act is invalid, its fall would not necessarily drag down the remainder of the Act; all other provisions would remain unaffected. But that is not the point of the Government's contention. The Government contends that each provision,[6] even if all are valid, must be treated separately from the others, as though each were an independent enactment unrelated to the others. The question whether one section of a statute can stand when other sections are invalid, and the question whether one valid section of a statute can be treated separately and independently of all other valid sections, are two different questions. The former would raise a separability question. The latter is governed by the elementary rule that a statute must be considered as a whole, in its entirety, all parts together.[7] The Government's argument is, in effect, that this statute is not an integrated unit but is a collection of separate measures. But we think this is not that sort of statute. The mandatory provisions, called "sanctions" in this litigation, in Sections 5, 6, 10 and 11,[8] are attached directly to registration. For example, if an organization is registered, or ordered to register, its mail must be marked and its broadcasts identified. We cannot strip the registration of its attachments. We cannot consider the registration requirement as though it were

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[6] The Government agrees that the disclosure of information required by Section 7(d) may well be considered with the registration requirement.

[7] CRAWFORD, STATUTORY CONSTRUCTION § 165 (1940); cases collected and cited at 50 AM. JUR., Statutes § 352.

[8] "Sanctions" were also imposed by Sections 22 and 25 upon alien members of a registered organization, but those sections have been superseded by the Immigration and Nationality Act of June 27, 1952, 66 STAT. 163, 8 U.S.C.A. §§ 1182, 1251, 1424, 1451.

bare, when it is not bare either in the statute or in factual consequences.

The Government relies upon *Electric Bond Co. v. Comm'n.*[9] That case involved the validity of those sections of the Utility Holding Company Act which required registration. It was urged that those sections and various other control provisions were an integrated whole and had to be considered together, as though interdependent one upon the other. The Supreme Court held that both the structure of the Act and the intent of Congress were clear that each provision had a purpose and effect of its own, that the provisions constituted groups of regulations, and that as a practical matter they could be sustained and enforced separately. It held that the statute was not an integrated unit. We think the statute now before us is an integrated unit, although invalid sections may be excised. We must treat the registration requirement as though it involves the sanctions in Sections 5, 6, 10 and 11.[10]

We later point out that Section 8, providing for registration by individual members of an organization, is not attached to organization registration but on the contrary applies when the organization does not register. We think it a separate measure from organization registration.

In the disposition of the problems presented to us we will follow the course indicated by the foregoing. We will consider the so-called "sanction" and other provisions which depend upon or flow from registration of the organization. In so far as such sections are valid we will treat them as integrated with the registration requirement and thus involved in the order before us. In so far as any of such provisions are invalid they may

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[9] 303 U.S. 419, 82 L.Ed. 936, 58 S.Ct. 678 (1938).

[10] See note 8, *supra*.

be excised, being severable, and the valid remainder will constitute the integrated unit. We will lay aside consideration of provisions which do not depend upon organization registration but are in lieu of or take effect in the absence of such registration. Factual bases for consideration of such sections are not before us.

We also quickly dispose of contentions by petitioner that the statutory procedures, as procedures, are inadequate or otherwise invalid. Full administrative hearing (Section 13), full findings (Section 13), and full judicial review (Section 14) are provided. There is no insufficiency in this respect so far as the statute is concerned.

## II

The basic provision of the statute, as it concerns the present litigation, is that a Communist-action organization must register with the Attorney General. Such an organization is defined by the statute [11] as follows:

> "(3) The term 'Communist-action organization' means—
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> "(a) any organization in the United States (other than a diplomatic representative or mission of a foreign government accredited as such by the Department of State) which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title; and
>
> "(b) any section, branch, fraction, or cell of any organization defined in subparagraph (a) of this paragraph which has not complied with the registration requirements of this title."

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[11] Sec. 3, 64 STAT. 989, 50 U.S.C.A. § 782.

Congress defined "the world Communist movement" in several paragraphs in Section 2 of the statute. It is enough for our purposes to quote paragraph (1):

> "(1) There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization."

For the purpose of testing the validity of the statute itself, as a statute, we must assume that the conditions with which it purports to deal actually exist. The question upon validity is: If the conditions recited in the statute as necessary requisites for action under the statute do actually exist, is the statutory plan for dealing with them valid? The question whether a certain organization is subject to the statute is a different and separate question.

We turn first to the general power of government in the premises. Antipathy to domination or control by a foreign government, or even to interference on the part of a foreign government, is a basic policy in this nation. It was one of the compelling reasons for the making of the Constitution in replacement of the Confederation. Frequent references were made to it in the Constitutional Convention. Mr. Madison went all the way back to the intrigues practiced among the Amphictionic Confederates by the kings of Persia as a citation of the danger of foreign interference.[12] It was the premise of the action of the Government, through President Wash-

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[12] 1 FARRAND, RECORDS OF THE FEDERAL CONVENTION 319 (1911).

ington, in respect to Citizen Genet. It ran through the War of 1812 and the Monroe Doctrine, the fight over the League of Nations, and down to such qualms as there are concerning the United Nations. This country has always unequivocally repudiated any action which has seemed to contain the element of foreign control over our governmental affairs. To declare unconstitutional a statute which would require the registration of an organization, substantially directed, dominated or controlled by a foreign government or by an organization such as the world Communist movement defined in this statute, would be to deny one of the purposes and one of the best-established policies of the government which was created by the Constitution. This is true whether or not the foreign government is coupled with a particular movement.

Self-preservation is a high prerogative of any sovereignty. "Security against foreign danger is one of the primitive objects of civil society," wrote James Madison in the Fortieth *Federalist* paper. And he continued, "It is an avowed and essential object of the American Union." It seems to us that, however high in priority the right of self-preservation is among the prerogatives of sovereign powers in general, it is peculiarly so in respect to the Federal Government presently established in this country. As we conceive the matter, the government established by our Constitution is an instrument for service, particularly for the protection of the security of the people whose servant it is; it is a working tool the value of which lies in its usefulness. It was established by the people themselves; it did not arise of its own accord; it was not imposed from without. Since it was created by the people for the security of the people, especially against foreign encroachment, it has supreme duties both to protect its own existence and to insure that unidentified efforts on behalf of foreign agencies devoted to its disestablishment do not occur. It seems clear beyond question that, if the conditions

described in this statute do actually exist, the presently existing Federal Government has power to prohibit within its borders activity of the sort described; *a fortiori* it has power to require identification of such activities and to impose conditions short of proscription. If there is a world movement for the destruction of all presently existing national governments and for the establishment of a world dictatorship under Communist auspices, and if a given organization in this country is actually under the control of the leaders of that movement and is acting to achieve its objectives, we perceive no reason why the presently existing government in this country should not prohibit the unidentified activity of such an organization or withdraw from its members protections and privileges otherwise afforded by that government. We perceive no basic reason why that government must stand helpless before activities such as those described in this statute.

## III

We come next to the place of the First Amendment in our problem. The initial inquiry is a general question whether the subject matter of the statute is such that impingement upon First Amendment rights may be imposed. If the answer to that query be affirmative, the next inquiry is a specific question whether the restrictions imposed by the statute are reasonably calculated to effectuate the remedial purposes being sought and so are valid although impingements upon the protected rights. We discuss this latter question later in this opinion.

We make the same assumption here that we made in *Barsky* v. *United States*.[13] We assume, without deciding, that this statute will interfere with freedoms of speech

[13] 83 U.S. App. D.C. 127, 167 F.2d 241 (D.C.Cir. 1948), *cert. denied*, 334 U.S. 843, 92 L.Ed. 1767, 68 S.Ct. 1511 (1948).

and assembly. It does not interfere in terms, but we think a realistic view must be taken of restrictions on First Amendment freedoms, and realistically the registration and sanction provisions will erect restrictions upon what otherwise might be a wider latitude of expression. The problem is whether the restrictions imposed are valid in this situation.

In the Party's argument an effort is made to cast the entire controversy over Communism into the form of an ideological or philosophical difference of opinion. It is true that there are such differences of opinion in respect to Communism, and controversy does rage in ideological and philosophical circles. But the problem before us deals with government, and government has intensely practical as well as theoretical aspects. Its aspects may be freely discussed in philosophical dissertations, but in the field of action a government must be realistic and factual. The right to free expression ceases at the point where it leads to harm to the Government. The epigram which has become classic as a designation of that point is "clear and present danger". When danger to government is clear and present, the right of unrestricted speech gives way as do the other basic rights of liberty and life. The "clear" in that epigram is not limited to a threat indubitably etched in every microscopic detail. It includes that which is not speculative but real, not imagined but actual. The "present" in the epigram is not restricted to the climactically imminent. It includes that which exists as contrasted with that which does not yet exist and that which has ceased to exist.

The activities of a world Communist movement such as that described in this statute and of organizations in this country devoted to its objectives constitute a clear and present danger within the meaning of any definition of the point at which freedom of speech gives way to the requirements of government security. The basic

theory of Communism that all presently existing nationalist governments be superseded by a stateless world organization under a proletarian dictatorship, the domination of one world power with all its assets by the Communists, the succession of national capitulations to the forces of that group, and the declared intentions of its leaders in respect to the remainder of the world, are reflected in the recitations in this statute and, moreover, are historic facts which cannot be disputed. We cannot at the present time treat the program and policies of the world Communist movement as a dialectic debate.

A few references will support the proposition. In the *Dennis* case [14] the Supreme Court considered the statute (known as the Smith Act) in which Congress made it unlawful for any person knowingly or wilfully to advocate, etc., the desirability, etc., of overthrowing any government in the United States by force or violence or to organize any society of persons who teach such overthrow. Holding that the power of Congress to protect the Government is beyond question, the Court said: "The question with which we are concerned here is not whether Congress has such *power*, but whether the *means* which it has employed conflict with the First and Fifth Amendments to the Constitution." [15] It held that the Government need not wait "until the putsch is about to be executed"; [16] that, if the Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required.

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[14] Dennis v. United States, 341 U.S. 494, 95 L.Ed. 1137, 71 S.Ct. 857 (1951).

[15] *Id.*, 341 U.S. at 501.

[16] *Id.* at 509.

An attempt to overthrow the Government by force, the Court held, even though doomed from the outset, is a sufficient evil for Congress to prevent, and a conspiracy to advocate, as distinguished from the advocacy itself, can be constitutionally restrained, because the existence of the conspiracy creates the danger.

Moreover, the right to unimpeded expression of views does not apply to unimpeded conduct. That the protection which surrounds speech does not encompass action is well established. *Thomas* v. *Collins* [17] is a sufficient citation. Thomas had been committed for contempt for violating an order of a Texas court. Texas by statute required labor union organizers to secure organizers' cards before soliciting members. A mass meeting had been arranged in a campaign to organize employees at a plant near Houston. Thomas was to address the meeting. He was served with an order of the court, which mentioned the prospective speech and enjoined him from soliciting memberships without an organizer's card. The Supreme Court held that "a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment." [18] But the Court went on to say:

> "Once the speaker goes further, however, and engages in conduct which amounts to more than the right of free discussion comprehends, as when he undertakes the collection of funds or securing subscriptions, he enters a realm where a reasonable

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[17] 323 U.S. 516, 89 L.Ed. 430, 65 S.Ct. 315 (1945).

[18] *Id.*, 323 U.S. at 540.

registration or identification requirement may be imposed." [19]

If the mere solicitation of funds for a lawful cause is sufficient conduct to validate the restrictive police power of a state, operation to achieve the objectives of a movement such as this statute describes is conduct sufficient to invoke federal regulatory power.

Clearly the aim of the statute before us is at action and conduct rather than at mere speech and assembly. A purpose to establish a totalitarian dictatorship, posited in paragraph (1) of Section 2 of the Act,[20] is itself a program of action rather than of mere discussion. Surely no one can be naive enough to believe that such a cataclysmic change in the system of government in this country could be accomplished without action as distinguished from words. And the terms used in paragraph (1) of Section 2 to describe the means adopted by the world Communist movement—infiltration into other groups, espionage, sabotage, terrorism—are terms of action. It is a program of action; it involves the Government. It can be met with action by the Government.

The opinions in *American Communications Ass'n* v. *Douds* [21] are pertinent. That case concerned paragraph 9(h) of the National Labor Relations Act as amended,[22] which denied the privileges of the National Labor Relations Board to labor organizations unless each officer filed an affidavit that he was not a member of the Com-

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[19] *Ibid.* To the same effect are Breard v. Alexandria, 341 U.S. 622, 641 *et seq.*, 95 L.Ed. 1233, 71 S.Ct. 920 (1951), and Giboney v. Empire Storage Co., 336 U.S. 490, 93 L.Ed. 834, 69 S.Ct. 684 (1949).

[20] Quoted *supra*.

[21] 339 U.S. 382, 94 L.Ed. 925, 70 S.Ct. 674 (1950).

[22] 61 STAT. 146 (1947), 29 U.S.C.A. § 159(h).

munist Party. Sustaining the constitutionality of the provision, the Supreme Court held, *inter alia*, that Congress has power to protect interstate commerce; that Congress had before it a mass of material which tended to show that Communists had infiltrated union organizations to make them a device by which commerce might be disrupted; that the remedy provided bore a reasonable relation to the evil which the statute was designed to reach; that Congress might reasonably find that Communists, unlike members of other political parties, represent a continuing danger of disruptive political strikes; that Congress, not the courts, is primarily charged with the determination of the need for regulation of activities affecting interstate commerce; that the legislative judgment that interstate commerce must be protected from a continuing threat of unlawful strikes is a permissible one; that the Act does not suppress belief nor prohibit those who hold beliefs from engaging in any above-board activity; and that the answer to the implication that if the statute were upheld the power of government over beliefs would be as unlimited as its power over conduct, is that that result does not follow "while this Court sits". The concurring opinions throw much light upon the problem.

It seems clear to us that, if Congress, in order to protect interstate commerce, can validly deny the privileges of union office to members of the Communist Party because of the program of that Party, it can, in order to protect the Government itself, impose restrictions upon adherents of a world Communist movement such as that described in this statute.

So we are of opinion that the field in which this statute lies is one in which Congress can impose restrictions upon First Amendment rights, and that the specific evil at which the statute is aimed is one which justifies remedial steps even though such steps are restrictions upon those rights. There remains the question whether

the statutory restrictions go beyond the bounds permitted to remedies for the evil here under attack. We postpone that discussion for the moment. See VI hereinafter.

## IV

Our next consideration is the protection of the Fifth Amendment. Two clauses are involved in the argument—the protections against being compelled to be a witness against oneself and against being deprived of liberty or property without due process of law.

It is said that the revelation of the membership list, required upon registration, would tend to incriminate the members under the Smith Act,[23] and that the revelation would therefore be in violation of the privilege against self-incrimination. But the membership records of an organization are not protected by the privilege. If a grand jury subpoenaed the membership roll of the Party, the custodian of the list, whether or not he was an officer or member, would be compelled to produce. This is made amply clear by *United States* v. *White*.[24] In that case a grand jury had subpoenaed an official of a labor union to produce certain union records. He declined upon the ground that they might tend to incriminate the union or himself as an officer or individually. He based his claim upon a statute which made it a crime to induce any person employed in certain work to "kickback" part of his compensation. The Supreme Court held that the privilege did not apply. It held, first, that the privilege is essentially a personal one, applying to natural individuals only. It then held that the papers which the privilege protects must be the private property of the person claiming the privilege, or at

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[23] Blau v. United States, 340 U.S. 159, 95 L.Ed. 170, 71 S.Ct. 223 (1950).

[24] 322 U.S. 694, 88 L.Ed. 1542, 64 S.Ct. 1248 (1944).

least in his possession in a purely personal capacity, and that individuals acting as representatives of a collective group are not exercising personal rights. The Court said it was unnecessary to determine whether the official was or was not a member of the union, because in any event he could not invoke the privilege. The decision and the opinion apply to the present case. If labor union records are not subject to the privilege in order to protect union members from criminal prosecution, the records of a Communist-action organization, as that term is defined in Section 3 of this statute, are not within the protection. The records of a political party are more "impersonal" than are the records of a labor union.

That the records of the Communist Party are covered by the ruling in the *White* case is established by *Rogers* v. *United States*.[25]

The Party argues that the registration provisions of the statute before us do not call for the production of books or records but require the preparation and submission of a registration statement. That statement must contain (Section 7(d)) the name and address of the organization, the names and last-known addresses of the officers and members, an accounting of moneys received and expended, and, in the cases of officers and members who are known by more than one name, such other names. The Party says that such a statement is protected by the privilege even though books and records are not. But membership lists and accountings for money furnished by an organization are reproductions of or extracts from organization records. And if the records can be compelled oral testimony "auxiliary to the production" can be compelled.[26] Whether such rec-

[25] 340 U.S. 367, 95 L.Ed. 344, 71 S.Ct. 438 (1951).

[26] United States v. Field, 193 F.2d 92 (2d Cir. 1951), *cert. dismissed*, 342 U.S. 908, 96 L.Ed. 679, 72 S.Ct. 303 (1952).

ords are kept formally or informally is immaterial. No additional explanatory testimony is required by this statute.

Moreover Congress could require Communist-action organizations to keep membership lists and accounting records. The opinion in *Bryant* v. *Zimmerman*[27] establishes that proposition. The provisions of this statute in effect make such a requirement. The Government requires many organizations to keep records. For example, it required all business houses to keep price records when prices were under Government control. To say that a Communist-action organization, as that term is defined in this statute, could not be required to keep records of its membership and its moneys is wholly untenable in our view. If these are matters of which organization records could be required, they fall squarely within the rule in the *White* case, *supra*.[28] As to a registration statement we think the *White* case applies.

Under the *White* case no privilege exists as to organization records—even for the individual who produces and signs them. But, even if the *White* case did not apply, the privilege would protect only the person called upon to sign or swear to the statement, and would protect him only in so far as his own name was involved. The privilege would not protect all members against one person's swearing that they are members, or protect one person against swearing that persons other than himself are members.[29]

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[27] 278 U.S. 63, 72, 73 L.Ed. 184, 49 S.Ct. 61 (1928). And see Shapiro v. United States, 335 U.S. 1, 92 L.Ed. 1787, 68 S.Ct. 1375 (1948), and cases there cited.

[28] Wilson v. United States, 221 U.S. 361, 55 L.Ed. 771, 31 S.Ct. 538 (1911). See discussion at 68 HARV. L. REV. 340 (1954).

[29] It might be urged that even if a person has no privilege against revealing his own membership he has a privilege against revealing the names of other members, since the

We assume for a moment, *arguendo*, that the *White* case does not apply here. We have, then, the problem of the individual who is required to sign the organization registration statement as an executive official of the Party. See Section 7(h) of the statute. By that act alone, even if he were to omit his own name from the list, he would be admitting that he is a member and an officer of the Party. We must make definite the question here posed. It is whether an order directing an organization to register is invalid because the officer who would be required to sign the registration statement would thereby be admitting a membership which might be a basis for a prosecution against him.

The statute provides (Section 4(f)) that the fact of a registration cannot be admitted in evidence in any criminal proceeding and that mere membership in a registered organization is not a violation of any criminal statute. No person called upon to sign is in danger of a prosecution which depends upon the bare fact of registration. So the protection here discussed is against the fringe effects (*e.g.*, a lead to evidence of some offense not premised upon mere membership) of signing the statement.

Several considerations are pertinent. In the first place the privilege against self-incrimination is a privilege which must be explicitly claimed. This rule has been firmly established.[30] We are urged to create an exception of law for the present case, but we see no justification for doing so. Then, since the privilege

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latter revelation might involve him in a conspiracy charge. The contrary was established by *Rogers* v. *United States*, *supra*.

[30] United States v. Monia, 317 U.S. 424, 427, 87 L.Ed. 376, 63 S.Ct. 407 (1943); Rogers v. United States, *supra*, 340 U.S. at 370; United States v. Murdock, 284 U.S. 141, 148, 76 L.Ed. 210, 52 S.Ct. 63 (1931).

must be claimed in order to bring it into play, it is by no means inevitable that a conflict would ensue between this order for registration and the privilege clause. We do not know as of now that the executive officers of the Party would claim the privilege; they might not. The only incriminatory results flowing from the act of signing would be corollaries to the fact of membership in the Party. This record shows that the Chairman and the Executive Secretary of the Party have never attempted to conceal their membership or their places of leadership. On the contrary they have proclaimed it often and publicly, both in writing and in speaking. We have no basis for assuming that they would claim protection against a mere revelation of their membership.

It is suggested to us that a statute or administrative order which places an individual in a position where he must claim his privilege in order to avoid incriminating himself is invalid. It is said claiming the privilege is incriminatory and so to force a person to claim the privilege is to force him to incriminate himself. We think the suggestion is not sound. One does not admit guilt by claiming the privilege; he merely says that an answer would tend to incriminate him, which means that it might involve him in a criminal proceeding.[31] Moreover, if the suggestion were good law many avenues of legitimate inquiry would be shut off. For example, the statutes imposing punishment for refusal to answer questions would be invalid, because they compel people to claim the privilege.

In the second place it is by no means certain that all the executive officers of our petitioner Party have any privilege in respect to the fact of their membership in

[31] This is the tenor of federal cases from United States v. Burr, 25 Fed. Cas. 38, No. 14,692e (C.C.Va. 1807), down to Hoffman v. United States, 341 U.S. 479, 95 L.Ed. 1118, 71 S.Ct. 814 (1951).

the Party. The precise provision of the Constitution is that no person shall be compelled to be a witness against himself in a criminal proceeding.[32] Practical considerations, obvious on the face of things, caused the courts to extend that language from its literal content to cover any compulsion to speak where the result would tend to incriminate. But an essential element in the latter doctrine is that the spoken matter would reveal or disclose something, or supply a needed confirmation of something suspected or only partly known. This is a note clearly struck in the cases dealing with the subject.[33] The Supreme Court said in the *Rogers* case:[34] "Since the privilege against self-incrimination presupposes a real danger of legal detriment arising from the disclosure, petitioner cannot invoke the privilege where response to the specific question in issue here would not further incriminate her."

The constitutional provision is not an empty legalism. It is a realistic barrier between the obligation of a citizen to give evidence and the injustice of inquisition by force. It was designed to achieve a precious protection. But, when it has no factual purpose under given circumstances, no reason exists for its application. If a required word does not in fact tend to incriminate the compelled witness, to interpose the barrier to the other

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[32] See Huard, *The Fifth Amendment—An Evaluation*, 42 GEO. L.J. 345 (1954).

[33] Hoffman v. United States, 341 U.S. 479, 95 L.Ed. 1118, 71 S.Ct. 814 (1951); Mason v. United States, 244 U.S. 362, 61 L.Ed. 1198, 37 S.Ct. 621 (1917); Heike v. United States, 227 U.S. 131, 143-4, 57 L.Ed. 450, 33 S.Ct. 226 (1913); Brown v. Walker, 161 U.S. 591, 600, 40 L.Ed. 819, 16 S.Ct. 644 (1896); United States v. Burr, 25 Fed. Cas. 38, No. 14,692e (C.C.Va. 1807); *Ex parte* Irvine, 74 Fed. 954 (C.C.S.D.Ohio 1896).

[34] *Supra*, 340 U.S. at 372-3.

wise proper process of the law would be to make a mockery of a valued instrument. We turn to the facts before us. Some of these executive officials have been convicted and have served their sentences under the Smith Act, because they organized the Party.[35] Some of them, as we have said, have many times in public print and places asserted membership in the Party. Two members of the National Committee of the Party came forward voluntarily and testified in the proceeding at bar, stating that they are members. In no event could one of these persons be compelled to take the stand as a witness against himself in a criminal case; but in a non-criminal proceeding could he be required to state something which would not in actual fact be a valuable link in a prosecution against him? We do not decide the point, but we note in connection with the suggestion now under discussion that another revelation of the membership in the Party of some of its executive officials may not constitute any real danger of legal detriment to them or tend further to incriminate them. Those officials of the Party may not now have a privilege in respect to their Party membership.

In the next place we do not know and cannot assume what the Attorney General might do under the new Immunity Statute[36] if an executive officer of an organization called upon to sign an organization registration statement had a valid right to the privilege and claimed it. Under that statute the courts have broad powers to grant immunity, upon application of the Attorney General, in proceedings before them involving violations of the statute here involved. We do not decide the

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[35] United States v. Dennis, 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494, 95 L.Ed. 1137, 71 S.Ct. 857 (1951).

[36] 18 U.S.C. § 3486(c), Pub. L. No. 600, 83d Cong., 2d Sess. (Aug. 20, 1954).

validity or meaning of the Immunity Statute, but we note the possibility that under this new act a person under compulsion to sign a statement which would tend to incriminate him might be granted immunity from prosecution.

In the next place, even if the suggestion under discussion were true, *i.e.*, even if one or all executive officials of an organization validly invoked the privilege, so that no one could be compelled to sign the registration, the utmost result would be that the statute and order would be unenforceable. We think they could not be held to be invalid merely because they might conceivably be unenforceable in a given case. The problem of the practicality of enforcement arises when enforcement efforts are made.

The foregoing considerations lead us to a clear conclusion upon the point. We have before us an order addressed to an organization as such; it is not addressed to any individual. We conclude that neither the statute nor the order requiring an organization to register can be held invalid because of the possibility that the person or persons required to sign on behalf of the organization might be called upon to claim a privilege against self-incrimination, or that such a claim if made would be sustained, or that an application for immunity would not be made or would not be validly granted, or that the statute or order might not be enforceable.

*Boyd* v. *United States*[37] is urged upon us as contrary to the foregoing views. But we do not so read that case. In the first place it dealt with personal, private papers, and the Court made that fact a key to the decision. The production of private papers and the production of organization papers "differ *toto coelo*", the Court said. In later cases the Court has emphasized

[37] 116 U.S. 616, 29 L.Ed. 746, 6 S.Ct. 524 (1886). For a discussion of the *Boyd* case see 8 WIGMORE, EVIDENCE § 2184 (3d ed. 1940).

that feature of the *Boyd* case.[38] In the second place the statute in that case authorized the compulsory production directly for use in a forfeiture case under a criminal statute. In the case before us, as we have sufficiently noted, the revealed membership is not *per se* a violation of any criminal statute, and the fact of the registration cannot be shown in evidence in any criminal case. We think the *Boyd* case is not in point here.

The information required on a registration statement as to members with more than one name poses a slightly different problem. In so far as the other names appear on organization records, they are covered by the foregoing. In so far as they are names of persons other than the person signing the statement, they have no privilege in his hands. Whether an individual known by several names, and called upon to sign or swear to a registration statement, is privileged to refuse to reveal his own other names is not before us; decision upon it must await the happening and a claim of the privilege.

*United States* v. *Daisart Sportswear*,[39] relied on by the Party, does not apply to the problem before us. It concerned the one individual who testified under compulsion and who claimed immunity.

The Party says the requirement of Section 8 of the statute that an individual member register himself as a member violates the protection against self-incrimination and so invalidates the statute. This section provides that

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[38] Wilson v. United States, *supra* note 28, 221 U.S. at 377; Essgee Co. v. United States, 262 U.S. 151, 158, 67 L.Ed. 917, 43 S.Ct. 514 (1923); Nathanson v. United States, 290 U.S. 41, 47, 78 L.Ed. 159, 54 S.Ct. 11 (1933); United States v. White, *supra*, 322 U.S. at 699; Shapiro v. United States, 335 U.S. 1, 33, 92 L.Ed. 1787, 68 S.Ct. 1375 (1948).

[39] 169 F.2d 856 (2d Cir. 1948), *rev'd on other grounds sub nom.* Smith v. United States, 337 U.S. 137, 93 L.Ed. 1264, 69 S.Ct. 1000 (1949).

an individual member must register himself as a member if an organization finally ordered to register fails to do so, or if upon registering and filing its membership list the organization fails to include the member's name. The section operates when an organization does not register or fails to register accurately. It is an alternate, rather than an attachment, to the registration of the organization. As such it poses a separate and independent problem from that posed by the requirement for organization registration. To reach the problem posed under Section 8 we would have to assume that the Party will not register if it is finally ordered to do so, or that if it registers its membership list will be incomplete. But we cannot make such assumptions. An opinion based upon them would be merely an advisory opinion, which we have no power to render. We have before us only an order requiring the organization to register. Section 8 is separable; if it were held to be invalid its fall would not affect organization registration; it is not before us; its validity is not involved in the order here under review. We do not consider any problems which might be posed by it.

## V

The due process of law clause is the basis for two contentions by the Party. The first is that the application of the sanctions to members of a registered organization deprives those members of rights and privileges solely because of their membership in an organization, and that this violates due process. The second contention is that the statute violates procedural due process.

We come first to the sanctions imposed upon members respecting Government and defense facility employment (Section 5(a)(1)) and applications for passports (Section 6). One must note that the condition upon which these sanctions apply is membership; it is not a mere listing as a member in a registration statement. One of

the two provisions refers to "any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final"; the other section contains similar language. Membership in an organization is of course a fact, and if one is actually a member he knows it. The statute before us requires that before these sanctions apply a member must have "knowledge or notice" that the organization has registered or been finally ordered to register. If the organization has registered as a Communist-action organization without an order to do so, it has voluntarily agreed that it is such an organization. If a final order has been entered against it, its nature as such an organization has been determined by full administrative proceedings, fully reviewed by the courts. So notice or knowledge of registration carries knowledge or notice of the nature of the organization; its nature has been either admitted or established. The statute provides for notice to every listed member of a registered organization, and it is to that notice that the statute here refers. If a member has either notice of the registration or knowledge of it through some other means, the sanctions apply to him. Thus there are three requisites for application of the sanctions to members: (1) The person must be a member; (2) the organization must be registered or finally ordered to register; and (3) the person must have knowledge or notice of the registration or order.

There is no novelty in the application of civil prohibitions to members of organizations. For example, an officer, director or employee of a stock investment house cannot be an officer, director or employee of any Federal reserve bank;[40] and a member of one political party cannot become a member of the Federal Communications

[40] 48 STAT. 194 (1933), as amended, 12 U.S.C.A. § 78.

Commission if a majority of that Commission are already members of that party.[41]

That a sanction may be imposed upon members of an organization which advocates the overthrow of the Government by force is established by *Adler* v. *Board of Education*[42] and *Wieman* v. *Updegraff*.[43] In the *Adler* case the Supreme Court held:

> "Membership in a listed organization found to be within the statute and known by the member to be within the statute is a legislative finding that the member by his membership supports the thing the organization stands for, namely, the overthrow of government by unlawful means. We cannot say that such a finding is contrary to fact or that 'generality of experience' points to a different conclusion. Disqualification follows therefore as a reasonable presumption from such membership and support." [44]

In the *Wieman* case an Oklahoma statute required state employees to take an oath that the affiant was not affiliated with any agency, etc., officially determined by the United States Attorney General to be a subversive organization. The Supreme Court held the statute invalid. The Court distinguished *Garner* v. *Los Angeles Board*,[45] the *Adler* case, and *Gerende* v. *Election Board*,[46] on the grounds that in each of those cases knowledge on the part of the employee was implicitly or explicitly required. In *Wieman* the Court found that the oath would exclude persons solely on the basis of organizational

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[41] 48 STAT. 1066 (1934), as amended, 47 U.S.C.A. § 154.

[42] 342 U.S. 485, 96 L.Ed. 517, 72 S.Ct. 380 (1952).

[43] 344 U.S. 183, 97 L.Ed. 216, 73 S.Ct. 215 (1952).

[44] *Supra*, 342 U.S. at 494-5.

[45] 341 U.S. 716, 95 L.Ed. 1317, 71 S.Ct. 909 (1951).

[46] 341 U.S. 56, 95 L.Ed. 745, 71 S.Ct. 565 (1951).

membership regardless of their knowledge concerning the organization. It said: "Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power." [47]

In *Bryant* v. *Zimmerman, supra,* the Supreme Court upheld the validity of a requirement that certain organizations report their membership lists against an attack based upon the due process clause. The discussion is apt here.

We think the requirement in this statute that a member have knowledge or notice of the registration of the organization, which means that he has knowledge or notice of the nature of the organization, before these sanctions apply to him, satisfies the due process clause so that sanctions could be premised upon membership under the doctrine of the *Adler* and similar cases.

A special argument is made by the Party in respect to the denial of passports by Government officers under Section 6(b). That section provides that officials shall not issue a passport to an individual if they know the individual is a member of a registered Communist-action organization or if they have reason to believe the individual is a member of such an organization. The latter clause gives rise to the problem. Under it an official may deny the passport if he merely "ha[s] reason to believe". If that provision is valid, knowledge on the part of the individual as to the nature of the organization to which he is supposed to belong would not be a requisite for denial of the passport. We do not pass upon the point, because such a situation is not before us; it does not depend upon registration but upon considerations not necessarily even factual. The provision is severable.

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[47] *Supra,* 344 U.S. at 191.

In this part of its argument the Party groups with the sanctions just discussed the penalty provided by Section 15(a)(2) for individuals who fail to comply wi an individual's obligation to register. But such a penalty does not flow from organization registration; it is an alternate provision, not before us. We do not consider it. We postpone to Part VI of this opinion consideration of the provisions relating to aliens and denaturalization.

We have next the question of procedural due process of law. This general question involves several specific questions. Is procedural due process of law afforded: (1) An organization from which registration is demanded? (2) An organization faced with sanctions to be imposed upon it because it is registered? (3) An individual listed, or proposed to be listed, as a member of a registered organization? (4) An individual threatened with sanctions because of membership in a registered organization? (5) An individual threatened with criminal prosecution by reason of membership in a Communist-action organization?

We have already noted that the provision for the registration of an organization, which involves a determination of its nature, complies with procedural due process. In so far as sanctions—identification of mail and broadcasts and denial of tax benefits—imposed upon an organization, registered or ordered to register, are concerned, the due process afforded by the procedure required for compulsory registration constitutes due process as to the results inherent in the registration and applicable to the registering organization as an organization. In so far as the listing of a name of an individual is concerned, the statute contains detailed provisions whereby one who has been listed erroneously or who leaves the organization can secure the removal of his name from the list before the list is made public. It provides for an individual notice of a listing (Section 7(g)), an application to the Attorney General (Section

13(b)), an appeal to the Subversive Activities Control Board (Section 7(g) and Section 13(b)), and review by the courts (Section 14). In so far as the rights of a person who denies the fact of membership are concerned, not only the foregoing procedure in respect to the listing but all other procedures ordinarily open to a person asserting such a denial are left open in this statute." This statute does not negate any procedural rights otherwise available to a person entering upon a factual controversy. We do not attempt to determine here the validity of the administrative procedures ordinarily open to Government employees and to applicants for passports. This statute leaves all such procedures available for the determination of a disputed claim that a person is a member of a registered organization. Neither the Lloyd-LaFollette Act,[49] which protects Government employees, nor the Secretary of State's procedural passport regulations[50] are repealed or amended by this Act. This statute itself imposes no restriction upon procedural due process. Whether some other statute or regulation does so is not now before us. Moreover the courts are open

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[48] The Act as originally passed provided (Sections 5(c) and 6(c)) that a person who is listed on a membership list in a registration statement and who inaugurates a contest against such listing should not be deemed to be a member of an organization for purposes of the sanctions during the period of the contest and until he has lost and his name has been published as a member. Those provisions were repealed by Section 7(c) of the Communist Control Act of 1954, 68 STAT. 775, 778, and so one who is a member is subject to the sanctions without the interval of immunity. But the presence of such an immunity period is not a due process requirement. Due process is afforded if a person has full opportunity to get off a list and full opportunity to prove he is not a member if he is asserted to be one and thus liable to sanctions or penalties.

[49] 37 STAT. 555 (1912), as amended, 5 U.S.C.A. § 652.

[50] 22 CODE FED. REGS. Part 51.

for an ousted Government employee,[51] and would be open to a person denied a passport under the requirement of this statute. The reviewability of the State Department's denial of a passport in ordinary cases is a disputed question [52] because of the official discretion involved. The statute before us neither adds to nor detracts from that general reviewability. But certainly, so far as a denial might be premised upon a mandatory requirement of this statute, *e.g.*, Section 6, the courts would be open for review of the action under the statute. In so far as due process is required preliminary to any damage or inconvenience caused by the publication of a listing of a person's name as a member, the statute protects him from publicity until he has exhausted the process, already described, available to test the presence of his name on the list. In so far as criminal prosecutions are concerned, the statute (Section 4(f)) provides: "Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of • • • any • • • criminal statute. The fact of the registration of any person • • • as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution • • • for any alleged violation of any • • • criminal statute."

Thus it seems to us that procedural due process is afforded in each of the several situations presented to us for consideration in this respect.

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[51] See Roth v. Brownell, 93 U.S. App. D.C. —, 215 F.2d 500 (D.C.Cir. 1954), *cert. denied*, 23 U.S.L. WEEK 3108 (U.S. Oct. 25, 1954).

[52] Note, *Passports and Freedom of Travel: The Conflict of a Right and a Privilege*, 41 GEO. L.J. 63 (1952); Comment, *Passport Refusals for Political Reasons: Constitutional Issues and Judicial Review*, 61 YALE L.J. 171 (1952).

## VI

We come now to examine severally, in respects not already discussed, the restrictions (or so-called "sanctions") imposed by the statute upon registered organizations and their members. This includes the question whether each sanction is reasonably related to the substantive evil at which Congress was aiming, a pertinent inquiry under the First Amendment. See III hereinabove.

When a Communist-action organization is registered the following consequences ensue: (1) No member with knowledge or notice of the registration can have non-elective Government employment or employment in a defense facility (Section 5); (2) no member can obtain a passport (Section 6); (3) organization mail and broadcasts must be identified as originating with a Communist organization (Section 10); (4) alien members are excludable, deportable, and ineligible for naturalization (Sections 22 and 25);[53] (5) tax deductions and exemptions are withdrawn (Section 11); and (6) certain members are subject to denaturalization (Section 25).[54]

Preliminarily we note that the requirement for registration in and of itself presents no difficulty. It is no more than we customarily require of many organizations, such as lobbyists[55] and foreign agents,[56] and even of doctors, lawyers, restaurants and barbers, who are required

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[53] Carried forward in Sections 212(a)(28)(E), 241(a)(6)(E), and 313(a)(2)(G) of the Immigration and Nationality Act of June 27, 1952, 66 STAT. 185, 205, 240, 8 U.S.C.A. §§ 1182(a)(28)(E), 1251(a)(6)(E), 1424(a)(2)(G).

[54] Carried forward in Section 340(c) of the Immigration and Nationality Act of June 27, 1952, 66 STAT. 261, 8 U.S.C.A. § 1451(c).

[55] 60 STAT. 841 (1946), 2 U.S.C.A. § 267. See United States v. Harriss, 347 U.S. 612, 98 L.Ed. —, 74 S.Ct. 808 (1954).

[56] 52 STAT. 632 (1938), as amended, 22 U.S.C.A. § 612.

to register and obtain licenses. The requirement for an accounting of moneys received and expended is no more than is required of any political party,[57] and since petitioner claims to be a political party we see no invalidity in the application to it of such a requirement. The requirement that a political organization and its members is similar to the customary requirement in the states that persons participating in the activities of a political party, such as primaries, conventions, etc., register publicly as members.

The provisions respecting employment by the Government are in Section 5 of the statute. Congress has forbidden political activity to Government employees, and the Supreme Court has sustained the enactment.[58] The power in this respect as it concerns members of Communist organizations was specifically sustained in *Adler* v. *Board of Education, supra*, as to the public schools. The general power over executive employees was discussed at length in *Bailey* v. *Richardson*.[59]

The restrictions upon Government employment are directly related to the substantive evil at which Congress was aiming in this statute. Infiltration of government by world Communist adherents is one of the specified evils recited by the Congress, and certainly a prohibition of Government employment to such adherents is a direct attack upon that evil. Indeed we can think of no more direct relationship than that which would exist between the objectives of the world Communist movement, as it is described in this statute, and the occupation of Government positions by members of a Communist-action organization.

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[57] 43 STAT. 1071 (1925), 2 U.S.C.A. § 244.

[58] United Public Workers v. Mitchell, 330 U.S. 75, 91 L.Ed. 754, 67 S.Ct. 556 (1947).

[59] 86 U.S. App. D.C. 248, 182 F.2d 46 (D.C.Cir. 1950), *aff'd*, 341 U.S. 918, 95 L.Ed. 1352, 71 S.Ct. 669 (1951).

We think the considerations which validate power to forbid Government employment likewise support the power to forbid defense facility employment. The latter employment is sensitive business, and it would be sheer folly to say that the Government cannot close the gates of such facilities against those who are knowingly members of organizations under the dominion of a foreign government.

The provision respecting passports is in Section 6 of the statute. A passport is addressed to foreign governments and requests for the holder "permission to come and go as well as lawful aid and protection."[60] An American passport, says Hackworth,[61] "indicates that it is the right of the bearer to receive the protection and good offices of American diplomatic and consular officers abroad and requests on the part of the Government of the United States that the officials of foreign governments permit the bearer to travel or sojourn in their territories and in case of need to give him all lawful aid and protection." Only rudimentary reasoning is necessary to a conclusion that the Government may validly decline to confer its diplomatic protection upon, and to request foreign governments to give aid and protection to, a member of an organization operating primarily to achieve the objectives of a world movement such as the Communist movement is defined to be in the statute. Surely a government owes no duty of protection to those who, dominated by a foreign organization, seek its overthrow. Congress can narrow the scope of the passport privilege, so long as the limitation is reasonable.

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[60] United States v. Browder, 113 F.2d 97, 98 (2d Cir. 1940), quoting BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD.

[61] 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW c. 10, § 259 (1942).

Under current rules a person must have a passport in order to leave the United States to go outside this hemisphere.[62] It is urged that that is a restriction upon liberty and is without due process because unrelated to the congressional purpose. But we need not, and do not, enter upon consideration of that question, because, whatever else a passport may validly do, it serves the purposes enumerated by Hackworth, *supra*, and that feature is enough to support denial. We think this provision is directly related to the congressional purpose in this statute and is otherwise valid.

The provision respecting the identification of mail and broadcasts (Section 10) applies to a registered organization, not to the individual members as such. It requires the mail of such an organization to bea the label "Disseminated by ————, a Communist organization". It requires similar identification of broadcasts. No censorship of content is imposed. Congress has frequently imposed limitations upon the use of the mails[63] and on broadcasting.[64] All paid broadcasting must be identified by the name of the person paying for it.[65] So far as our present petitioner is concerned, there seems little to choose between identification as "The Communist Party", as it would be identified without the statute here involved, and

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[62] 22 CODE FED. REGS. §§ 53.1, 53.2.

[63] 25 STAT. 874 (1889), 39 U.S.C.A. § 256; REV. STAT. § 3224, as amended, 39 U.S.C.A. § 259; REV. STAT. § 4041, as amended, 39 U.S.C.A. § 732; 52 STAT. 114 (1938), 15 U.S.C.A. §§ 52, 53; 48 STAT. 77 (1933), as amended, 15 U.S.C.A. § 77e.

[64] 48 STAT. 1088 (1934), as amended, 47 U.S.C.A. § 315; 48 STAT. 1089 (1934), 47 U.S.C.A. § 317. See Trinity Methodist Church, South v. Federal Radio Comm'n, 61 App. D.C. 311, 62 F.2d 850 (1932), *cert. denied*, 288 U.S. 599, 77 L.Ed. 975, 53 S.Ct. 317 (1933).

[65] 48 STAT. 1089 (1934), 47 U.S.C.A. § 317.

as "a Communist organization", which is what this statute requires. Moreover broadcasting is permeated with a public interest,[66] and surely the people are entitled to know when an organization which falls within the definition of a Communist-action organization in this statute is addressing them over the air. All political parties identify themselves on the air; otherwise their appeals are useless. The only conceivable reason for anonymity of political broadcasting is a purpose of deception, and that purpose is enough to validate a requirement of identification.

All publications relating to candidates for elective office in the Federal Government must be identified, showing the names of the persons, associations, committees and corporations responsible for the publication or distribution, under heavy penalties for failure to do so.[67] Newspapers must plainly mark as "Advertisement" all editorial or other reading matter for which a consideration is received.[68] All agents of foreign governments must identify "political propaganda" sent through the mails.[69] It is difficult for us to perceive much substance in the claim that the provisions for the identification of the mail and broadcasts of an organization finally required to register under this Act are invalid. First principles protect the right of the public to be advised of the identity of an organization found to be promoting the objectives of the world Communist movement, as that movement is here defined.

The provisions respecting aliens, which were in Sections 22 and 25 of the statute before us, have been carried

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[66] National Broadcasting Co. v. United States, 319 U.S. 190, 226-7, 87 L.Ed. 1344, 63 S.Ct. 997 (1943).

[67] 62 STAT. 724 (1948), as amended, 18 U.S.C. § 612.

[68] 37 STAT. 554 (1912), 39 U.S.C.A. § 234.

[69] 52 STAT. 632 (1938), as amended, 22 U.S.C.A. § 614.

forward into the 1952 Immigration and Nationality Act.[70] Under the latter provisions sanctions apply to aliens who are members of organizations registered under the Act now before us. We therefore consider them. That membership in the Communist Party is a valid ground for the deportation of an alien is settled by *Galvan* v. *Press*,[71] and that it is a valid ground for denial of bail to an alien pending deportation proceedings is settled by *Carlson* v. *Landon*.[72] There is nothing on the subject to be added to the opinions in those cases. They rest upon the power of Congress over the admission of aliens and the rights of aliens to remain in this country.[73] The rationale upon which the Supreme Court there validated the proscription of alien members of the Communist Party applies directly to members of any Communist-action organization as defined in this statute. We think those rulings govern exclusion and naturalization as well as deportation and bail.

Section 25 of the statute before us[74] also contained a provision respecting denaturalization, which was carried forward as Section 340(c) of the Immigration and Nationality Act of June 27, 1954.[75] It established as *prima facie* evidence[76] in a denaturalization proceeding proof that the person within five years of naturalization became

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[70] See note 53 *supra*.

[71] 347 U.S. 522, 98 L.Ed. —, 74 S.Ct. 737 (1954).

[72] 342 U.S. 524, 96 L.Ed. 547, 72 S.Ct. 525 (1952).

[73] See Shaughnessy v. Mezei, 345 U.S. 206, 97 L.Ed. 956, 73 S.Ct. 625 (1953).

[74] Amending Sec. 305(d) of the Nationality Act of 1940.

[75] See note 54 *supra*.

[76] The full phrase is "prima facie evidence that such person was not attached to the principles of the Constitution of the United States and was not well disposed to the good order and happiness of the United States".

a member of, among others, a registered Communist-action organization. The necessities of proof in a denaturalization case involving foreign allegiance are spelled out in *Knauer* v. *United States*.[11] A denaturalization does not flow automatically from registration; a regular proceeding for the purpose must be brought. No such case is before us, and we therefore express no views upon the problem. Its solution must await a specific test.

The sanctions with reference to tax exemptions and deductions, which are in Section 11 of the Act, forbid income tax deductions for contributions to a registered organization and deny income tax exemptions to such organizations. These allowances and denials fall within the field of congressional grace so long as a reasonable basis appears. This is too well established to require citation. We think these provisions clearly valid.

Concluding, then, our discussions of the several provisions applicable to registration and to registered organizations and their members we find that they are reasonably related to a remedy for the evil depicted in this statute, that the impingement upon First Amendment rights which their effect is not beyond that permissible for the statutory purpose, and that the provisions are not violative of Fifth Amendment rights.

## VII

The Party makes a number of additional attacks upon the statute as a whole. It says it is an "outlawry" statute. But many valid statutes declare specified activities to be unlawful. The critical questions concerning a so-called "outlawry" statute are whether the matter prohibited is eligible for prohibition and whether the procedures provided protect the rights of those involved. We have discussed those features of this statute.

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[11] 328 U.S. 654, 90 L.Ed. 1500, 66 S.Ct. 1304 (1946).

The fact, if it be a fact, that no organization could survive registration under the Act is no detriment to the validity of the statute. In the first place, if an organization is actually operating primarily to achieve the objectives of a foreign organization dedicated to the establishment of a totalitarian dictatorship in this country by other than constitutional processes, we perceive no constitutional obstacle to its outlawry. In the second place the inability of an organization to survive registration under this Act arises, if it does arise, not from the terms of the statute but because of the extreme unpopularity of the revealed foreign domination, of world dictatorship, and of the Communist world leadership. This statute does not forbid any person to be a member of the Party, but the Party says that when its members are identified their livelihood and liberty will be jeopardized. But a statutory requirement is not invalid merely because of results which may flow from the unpopularity of the cause affected. Popularity of men and movements varies with time and place. In some periods of our history friendship with Great Britain was unpopular, and at other periods friendship with Russia was popular. It would indeed be senseless to propose that popular causes could be subjected to statutory restrictions but that unpopular ones could not be. Unpopular causes are entitled to the privilege of the public arena, but they must sustain the severe burdens of that arena. So long as they are not denied the privilege, they cannot complain that their unpopularity frustrates them or that the observing public visits upon them its displeasure. Stoutness is indeed a requisite for those who would contest in that arena.

Petitioner urges that the statute contains a predetermination of its nature as a Communist-action organization—a built-in verdict against it. We find no such predetermination. Petitioner is not mentioned. Whether it does or does not fall within the description in the

statute is a matter of evidence, just as it is in respect to every other respondent to a petition before the Board. A statute is not necessarily null merely because it fits a known person. Many valid statutes do.

Petitioner says the statute is a bill of attainder and therefore void. We think it is not. The opinion in the *Garner* case [78] discusses and disposes of the point in so far as it relates to Government employ. The remainder of the point is covered by that part of the opinion in *Douds* in which bills of attainder are discussed.[79] Referring to the familiar cases the Court said:

> "But there is a decisive distinction: in the previous decisions the individuals involved were in fact being punished for *past* actions; whereas in this case they are subject to possible loss of position only because there is substantial ground for the congressional judgment that their beliefs and loyalties will be transformed into *future* conduct."

We think that doctrine applies to the case at bar.

## VIII

The next main subject in our consideration of the statute itself is our petitioner's attack upon Section 13(e). That section enumerates eight evidentiary considerations which it requires of the Board in determining whether an organization is Communist-action within the statutory definition. Petitioner says the section is invalid for lack of due process. It says the provisions are irrelevant, vague, and without any rational relation to the derivative facts to be established.

The eight subparagraphs of Section 13(e) direct the Board to take into consideration "the extent to which" an organization does certain things. Roughly paraphrased these are the extent to which

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[78] *Supra*, 341 U.S. at 722-3.

[79] *Supra*, 339 U.S. at 413-14.

(1) its activities are performed pursuant to directives or to effect the policies of the foreign government or organization in which is vested control of the world Communist movement;

(2) its policies do not deviate from those of such foreign organization;

(3) it receives financial or other aid from such foreign organization;

(4) it sends representatives to a foreign country for instruction in the policies or tactics of the world Communist movement;

(5) it reports to such foreign organization;

(6) its leaders are subject to the disciplinary power of such foreign organization;

(7) it operates on a secret basis for the purpose of concealing foreign domination; and

(8) its leaders consider allegiance to the United States subordinate to obligations to such a foreign organization.

The Party denominates these eight specifications "tests" and, having thus characterized them, attacks them severally and collectively.

The Party says that by the definition in Section 2 of the statute the world Communist movement engages in espionage, treason, etc., whereas none of the eight "tests" to be applied to a domestic organization involves any of those offenses; and that thus the whole of Section 13(e) is irrational. The argument misconceives both the text and the purpose of the section. The inquiry with which the statute as a whole is concerned is in two separate parts: (a) What is the world Communist movement? That is dealt with in Section 2. (b) Is a certain domestic organization under the domination and control of that movement, and does it operate primarily to achieve its objectives? The problem at the first stage of the process is the nature, etc., of a world movement known as Communism. The problem at the second stage of the process is simply whether a named organization operates to

achieve the objectives of the world Communist movement, whatever the nature of that movement may be. The so-called "tests" in Section 13(e) are directed at the latter problem, and it alone. Thus construed, as it obviously was intended to be, the section is apt and cogent. We think the division of the inquiry into two steps is a rational one. Certainly it is followed in many types of inquiry.

The Party says the section is too vague to be valid. We find no such infirmity.

The Party says none of the subparagraphs in Section 13(e) specifies how much of any described activity requires a finding of, for example, foreign control; there is no quantitative standard. This argument is an attempt to make out a formula in the statute. But there is no formula. The ultimate finding is to be derived as a conclusion from basic findings. The Board may find full activities in respect to some of these matters, partial activities in respect to some, and a complete absence of activity in respect to some. The Board may make findings in other relevant respects not here enumerated. Having made these several findings, the Board must distil from the composite an ultimate finding whether the respondent is or is not under foreign control, etc. There is nothing unusual about this process; indeed it is quite elementary. It is a familiar process of adjudication based upon fact-finding. Frequently a case discloses numerous basic facts established by the evidence, upon which the trial tribunal exercises its reasoning power and deduces a derivative or ultimate finding. So in the present case.

Moreover this catalog in Section 13(e) is not exclusive. These eight items must be considered, but others which are relevant and of material effect and are offered in competent form must be considered also. Nothing in the statute hints at an exclusive criterion. The Board should, and so far as we can tell did, admit and consider whatever is competent, relevant and material.

The Party argues that evidence merely of the extent to which a respondent does these specified things does not prove or tend to prove any derivative fact in issue, *e.g.*, domination by a foreign government. The argument is clearly without merit. High blood pressure does not prove heart disease, but any competent doctor examining a suspected bad heart would determine and take into consideration the patient's blood pressure. In legal parlance, evidence must be relevant, *i.e.*, must relate to the issue, and must be material, *i.e.*, must have some weight as proof, but there is no legal doctrine that each separate item of evidence must be conclusive.

Somewhat contrary to the contentions just discussed, the Party asserts that Section 13(e) establishes presumptions and that the presumptions are irrational. We find no presumptions, and we are at a loss as to how one would spell out a presumption from the text. As aids to an ultimate conclusion the Board is directed to take into consideration the extent to which a respondent does certain things. The statute says nothing about presumptions. As we have just pointed out, it does not even specify what quantum or what character of evidence shall produce a given result. The section is a catalog of some basic considerations. There are no statutory presumptions.

The Party argues that under the statutory definition in Section 3 the basic inquiry is whether an organization operates "primarily" to advance the objectives of the world Communist movement, and that the mere "extent to which" the organization operates to advance such objectives is an irrational and irrelevant test. We are not told how the Board could ascertain whether a respondent operated "primarily" in a given manner without taking evidence upon the extent to which it so operated, and we are unable to discern how it could do so.

We next turn to the contentions in respect to the subparagraphs separately, avoiding as much as possible

repetition of the general contentions already discussed.

The Party says that the "directives and policies test" in Section 13(e)(1) is irrational. It says that the statutory definition of a Communist-action organization in Section 3(3) refers only to organizations which pursue objectives which are "evil", whereas the test section refers to any objectives, good or bad.

We take it that by "evil" the Party means immediate objectives which are morally wrong. In our view the objectives here referred to need not necessarily be "evil" in that sense. If the organization in question is dominated by a foreign government or organization, as the definition prescribes, and operates primarily to advance the objectives of the world Communist movement, as the definition describes that movement, Congress may well impose upon it the sanctions of this Act, even if the active or immediate objectives are not "evil". Some of the objectives of the Soviet Union and of the world Communist movement may be excellent, even laudable; as to that we express no opinion here. If the Soviet Union has policies of peace and racial equality before the law, as the Party says it has, those are laudable objectives. Our Government has those objectives, as do many other governments. The crucial factor in the statute before us is the aim, spelled out in detail, of the world Communist movement to disestablish our system of government. Our Government may well oppose the establishment in this country of a totalitarian dictatorship of the sort described in the definition, even if such a dictatorship does not meet the definition of "evil" or even if it has many beneficent features.

The Party says the "non-deviation test" in Section 13(e)(2) is vague and irrational. We think it difficult to conceive of a more proper standard for the purpose. In an inquiry as to the domination of one organization by another, the extent of the deviation one from the other in views and policies is both relevant and material; indeed it would be one of the necessary considerations. If

there were no similarity, domination would be negatived almost conclusively, whereas, if there were identity, domination would be a definite possibility, if not a certainty. Petitioner says the test includes non-deviation respecting policies calculated to secure peace and welfare as well as others characterized as evil. The argument misses the point of this section of the statute. The point is foreign domination; identity of purpose and policy, whether good or bad, is clearly relevant in the proof. Indeed the Board might conclude on this particular phase of its inquiry concerning some domestic organization that it adheres only to the admirable policies of the foreign organization, a partial non-deviation negativing domination. But the possibility of such a conclusion does not nullify the propriety of the inquiry.

Petitioner says that under the non-deviation test a respondent organization could prove its freedom from foreign domination only by proving its failure to adopt any views contrary to those of the Soviet Union. But this paragraph is not limited to absolute identity of views. We repeat once more that these subparagraphs do not constitute a formula for ascertaining foreign domination; they constitute a catalog of required considerations. They involve "the extent to which"—not "whether". So there is no merit in this contention of the Party. Furthermore, even if the statute required consideration of total identity, the provision would be valid, because, if an organization never had any policy which differed from the policies of the world Communist movement, that fact would certainly be pertinent to an inquiry into the relationship between the two. It might not be conclusive, but it would be pertinent.

Subparagraph (3) of Section 13(e) directs the Board to consider the extent to which a respondent receives "financial or other aid" from the foreign government which directs and controls the world Communist movement. The Party says the inclusion in the test of "or

other aid" vitiates it. But we think not. Any type of aid received by one organization from another is pertinent to the question whether the one operates to achieve the objectives of the other. Petitioner says that, while it is an obvious truth that a contributor has a lever by which to shape the policies of the contributee, the terms of the donation are the relevant consideration and the bare fact of the donation is irrelevant. We agree that the terms of a contribution are more, even much more, material to the issue of intended influence by means of the gift, but the bare fact of the gift is not irrelevant to the consideration. It does not have the persuasive weight carried by the terms imposed by the donor, but the fact of the gift is certainly an admissible item of proof. Of course it may be explained away, as may any of the statutory specifications of considerations.

The fourth subparagraph under Section 13(e) provides that the Board shall consider the extent to which a respondent sends representatives to foreign countries for instruction in the principles or policies of the world Communist movement. The Party says that the section is invalid, because it fails to require that the Board also consider whether respondent is obliged to or does conform to what its representatives were taught. Certainly, if the Board were to make an ultimate finding of foreign domination upon the basis of bare evidence that respondent sent agents abroad, the Party would be perfectly correct upon the point. But the argument does not go to the validity of the subparagraph as such, but merely points to possible rebuttal proof and to a contention which might be addressed to findings made on this item in a particular case.

We think we need not prolong this opinion by discussing in detail the contentions made by our petitioner, the Party, in respect to the remaining four of the subparagraphs of Section 13(e). They are variations of contentions already discussed, and what we have already said applies to them.

## IX

The Party says that the order of the Board is invalid because the original appointments of members to the Board were in violation of the Constitution. It says no vacancy had "happened" when the appointments were made, that vacancies did not happen during a recess of the Senate, and that in any event the appointments expired January 2, 1951. The sequence of dates is as follows:

| | |
|---|---|
| September 23, 1950 | Subversive Activities Control Act approved. |
| September 23, 1950 | Congress adjourned or recessed to a day certain. |
| October 23, 1950 | President made recess appointments. |
| November 27, 1950 | Congress reconvened. |
| November 27, 1950 | President transmitted nominations. |
| January 2, 1951 | Congress adjourned *sine die*. |
| April 23, 1951 | Hearings began before panel of three Board members. |
| August 9, 1951 | Senate confirmed nominations. |
| October 20, 1951 | One member retired from panel. |
| July 1, 1952 | Hearings before panel concluded. |
| July 28, 1952 | Briefs and proposed findings filed. |
| August 6, 1952 | Reply briefs filed. |
| August 14, 1952 | Argument before panel. |
| October 20, 1952 | Panel issued recommended decision. |
| November 21, 1952 | Exceptions filed. |
| November 24, 1952 | Exceptions filed. |
| January 7, 1953 | Oral argument before full Board. |
| April 20, 1953 | Report and order of the Board issued. The action of the Board was unanimous, four members signing the order. There was then one vacancy in the membership. |

We think we need not discuss this contention of petitioner at length. The minimal effect of any invalidity of appointment upon the final order is obvious from the foregoing table. The appointments were indubitably valid from August 9, 1951. The taking of evidence, which began April 23, 1951, did not conclude until July 1, 1952. The evidence was taken by a panel of members, but it could have been taken by a hearing examiner (Section 13(c) of the Act) and not by a member at all. If prior to confirmation these Board members were merely hearing officers whose taking of the testimony was thereafter ratified by the Board, the proceeding was valid. All findings and conclusions were adopted by a properly confirmed Board after hearing before that Board. The order therefore would be valid regardless of the technical legal status of the members as members prior to formal Senate confirmation. We see no need to examine further the complicated questions posed by petitioner as to constitutional recess appointments.

## X

We directed the parties to discuss in a reargument, the applicability of the Communist Control Act of 1954[80] to this proceeding. In respects other than those already discussed we think it has no application. Its validity and the validity of the order before us are independent questions. Either might stand without the other.

## XI

We come now to the second main part of the case, consideration of the factual findings of the Board. The problem is whether the Board's ultimate finding that the petitioner in the case at bar is a Communist-action organization within the statutory definition is or is not supported by a preponderance of the evidence in the record.

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[80] Pub. L. No. 637, 83d Cong., 2d Sess., 68 STAT. 775.

The statute says that the findings of the Board as to the facts shall be conclusive if supported by the preponderance of the evidence (Sec. 14(a)). That is a less stringent restriction upon the function of judicial review than is customary in such statutes. By the same token it imposes a laborious task upon the reviewing court. We must ascertain the preponderance of the evidence in respect to the findings as that problem is put to us by our petitioner.

Space does not permit comment upon the evidence on each minute issue of fact, or an attempt here to evaluate particles of the proof. But we can indicate the extent, nature, particularity, and personal character of the testimony presented by the Government, and the nature and extent of the evidence presented by the Party, including the character of both its denials and its explanations.

The Attorney General presented the oral testimony of twenty-two witnesses, nineteen of whom had been members of the Party. Thirteen of these nineteen had been members until 1945 or later, four of them as late as 1952. Some of them voluntarily quit the Party, some were expelled, and some were agents of the F.B.I. and acting as such during their membership.

These witnesses testified in large measure concerning practices prior to the disaffiliation of the Party from the International, but each described operations in the Party up to the time of his resignation or expulsion. They stated their views of the reasons for the present concealment of Party matters such as records, membership, etc., and their views concerning the objectives of the Party and its relationship to the world Communist organization and its leaders.

For illustrative purposes we turn to the witness Philbrick. He was an agent of the F.B.I. who from 1942 to 1944 was a member of the Young Communist League and from 1944 to 1949 a member of the Communist Party.

Thus his entire period of membership was after the disaffiliation of the Party from the International. He held several positions in the League, becoming state treasurer for its successor organization, American Youth for Democracy. He also held a series of positions with the Party, being a member of the State Educational Commission, chairman of leaflet production; then he was educational director of the Eighth Congressional District, and later a member of the "pro group", an underground group of professional people. He organized and taught Party classes. These classes studied how to apply the Communist Classics to current problems. His membership in the Party was never an open membership; at times he carried a card, and at times he did not. He identified by name a number of the Party leaders and described their activities. He described the operations and purpose of the Party builders' conference and a number of the speakers and speeches. The *Daily Worker*, he said, is the central organ of the Party, and every member is supposed to read it. He described the intra-Party lines of communication between groups or cells, and the caution taken in respect to meetings. The sessions of the cells were devoted to study, literature sales, and collection of dues. As literature director he furnished his cell regularly with copies of *For a Lasting Peace, Political Affairs, The Worker, The Daily Worker*, and many books. A principal topic of discussion in early 1948 was Zhdanov's report, which appeared in the *Cominform Bulletin*. Another topic was Yugoslavia and Marshal Tito. He testified that a member of the Party could not disagree with a position taken by the Cominform and remain a member of the Party. He discussed the study of capitalism in the United States as a developer of wars, and the teaching that "the true patriot is the one who fights on the side of the working class and who fights against capitalism." He testified that the basic

objective of the Party while he was a member was "to establish a Soviet State in the United States following, without any deviation, the dictates and the methods laid down by Marx, Engels, Lenin, and Stalin." He did not recall hearing any criticism by leaders of the Party directly against the Soviet Union, or any instance in which, when the policy of the Soviet seemed to differ from the policy of the United States, any leader of the Party appeared sympathetic to the United States.

The testimony of the other witnesses presented by the Attorney General as to the operation of the Party after 1940 covered other phases of the alleged operation, but the foregoing illustrates the specificity and claimed first-hand knowledge from which the witnesses spoke.

On the other side of the controversy, as we have said, the Party presented three witnesses. The testimony of John Gates reveals the tenor of that presentation. In addition to the testimony from Mr. Gates which we have already described, this witness said that he has been a member of the National Committee of the Party since 1945. The immediate objectives of the Party, he said, are the improvement of the democratic rights of the American people, and peace. The ultimate objective is a revolutionary change, the superseding of the capitalist system by a socialist system. The Party advocates the achievement of these objectives by peaceful and constitutional means. Democratic centralism, the principle which governs Party organization and function, means that all Party policies and programs are formulated by participation of every member, and once the policies are formulated, democratically, each and every member is obligated to carry out the decision. Mr. Gates denied (1) that the Party has since January, 1946, been affiliated with any other organization; (2) that it contributed to the Communist Information Bureau; (3) that any rep-

resentative of the Party attended any meeting of that Bureau; (4) that any representative of the Bureau ever visited the Party; (5) that the Party ever received any directive or instruction or any written communication of any kind from the Bureau; (6) that the Party received any directives or instructions from *The Lasting Peace*, the newspaper which published information as to what was going on within the various Communist parties throughout the world; (7) that the Party ever received any instructions or directives from the Communist Party of the Soviet Union, or from any representative of that Party, or from any official of the Soviet Union, or from any Communist Party of any other country; (8) that the Communist Party of the United States ever sent any representative to the Soviet Union or to any other foreign country for instruction or training in Communism; and (9) that the Party reported its policies, etc., to the Soviet Government, the Communist Party of the Soviet Union, the Communist International, or the Communist Information Bureau. He stated that the funds of the Party are obtained entirely from dues, annual collection campaigns, and the sale of literature. In respect to the size of the Communist clubs Mr. Gates testified that there were many discussions, that they were interested in bringing about a 100 per cent activity on the part of the membership, that many Communists were being deprived of their constitutional rights, jeopardizing their means of livelihood, and that for those reasons steps were taken to protect the members, reducing the size of the clubs, eliminating lists of members and membership books. He said that the leaders of the Communist Party of the United States recognize no disciplinary power of the Soviet Government, the Communist International, the Information Bureau, or any agent thereof over an American Communist, that American Communists are not bound by any principle or doctrine to execute the decisions of foreign leaders.

Mr. Gates testified the Communists' position is that the national interests of all peoples on earth are identical; that the Party of the United States formulates its policies on the basis of a scientific approach, consisting of the general principles of Marxism-Leninism, which are general scientific principles to be applied in every situation according to time, place and circumstances; that the policies of the Party of the United States are not in many respects similar to the policies of the Party of the Soviet Union, because the circumstances differ, the United States having a capitalistic system and the Soviet a socialistic system; but that the Party of the United States agrees with the Soviet Party on peace. Mr. Gates said that he owed allegiance to the United States and to it alone.

On cross examination Mr. Gates testified that there is a world Communist movement but not of the kind described in the Attorney General's petition. He said that everything he has done is in the defense of democratic rights, economic welfare, and peace, and ultimately in the interest of the establishment of socialism, which is the first stage toward Communism. The Communist International was an actual organization of the world Communist movement, and the Party of the United States was affiliated with it at one time. He knows of no instance where the *Daily Worker*, while he was editor, supported this government in opposition to the Soviet Union, because it is his opinion that the Soviet has never put forward policies in any way contrary to the interests of the American people. He testified to the same effect in respect to deviation from the policies of Cominform, saying that if the Communists of the United States have expressed no disagreement with the views of *The Lasting Peace* it is because they believe those views have not been in contradiction to the interests of the American people. They consider the Soviet Union to be the out-

standing socialist country of the world. To his knowledge the *Daily Worker* has never disagreed with the views and policies of the Soviet Union. It has been stated many times, although not since 1946, that the Soviet Union is the fatherland of the world proletariat. The witness contradicted a statement made by Earl Browder that during the fifteen years of the Browder leadership all major policies of the Party of the United States had the previous knowledge and consent of the international Communist leadership.

The Party attacks the credibility of the witnesses presented by the Government. In this connection it stresses that some of these witnesses were employees of the Federal Bureau of Investigation while they were members of the Party, that others were expelled from membership in the Party, and that some were under charges of false swearing. Full opportunity for cross examination of these witnesses was afforded at the hearing before the Board, and full opportunity was also afforded for the presentation of rebuttal testimony. The evaluation of credibility is primarily a matter for the trier of the facts, and a reviewing court cannot disturb that evaluation unless a manifest error has been made. Moreover the testimony of the witnesses against whom charges are said to have been made was consistent with and supported by masses of other evidence. Petitioner attacks especially the testimony of the F.B.I. operatives, as being without probative weight because they were Government operatives. But we know of no such doctrine. Government agents, especially detectives, are charged with the duty of observing operations to which they are assigned. Their testimony is a commonplace in our courts. We do not consider employment by the F.B.I. or the mere fact of expulsion from the Party as substantial bases for blanket attacks upon credibility. They might be grounds upon which the trier of the facts would

receive such testimony with caution, but standing alone they do not constitute so serious a detriment to credibility as to be grounds for reversal.

## XII

We come, then, to consider the disputed issues of fact. Broadly speaking, these issues concern two subjects, (1) the existence and nature of the world Communist movement and (2) the relationship of the Party USA to the world movement. We divide our consideration accordingly.

In Section 2 of the Act, as we have pointed out, Congress made findings upon the existence and the nature of the world Communist movement. Some years ago, a difference of opinion existed as to the extent to which courts are bound by legislative findings of facts in cases in which constitutional questions are posed.[81] Since then the Supreme Court has resolved the problem in *American Communications Ass'n* v. *Douds* and *Galvan* v. *Press*, both *supra*. The rule, as we understand it, is that, if it appears Congress has power over the subject matter of a statute, and if the findings of fact are not baseless but are based upon extensive investigation, the courts are to adopt those findings. The opinion in the *Galvan* case contains the following statement concerning the section, *i.e.*, Section 2 of the Internal Security Act of 1950, which we are now considering:

> "Under the 1940 Act, it was necessary to prove in each case, where membership in the Communist Party was made the basis of deportation, that the Party did, in fact, advocate the violent overthrow of the Government. *The Internal Security Act of 1950 dispensed with the need for such proof.* On the basis

[81] See the opinions in National Maritime Union of America v. Herzog, 78 F.Supp. 146 (D.C.D.C. 1948).

> of extensive investigation Congress made many findings, including that in § 2(1) of the Act that the 'Communist movement * * * is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship,' and made present or former membership in the Communist Party, in and of itself, a ground for deportation." (Emphasis ours.)[82]

From that viewpoint, and without going further, there is, then, for our purposes in reviewing this order under this statute, a world Communist movement whose purpose it is, by treachery, sabotage, or any other necessary means, to establish a Communist proletarian dictatorship throughout the world.

However the Board did not rely upon the Congressional findings as to these facts but thought it desirable to make independent findings based upon evidence adduced before it. That evidence was largely documentary. We refer here to a few bits of it.

Communism derives its name from Marx's *The Communist Manifesto*. Basic to present-day Communism is Marxism-Leninism. The meaning of Marxism-Leninism is to be found in the writings of Marx, Lenin, Stalin, and their collaborators, which works are known in this litigation as the "Classics". Marxism is a form of Socialism, the basic tenet of which is the ownership by the state of all means of production and distribution. According to Marx all society consists of antagonistic classes, the principal one being the capitalist class, which, as a result of owning privately the means of production, exploits the property-less working class. Marx expressed particular interest in the property-less factory workers, designated as the proletariat, whose numbers had increased

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[82] *Supra*, 347 U.S. at 529.

as a result of industrialization. The conclusion of Marx was that the only true value is the labor of the industrial working class. The objective of Communism is to bring capitalism to an end and to substitute for it a dictatorship of the proletariat in a socialist state.

The Communist Party was formed in 1898 in Russia. Lenin, a Russian revolutionist who had adapted Marxism to Russian revolutionary purposes, had a group within the Communist Party called the Bolsheviks. He recognized that two things were most important to the success of the proletariat revolution: rigidity of organization and flexibility of policy. His group of Bolsheviks obtained control of the Communist Party in Russia. Organizationally he held to the necessity of creating a group of disciplined professional revolutionists, among whom no dissent would be tolerated. After the Russian revolutions of 1905 and 1917 the Communist Party destroyed capitalism in Russia and then sought help throughout the world to support their victory. Following Lenin came Stalin, who further advanced the Marxist-Leninist ideas in a practical way.

In his *Problems of Leninism*, published in 1934, Stalin specified as one of the three fundamental aspects of a dictatorship of the proletariat "The utilisation of the power of the proletariat for the organisation of socialism, for the abolition of classes, and for the transition to a society without classes, to a society without a state." He stressed the necessity for violence, asserting: "But, of course, the dictatorship of the proletariat does not merely mean violence, although there is no dictatorship without violence." He quoted Lenin to the same effect. In his *Foundations of Leninism*, published in 1939, Stalin referred to a phrase used by Marx which seemed to indicate that Marx conceded the possibility of a peaceful evolution in certain countries outside of the European Continent. But, said Stalin, Lenin pointed out that condi-

tions had changed by 1917 and he had then said that the preliminary condition for the revolution "is the smashing, the destruction of the 'ready-made' state machine'". Stalin said, "Therefore, Lenin is right in saying: 'The proletarian revolution is impossible without the forcible destruction of the bourgeois state machine and the substitution for it of a new one * * *.'"

In 1919 the First Congress of the Communist Parties, held in Moscow and headed by Lenin, founded the Communist International (called the Comintern), described by the Communists as a new type of international revolutionary proletarian organization. The theses and statutes adopted by the Comintern in 1920 contained the following:

> "The Communist International makes its aim, to put up an armed struggle for the overthrow of the International bourgeoisie and to create an International Soviet Republic as a transition stage to the complete abolition of the State. The Communist International considers the dictatorship of the proletariat as the only means for the liberation of humanity from the horrors of capitalism. The Communist International considers the Soviet form of government as the historically evolved form of this dictatorship of the proletariat.
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> * * * * * * *
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> "* * * To all intents and purposes the Communist International should represent a single universal Communist Party, of which the parties operating in every country form individual sections. * * *"

The statutes of the International contained the following:

> "Sec. 1. The new International Association of Workers is established for the purpose of organizing common activity of the workers of various countries who are striving towards a single aim: the overthrow of capitalism; the establishment of the dictatorship of the proletariat and of the International

Soviet Republic; the complete abolition of classes, and the realization of socialism—the first step of Communist Society."

And also, among the theses and statutes of the Third International, the following expressions are to be found:

"• • • Only a violent defeat of the bourgeoisie, the confiscation of its property, the annihilation of the entire bourgeois governmental apparatus, parliamentary, judicial, military, bureaucratic, administrative, municipal, etc., even the individual exile or internment of the most stubborn and dangerous exploiters, the establishment of a strict control over them for the repression of all inevitable attempts at resistance and restoration of capitalist slavery—only such measures will be able to guarantee the complete submission of the whole class of exploiters.

• • • •

"• • • It is especially necessary to carry on unlawful work in the army, navy, and police, as, after the imperialist slaughter, all the governments in the world are becoming afraid of the national armies, open to all peasants and workingmen, and they are setting up in secret all kinds of select military organizations recruited from the bourgeoisie and especially provided with improved technical equipment."

The *Programme of the Communist International*, a publication of the Workers Library Publishers, Inc., contains the constitution and rules of the Communist International. Included in these rules is the following paragraph:

"Party questions may be discussed by the members of the Party and by Party organizations until such time as a decision is taken upon them by the competent Party committees. After a decision has been taken by the Congress of the Communist International, by the Congress of the respective Sections, or by leading committees of the Comintern, and of its various Sections, these decisions must be unreservedly carried out even if a Section of the Party mem-

bership or of the local Party organizations are in disagreement with it."

The Comintern was dissolved as an organization in 1943, and four years later a new international organization, known as the Communist Information Bureau, or Cominform, was formed by the Communist Parties in countries of Europe and Asia. There is no evidence of any dissolution of the world movement or of any abandonment of the policies and program enunciated by Joseph Stalin. On the contrary, ample evidence is shown that the movement under its Soviet leaders continues as it was planned.

The foregoing is drawn from a considerable mass of material. Out of the whole of the evidence comes a picture of a world movement which has ultimate objectives and interim objectives. The ultimate objective is a classless, stateless society ruled by the proletariat of the world. The basic concepts of this ultimate objective are that the sole value is labor and that capitalism and nationalism are merely means for exploiting the masses of workers. Thus capitalism and nationalism must be destroyed. In the interim the program calls for a small, hard core of revolutionaries, formed into a disciplined Party in every country, who are a vanguard of workers and fighters for the unorganized and suppressed masses of workers. This Party is to attain control of the government of its country for the purpose of destroying its present form and, ultimately, to weld it into the stateless world society. In this interim operation the Party must be ruthless. When the Party takes over the government it is the expectation that the masses will rise and make the Party government a majority government. In this interim period the present government of Russia, the Soviet Union, because it is the first and biggest government thus far brought into control of the Communists,

must be protected and preserved as Communistic at any cost.

The Board made a finding, based on evidence adduced before it, that there exists a world Communist movement substantially as described in Section 2 of the Act. We are of opinion that that finding is supported by a clear preponderance of the evidence.

## XIII

We come, then, to the second main division of the facts. This deals with the policies and program of the Party USA and its relationship to the world movement. The Board, pursuant to the mandate of Section 13(e) of the Act, made findings under each of the section's eight subparagraphs, and these, in due course, we will review item by item. For the moment, however, we observe that some things disclose their nature by set characteristics, basic factors which cannot be ignored. Thus we know fish from fowl. In other words, while all relevant facts are cumulative in delineating a completed whole, it is frequently true in respect to derivative facts that certain underlying basic facts, perhaps few in number, determine the final answer. Such facts are heavy in the scales. This is the situation in the case at bar, and we turn now to consideration of some preponderant basic facts. From the record as a whole six such facts emerge as a foundation for the ultimate finding.

1. Prior to 1940 the Communist Party USA was a section of the Communist International, the Comintern. No substantial dispute exists as to this area of the past. The Third Convention of the Party USA, held in 1921, adopted a resolution which read as follows:

> "The Communist Party will systematically and persistently propagate to the working class the idea of the inevitability of, the necessity for a violent revolution and will prepare the working class for armed insurrection as the only means for the destruction of the bourgeois state and the establishment of the proletarian dictatorship based upon soviet power."

A Special Convention of the Party USA, also held in 1921, adopted a resolution in which it "hereby reaffirms its position as an integral part of the Communist International" and unanimously adopted the 21 Points for Affiliation with the International.

Among the twenty-one conditions for membership in the International thus adopted by the Party USA were the following:

> "12. All parties belonging to the Communist International should be formed on the basis of the principle of democratic centralization. At the present time of acute civil war the Communist Party will be able fully to do its duty only when it is organized in a sufficiently thorough way, when it possesses an iron discipline, and when its party centre enjoys the confidence of the members of the party, who are to endow this centre with complete power, authority and ample rights.
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> "16. All the resolutions of the congresses of the Communist International, as well as the resolutions of the Executive Committee are binding for all parties joining the Communist International. • • •
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> "17. In connection with the above, all parties desiring to join the Communist International should alter their name. Each party desirous of joining the Communist International should bear the following name: Communist Party of such and such a country, section of the Third Communist International. • • •
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> • • • •
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> "21. Those members of the party who reject the conditions and the theses of the Third International are liable to be excluded from the party."

At the Eighth Convention of the Party USA in 1934 a manifesto was adopted, which declared, among other things, "The only way out of the crisis for the toiling masses is the revolutionary way out—the abolition of capitalist rule and capitalism, the establishment of the Socialist society through the power of a revolutionary workers' government, a Soviet government."

A delegation from the Party USA attended the Seventh

Congress of the International in 1935 and were among those who formally assured Stalin "that the Communists will always and everywhere be faithful to the end to the great and invincible banner of Marx, Engels, Lenin and Stalin. Under this banner Communism will triumph throughout the world."

Thus it is clear that in the years prior to 1940 the Communist Party USA was dominated and controlled by the world Communist movement.

The problem in dispute, then, is whether the same condition exists in present times. The Party denies that since 1940 it has been dominated or controlled from abroad. It also says: (1) Past history is not relevant or, even if relevant, is not material;[83] (2) the Party USA was disaffiliated from the Comintern in 1940; and (3) the witnesses who testified to various features of recent operations by the Party were devoid of credibility. We discuss these contentions *seriatim*.

The past is clearly pertinent to the present nature of a person or an organization. Surely a person's education and experience are pertinent to his present nature. The same is true of an organization. As a matter of fact it is rarely, if ever, possible to prove present nature by some instantaneous, contemporaneous fact, totally ignoring the whole of the past. Not only is the past clearly pertinent, it may be quite material to a determination of present nature. Whether it is material depends upon whether there is affirmative evidence of a departure from the established past. In the ordinary affairs of life and in ordinary litigation, if a person or an organization is shown to have had over many years a certain policy and program, and no more is shown, the conclusion

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[83] The Party makes an argument that only post-Act evidence, *i.e.*, evidence relating to activities since the enactment of the statute, is pertinent in the present proceeding, and that such evidence in this record is insufficient to support the findings. We see no basis for such an evidentiary restriction upon proof as to nature, policies and program.

is clearly indicated that he or it has the same policy and program in the present. He may prove that he has changed, and in the light of such evidence the past may lose its materiality. We are of opinion that the past nature of the Party USA is pertinent to the present inquiry and that it may or may not be material, depending upon the evidence showing a departure from the past.

In line with the thought which we have just indicated, the Party says that it disaffiliated itself from the Communist International in 1940. It concludes from that fact that the established nature of its past cannot be considered in determining its present nature. But there are flaws in that contention. The disaffiliation was an organizational separation. The international organization itself was disbanded in 1943, but the world Communist movement did not then cease to exist. The movement, intact both in theory and in program, continued to exist. Stalin was the leader of the Communists long after the Comintern ceased to exist, and he, as we have noted, was the successor to Lenin and protagonist of the ideas of Marx and Lenin. To demonstrate a changed nature in the Party USA, some assertion of a change in substantive belief and program would have to be made. No such evidence was presented by the Party. The tenor of its proof was that the Communist movement is not as this statute and the Attorney General's petition pictured it. The Party witnesses did not assert a cleavage in policy or program between the Party and the international movement. At the time of the disaffiliation the convention of the Party declared that this action was "for the specific purpose of removing itself [the Party] from the terms of the so-called Voorhis Act",[84] "which law would otherwise tend to destroy, and would destroy, the position of the Communist Party as a

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[84] Act of Oct. 17, 1940, 54 STAT. 1201, as amended, 18 U.S.C. § 2386.

legal and open political party of the American working class." The Party's witness Flynn described the event as "a friendly divorce".

We think a mere organizational disaffiliation, without more, does not render evidence of the Party's past immaterial to its present nature.

It seems to us, therefore, that the first major feature of the facts relating to the Party USA is that prior to 1940 the Party was part of the international Communist movement and that, although there was an organizational disaffiliation in 1940, no evidence has been presented which would indicate that since the disaffiliation the Party has repudiated either the policy or the program of the world movement.

2. The Party calls itself the "Communist Party of the United States of America". This is the name specified by the Communist International as the name by which a Party affiliated with the international movement must be known. The Communist parties in the other countries of the world are certainly motivated by a common cause. They have a common doctrinal basis and a common ultimate objective, and they have an international organization, which today, as we have noted, is known as the Communist Information Bureau, or Cominform. The Party USA is not affiliated organizationally with the Cominform, but it is difficult for us to see why the Party would call itself the Communist Party of the U.S.A. if it were not in fact a part of the Communist movement in theory and program.

3. The present organization of the Party USA resulted from a revulsion on the part of a group of its leaders against what they considered a departure from the program and principles of world Communism. In 1944 the Party underwent a reorganization under the leadership of Earl Browder. It became known as the Communist Political Association; it de-emphasized some

Marxism-Leninism principles and advocated a peaceful coexistence of the United States and the Soviet Union. In the spring of 1945 a French communist by the name of Duclos published an article severely criticizing the attitude and action of the Communists in this country. Following that publication a leading Soviet Union Communist, Manuilsky, being then in San Francisco, expressed to the American Communist leaders the view that the Party USA should follow the counsel of the French Communists. Browder's leading antagonist in the Party councils was William Z. Foster, who attacked Browder as preaching anti-Communism, as fighting the Communist Party, and as being a "revisionist". For some years prior to 1940 Foster had been an official of Communist International. In July, 1945, the Communist Political Association was reorganized into the Communist Party of the U.S.A., Browder was ousted, and Foster was made the National Chairman of the Party. Six of the present leaders of the Party were members of the delegation to the convention of the International in 1935 and participated in the declaration of fealty to Stalin.

4. The amended answer of the Party says that Marxism-Leninism is basic to the Communist Party USA. And, as we have pointed out, while the tenets of Marxism-Leninism, forcefully set out in the writings of Marx, Lenin and Stalin, permit a wide flexibility in tactics, that is, of intermediate activities and objectives, they admit of no deviation from the ultimate objective, which is a classless, stateless world. If the Communist Party USA does not adhere to the basic ultimate objective of Marxism-Leninism, some vivid evidence to that effect should be readily available. Such a position on the part of the Communist Party USA would be a noteworthy fact, which surely would be reflected somewhere. But this record contains no such evidence.

In this connection the Party points to the preamble to its constitution, adopted in 1948, which contains the following sentence: "The Communist Party upholds the achievements of American democracy and defends the United States Constitution and its Bill of Rights against its reactionary enemies who would destroy democracy and popular liberties." But that recitation must be viewed in the light of the established position of Communist leaders that American democracy has gone far in protecting the rights of minorities and of working people and in advancing the economic status of such people, and that in that respect American democracy receives the plaudits of those leaders. But that position in no way negates the ultimate stateless world objective of the Communist movement. Further in this connection it is interesting to note the description of the intermediate program of the Party USA, as described by the Party through its witness Gates. Mr. Gates testified that the historic mission of the working class is the establishment of socialism; that the Party USA advocates the peaceful and constitutional road to socialism; that it advocates a party composed of a coalition of all exploited classes and believes that this party will win an election but that the monopolists will not accept this result and will use violence to overthrow the people's government; that the new government should take measures to anticipate this violence and should remove from the army, navy, and police force all generals, etc., who are sympathetic to monopolists, and replace them with officers who are sympathetic to the cause of the common people; that thus the peace government would be forced by necessity to take revolutionary measures to prevent its overthrow; and that this process is in no way contradictory to the principle of dictatorship of the proletariat.

5. We note next; without discussion, that the evidence shows that the Party press, the *Daily Worker*, follows

the views of the publication of the Cominform, which is known as *The Lasting Peace.*

6. The next outstanding feature of the proof is an elaborate demonstration in the evidence presented by the Government that the Party USA has never differed in policy or program with the Soviet Union. Most notable in this evidence was the meticulous portrayal of many major international questions upon which the United States Government and the Soviet Union have differed, and the striking fact that in every such instance the Party USA has supported the position of the Soviet Union. Examples of such matters are the Truman Doctrine, the Marshall Plan, ECA, the North Atlantic Pact, control and inspection of atomic energy, the seating of Yugoslavia in the United Nations Security Council, the representation of China in the United Nations, the peace treaty with Japan, the William Oatis case, and the Korean War. The Party has consistently adhered to the view of the Soviet Union that the United States is an imperialistic nation which seeks world domination. Quite vivid is the identity of the course of the Party USA with the course of the Soviet Union when the latter's course changed abruptly. The Partv denounced Fascism in Nazi Germany until the Hitler-Stalin Pact in 1939, when the Party switched to the Soviet Union position. When the Pact was abrogated in June, 1941, and Hitler came into conflict with the Soviet Union, the Party promptly switched its attitude and thereafter urged that World War II was a just war. The Party strongly opposed lend-lease aid to Great Britain. It took the same position as did the Soviet in 1947-49 in regard to the internal situation in Greece, and in 1948 in respect to the Czech government. Its course precisely paralleled the Soviet Union's actions in respect to the Tito government in Yugoslavia, including an abrupt reversal of attitude in June, 1948, when the Cominform

attacked Tito. At each stage the Party supported the Soviet position in respect to the blockade of Berlin in 1948. Of current significance is the testimony and documentary evidence establishing that the Party USA and the Soviet Union express the same views regarding Korea. Both maintain that the Syngman Rhee government is a reactionary "puppet regime"; both vigorously condemn the hostilities in Korea as the direct result of imperialism and aggression; and both insist the United Nations police action was illegal and aggressive toward North Korea.

The Party does not deny the facts of the identity of the program and policies of the Soviet Union and of the Party. It makes two contentions in respect to them. In the first place it says the statutory phrase "do not deviate from" (Sec. 13(e)(2)) is the sole pertinent inquiry in respect to identity of views and policies, and that that phrase has reference only to instances where the Soviet Union first adopted a policy and the Party thereafter adopted it. That is obviously an untenable argument. The statutory phrase refers to identity or coincidence and not to chronological adoption. In the second place the Party, through its witnesses, says that the identity of views of the Soviet Union and the Party is a coincidence. Thus the witness Gates testified that while he was editor of the *Daily Worker* he could think of no instance where that paper supported this Government in opposition to the Soviet Union; that this was because the Soviet Union has never put forward policies in any way contrary to the interests of the American people. He said that if the Communists in this country have expressed no disagreement with the views of the Cominform it is because they believe those views have not been in contradiction to the interests of the American people. He testified that, so far as he knows, the views and policies of the Soviet Union are truly in

the interests of the American people. The Party witness Flynn testified to the same effect.

It seems to us that the foregoing six considerations—(1) that the Party was prior to 1940 a section of the Communist International and, although it was disaffiliated organizationally, it presents no evidence of a repudiation of world Communist doctrines; (2) that the Party calls itself the Communist Party of the United States of America; (3) that the present organization of the Party had its origin in a revulsion against a departure from the world Communist program; (4) that Marxism-Leninism is basic to the Party; (5) that the Party's press follows closely world Communist views; and (6) that the policies of the Party and its views upon all issues have for years been identical with those of the world Communist leaders—are the key considerations in the inquiry as to the relationship of the Party to the world movement and its leadership.

## XIV

We turn next to the mandate of Section 13(e) of the statute and to the findings made by the Board pursuant to it.

Petitioner attacks all these findings first upon the same grounds as were its attacks upon these subparagraphs as parts of the statute itself. We have discussed those contentions in detail in discussing the statute. Petitioner also attacks severally the findings under each subparagraph of the section.

Proceeding under the requirement of Section 13(e)(1), the Board made an elaborate examination of the policies and directives of the Party, devoting to the subject almost 130 pages of the printed report. Its conclusions are

stated in eleven paragraphs. In substance they are that the Party's organizational forms are based upon directives of the Soviet Union and are carried out to effectuate the policies of the world Communist movement; that by the acceptance of democratic centralism the Party subjects itself to the authority of the Soviet; that the Party advocates the overthrow of imperialist governments, including the United States; and that the major programs of the Party are set forth by the Soviet for the accomplishment of the objectives of the world Communist movement. Without recapitulating or reciting the multitudinous bits of evidence which underlie these findings, we simply state that in our view a clear preponderance of the evidence supports them. As we have made clear, there is scarcely a dispute as to the period prior to 1940, and there is ample evidence in this record as a whole, when balanced against the proof offered to the contrary, to support their accuracy as to the present.

The Board found that the Party invariably follows the views and policies of the Soviet Union (Sec. 13(e)(2)). We have already discussed non-deviation as one of the chief items of evidence in the case.

The Board found, pursuant to Section 13(e)(3)), that, until the disaffiliation of the Party from the International, the Party received substantial financial aid from and at the direction of the Soviet Union and the International, but that since 1940 only one incident of such aid was shown by the record. The evidence in support of that finding is overwhelming. Indeed it is not seriously controverted. The Party's chief defense on this point is that the evidence is not relevant, a legal question we have discussed.

The Board found (Sec. 13(e)(4) and (5)) that prior to the outbreak of World War II the Party USA sent many representatives to the Soviet Union and they were trained there in Communist policies and program; and that there is no substantial evidence that such rep-

resentatives were sent after the outbreak of that war. The latter conclusion is not disputed, of course; the former is overwhelmingly established. However the Board found that the Party reports to the Soviet Union, largely through representatives of the Soviet in this country. The Party's witnesses categorically denied this claim as it was presented to the Board by the Attorney General. There is little doubt about these reports having been made when the Party was a member of the International; such was one of the "conditions" of the International. There is some doubt that a preponderance of the evidence supports the broad conclusion that the Party "reports to the Soviet Union and its representatives." Such a conclusion seems to imply constant, systematic reporting as of now. The evidence indicates instances, as in the cases of Eisler and Peters. On this record we would strike this finding as phrased. There is a preponderance of evidence, we think, to support a conclusion that upon occasion leaders of the Party report to representatives of the Soviet Union.

The Board, pursuing Section 13(e)(6), found that an iron discipline exists throughout the world Communist movement, which requires unquestioned devotion to the program laid down by the Soviet Union, and that the Party has recognized and accepted that requirement. The Party's witness Gates denied that the leaders of the Party USA consider themselves subject to the disciplinary power of the Soviet Union or of any international Communist agency.

The requirement of iron discipline within the Communist movement is one of the basic principles of the movement. It is the "democratic centralism" so vigorously insisted upon by Communist leaders in both speeches and documents. The evidence offered by the Government upon the point included the Classics, many publications, categorical assertions by witnesses on the

stand, and incidents in which those who departed from the Communist program were expelled from the Party, including, among others, the experiences of Gitlow in 1929, Kornfeder in 1934, Johnson in 1940, Lautner in 1950, Tompkins in 1951, and the demotion of Browder in 1945. Identification of the Soviet Union as the leader of the world Communist movement is amply shown. It appears in documents taught in Party classes, in Communist publications, in oral testimony, and in circumstances such as the pledge of fidelity to Stalin by the International convention. We think the finding on this point is supported by a clear preponderance of the proof.

With respect to operations on a secret basis, referred to in Section 13(e)(7) of the Act, the Board made findings on a number of such practices, including concealed membership, refusal to reveal information, secretion of records, deceptive language, the use of aliases, the use of codes, false swearing, secret meetings, reduction of committee memberships, assignment of members to small groups, underground plans and operation, and the infiltration of other organizations. There is no serious dispute as to the facts in respect to these operations. Indeed the Party's witnesses testified to many of them, and the amended answer impliedly admits them. The dispute centers about the purposes of the practices. The Party contended, and now contends, that it was forced into these practices in order to protect the constitutional rights of its members to speak and to assemble, and to safeguard them from social and economic persecution. The Government says that these practices were for the purpose of concealing an unlawful conspiracy. The Board concluded that the practices were undertaken for the purposes of concealing the true nature of the Party and of promoting its objectives.

This question, whether the secret practices of the Party are for the purpose of protecting the liberties of the members or are for the purpose of promoting the

objectives of the Party, is a nebulous one. The two purposes may well overlap. In so far as protection of its members from public identification as Communists also promotes the objectives of the Party, both purposes could exist together. In a doubtful situation such as that on this point, we strike the finding as to purpose. At the same time we are of opinion that the Party's view of the limited purpose of secrecy is not shown by a preponderance of the evidence. On this point we conclude simply that a defined purpose is not proven.

The Board found (Sec. 13(e)(8)) that the purposes of the Party are the antithesis of allegiance to the United States and that the Party's leaders and members consider the allegiance they owe the United States as subordinate to their loyalty and obligations to the Soviet Union. The evidence on this point is long and in great detail. Considerable testimony was given that at Communist schools students were taught that a just war is one in which the Soviet Union has as an adversary an imperialist power, that from the standpoint of a war against the Soviet Union the war is an unjust one for the adversary, and that Party members must adhere to the Soviet Union in any just war. Certainly it is clear beyond question that the Party USA regards the Government of the United States as an imperialist government, and the ultimate essence of the Communist movement is the overthrow of imperialist governments. Certainty prior to 1941 the leaders of the Party USA declared fealty to the Soviet rulers, and the same men are now leaders of the Party. *The Communist Party Manual on Organization*, written by J. Peters and published by the Workers Library Publishers, contains this statement:

> "The Communist Party rallies the masses against imperialistic war and fascism, and for the defense of the Soviet Union.
>
> "The Soviet Union is the only fatherland of workers all over the world. * * *"

Certainly it appears that the Communists bitterly assail the Socialists for advocacy of a peaceful path to power. Repeatedly in Communist publications appears the phrase "the Workers' Fatherland, the Soviet Union," or similar phrases.

The Party relies chiefly upon the text of its constitution and the testimony of the three witnesses whom it presented. The witnesses denied that they owed allegiance to any government except the United States.

The use of the term "allegiance" in connection with a relationship to the Soviet Union injects some confusion into the discussion upon this point. Allegiance implies the formalities of the oath of citizenship, the necessities of military service, etc. Of course citizens of the United States have no such "allegiance" to the Soviet. But the statute itself is not confused upon the matter. It refers to the extent to which members of an organization "consider the allegiance they owe to the United States as subordinate to their obligations to such foreign government or foreign organization." The latter are obligations of a nature different from technical allegiance. The Board accurately phrased the point in its key considerations, saying that the obligations which members have accepted toward the Soviet are completely incompatible with, and the exact antithesis of, allegiance to the United States. We think the conclusion is amply supported.

This opinion is too long to permit of recapitulations. The foregoing recitations will reflect the state of the facts as we find the controlling features to be shown by the record. When the parts are put together, the picture is clear and forceful.

## XV

We are of opinion, as hereinabove indicated, that the statute and the order are valid as matters of law. The ultimate finding of the Board was that the Party USA "is substantially directed, dominated and controlled by

the Soviet Union, which controls the world Communist movement referred to in Section 2 of the Act; and that Respondent [the Party] operates primarily to advance the objectives of such world Communist movement." We conclude that this ultimate finding is supported by the basic findings which are in our opinion supported by a preponderance of the evidence, and that the ultimate finding is itself supported by a preponderance of the evidence.

The order of the Board will be

*Affirmed.*

BAZELON, *Circuit Judge*, dissenting: Suppose an Act of Congress required bands of bank robbers to file with the Attorney General statements of their membership and activities, and imposed criminal penalties upon their leaders and members for failure to do so. Such an Act would compel individuals to disclose their connection with a criminal conspiracy. No argument could reconcile such an Act with the Fifth Amendment's command that "No person * * * shall be compelled in any criminal case to be a witness against himself."

The registration provisions of the Internal Security Act of 1950 are similar.[1] They compel individuals, under

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[1] In 1951, sitting as a member of a three-judge District Court, I voted to deny the motion of the Communist Party for a preliminary injunction. 96 F.Supp. 47. The relief sought by that motion was a stay of the proceeding which the Attorney General had theretofore instituted before the Subversive Activities Control Board. I based denial of discretionary preliminary relief upon a series of estimates of probabilities, which was all we had before us. The Communist Party pointed to nothing in the conduct of the administrative proceedings themselves which would necessarily violate constitutional rights. The issue of coverage remained to be determined by the Board, which might have

criminal penalties, to disclose intimate association with the Communist Party, a disclosure which the Supreme Court has held to be incriminatory.[2] Every "Communist-action" organization must register with the Attorney General,[3] list the names, aliases, and addresses of its members and officers during the preceding twelve months, and account for all money received and spent during that time.[4] The organization must register within thirty days after a final order of the Board,[5] under a penalty of $10,000 for each day's delay.[6] In addition, if it fails to register, § 7(h)[7] requires certain officers to register on its behalf.[8] If the officers do not register within sixty days after the final Board order, § 8(a) requires all individual members to register.[9] Noncompliance by individuals with either § 7(h) or § 8(a) is punishable by a

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found that the Communist Party was not a Communist-action organization, and there was nothing in the administrative procedure or in the provision for judicial review which indicated that they were unconstitutional on their face. Since the Communist Party has now been found to be a Communist-action organization, the questions posed now are different. Because they are different, as Mr. Justice Jackson said, quoting Baron Bramwell, "The matter does not appear to me now as it appears to have appeared to me then." Kristensen v. McGrath, 340 U.S. 162, 178 (1950) (concurring opinion.)

[2] Blau v. United States, 340 U.S. 159, 161 (1950).

[3] Section 7(a), 50 U.S.C. § 786(a) (1952).

[4] Section 7(d), 50 U.S.C. § 786(d) (1952).

[5] Section 7(c), 50 U.S.C. § 786(c) (1952).

[6] Section 15(a)(1), 50 U.S.C. § 794(a)(1) (1952).

[7] 50 U.S.C. § 786(h) (1952).

[8] Section 11.205 of the regulations promulgated under the Act supplements the list of officers who must register. 19 FED. REG. 6035-36 (Sept. 18, 1954).

[9] 50 U.S.C. § 787(a) (1952).

fine of $10,000, five years' imprisonment, or both, for each day's delay.[10]

The registration of the organization, required by § 7(a), must necessarily be executed by some individual or individuals. Congress and the Attorney General have recognized this obvious fact. Section 15(b)[11] punishes "individuals" who willfully falsify or omit a required fact in executing a registration statement required under § 7;[12] and paragraph 6 of the Attorney General's instructions which accompany the registration form for organizations (Form ISA-1) requires the statement to "be signed by the partners, officers, and directors, including the members of the governing body of the organization."

My colleagues recognize that some individual will be "called upon to sign or swear to a registration statement" and may be ineriminated by having to disclose his aliases.[13] But they fail to recognize that his signing is a complete though tacit admission that he knows the names of the Party's officers and members, and its organization; that he is himself a member or a confidential employee of the Party; and that he has access to Party books and records. *Blau* v. *United States* is decisive of this case. The Supreme Court there held that an admission that one is "employ[ed] by the Communist Party or [has] intimate knowledge of its workings" might furnish

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[10] Section 15(a)(2), 50 U.S.C. § 794(a)(2) (1952).

[11] 50 U.S.C. § 794(b) (1952).

[12] See Note, *The Internal Security Act of 1950*, 51 COL. L. REV. 606, 620 (1951), where the author states: "It is obvious * * * that an organization cannot register unless its officers, or other persons designated by the membership, execute a registration statement and continue to make the necessary annual reports."

[13] Majority Opinion, p. 24.

a "link in the chain of evidence needed in a prosecution" under the Smith Act and therefore could not be required.[14]

It is true that the present Act does not in direct terms require any individual to execute a statement for the organization during the thirty-day period within which it must register. But of necessity and also by the Attorney General's instructions, the only individuals who can execute a statement for the organization are those upon whom § 7(h) of the Act, supplemented by § 11.205 of the Regulations, places a duty to register for the organization if it defaults;[15] and these officials are subject to the

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[14] 340 U.S. 159, 161 (1950). The admissions implied in executing the statements for the Communist Party are the very admissions sought from Mrs. Blau: "Mrs. Blau, do you know the names of the State officers of the Communist Party of Colorado?" "Do you know what the organization of the Communist Party of Colorado is, the table of organization of the Communist Party of Colorado?" "Were you ever employed by the Communist Party of Colorado?" "Mrs. Blau, did you ever have in your possession or custody any of the books and records of the Communist Party of Colorado?" "Did you turn the books and records of the Communist Party of Colorado over to any particular person?" "Do you know the names of any persons who might now have the books and records of the Communist Party of Colorado?" "Could you describe to the grand jury any books and records of the Communist Party of Colorado?" *Id.* at 160, n. 1. See cases collected 19 A.L.R. 2d 388.

[15] Under the statute the duty to register falls upon the organization's executive officer, secretary, or the individuals performing the ordinary and usual duties of such officers, and upon such other officers as the Attorney General may prescribe. Under the regulation, "(a) The president, chairman, or other person who is chief officer of the organization. (b) The vice-president, vice-chairman, or person performing similar function. (c) The treasurer. (d) Members of the governing board, council, or body" "jointly with the executive officer and secretary" are made liable to register for the organization after the expiration of thirty days. It

severe criminal penalties of § 15(a)(2)[16] if they fail to perform this duty. Since they will be subject to criminal penalties for failure to register shortly after the thirty-day period has run,[17] as a practical matter they are under heavy pressure to prevent it from running.[18] The "compulsion prohibited by the fifth amendment is not alone physical or mental duress, such as comes from unlawful commands and authoritative orders * * *,"[19] "the test being whether all things considered the testimony in question was voluntarily given."[20]

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will be recalled that paragraph 6 of the Attorney General's instructions specifies that the organizational registration form shall be signed by the organization's "partners, officers, and directors, including the members of the governing body * * *."

[16] The officers are subject to a fine of $10,000 and imprisonment of five years for each offense. Any offense is defined as one day's failure to register, so that two weeks' nonregistration could mean a fine of $140,000, seventy years in prison, or both.

[17] The designated officers must file the statement within ten days after the organization's thirty-day period has run. Regulations, § 11.205, 19 FED. REG. 6036.

[18] Cf. United States v. Bell, 81 Fed. 830, 837 (W.D.Tenn. 1897), where it was held that a witness, although "technically not under the compulsion of a subpoena," had nevertheless been under compulsion in testifying before an "official having the power to compel him to come, if he should be recalcitrant about it * * *."

[19] United States v. Bell, 81 Fed. 830, 837 (W.D.Tenn. 1897); cf. Boyd v. United States, 116 U.S. 616, 621-22 (1886) (holding that it is equivalent to the compulsory production of papers to make their nonproduction a confession of the allegations it is contended they will prove); and see McKnight v. United States, 115 Fed. 972, 981 (6th Cir. 1902).

[20] United States v. Neff, 212 F.2d 297, 312 (3d Cir. 1954).

Nor are the compulsory self-incrimination provisions of the Act saved by § 4(f). That section provides that "*the fact of registration* of any person • • • *shall not be received in evidence* • • • in any prosecution for any alleged violation of subsection (a) or subsection (c) or for any alleged violation of any other criminal statute."[21] Since this provision merely bars the "fact of registration" as evidence, and leaves the registrant exposed to prosecution for everything to which the registration relates, it does not meet the command of the Supreme Court in *Counselman* v. *Hitchcock*. There, as here, a statute prevented use of extorted disclosures as "evidence" in any criminal proceeding but, as the Court pointed out, the statue did not prevent their use "to search out other testimony to be used in evidence • • • in a criminal proceeding." No grant of immunity is sufficient unless it provides "complete protection from all the perils against which the constitutional prohibition was designed to guard."[22] Nothing less than "absolute immunity against future prosecution for the offence to which the question relates" can serve as a "full substitute for that [constitutional] prohibition."[23]

But my brethren say, in effect, that under the doctrine of *United States* v. *White*,[24] no officer of the Communist Party can assert the constitutional privilege to avoid giving information about the organization which § 7(a)

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[21] 50 U.S.C. § 783(f) (1952); emphasis supplied.

[22] 142 U.S. 547, 564, 585-86 (1892).

[23] *Ibid.* For law review comment asserting the purported immunity to be inadequate, see Meltzer, *Required Records, The McCarran Act, and the Privilege against Self-Incrimination*, 18 U. OF CHI.L.REV. 687, 724 (1951); Comment, *Communist Registration under the McCarran Act and Self-Incrimination*, 1951 WIS.L.REV. 704, 715 (1951).

[24] 322 U.S. 694 (1944).

requires. I do not think the *White* doctrine can be so applied.

In *White* an officer of a labor union had appeared before a grand jury in response to a *subpoena duces tecum* but had declined to produce union documents. His mere appearance as a union officer was not, and was not claimed to be, incriminatory. Instead, he invoked the privilege on the theory that the demanded documents were incriminating. The Court replied that he could not "place under the protective shield of the privilege * * * official union documents held by him in his capacity as a representative of the union." [25] The vice of the present statute is not that it compels someone to produce incriminatory documents, but that it *compels someone to identify himself as a Communist Party functionary.* Such identification, unlike identification as a corporate or union official, is incriminatory under the *Blau* case.[26] That situation was not involved in *White*; nor in *Rogers* v. *United States*, since the witness there had "freely described her membership, activities and office in the Party." [27] This fundamental difference makes the *White* case inapplicable. There are two further distinctions.

(1) Section 7(d) requires the *preparation of a statement* naming the organization, listing its members and officers (and their aliases), describing the officers' duties and functions, and accounting for money received and

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[25] *Id.* at 704.

[26] See n. 14 and text, *supra.*

[27] 340 U.S. 367, 372 (1951). In United States v. Field, 193 F.2d 109 (2d Cir. 1951), an official of the Bail Fund Committee of the Civil Rights Congress declined to produce the organization's documents on the ground that to do so would in itself be incriminatory. The argument was rejected by the Second Circuit solely on the ground that earlier, in the same proceeding, he had admitted being a trustee of the fund.

spent. Hence incriminating information is, in effect, "forced from the lips of the [executing officer], rather than obtained from the records or books." [28] As the Second Circuit has held, "the production of records must be distinguished from * * * testimony as to what the records would contain, had they been produced." [29]

(2) I do not think the *White* doctrine applies even as to books and records of the Communist Party, notwithstanding the dictum in *Rogers* that there is no privilege with respect to the books of the Party. Under the *White* test, the privilege is unavailable to officers of an organization only when the organization's character is "so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only." [30] The "impersonal" criterion, as discussed by the Court, clearly indicates that unions, other lawful associations, and corporations are to be distinguished from

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[28] United States v. Daisart Sportswear, 169 F.2d 856, 862 2d Cir. 1948). See Note, *The Internal Security Act of 1950*, 51 COL.L.REV. 606, 621 (1951), where the author states: "The execution of a registration statement by an individual would at least require him to confirm and transpose selected material from the organization's records to the registration statement. Since an organization need not keep complete records prior to registration, in many cases the officer would be forced to execute the registration statement by relying on his own knowledge. It is clear that in both instances the officer is doing more than producing records and identifying them. He is disclosing other matters of his personal knowledge."

[29] 169 F.2d at 862.

[30] 322 U.S. at 701.

criminal conspiracies.[31] Only by ignoring the history of the decade since *White* can the Communist Party be equated to an ordinary corporation, union or association. For in that decade it has been established that officers of the Communist Party are engaged in a conspiracy to violate the Smith Act.[32] Since these officers, unlike the officers of "impersonal" organizations, are co-conspirators, bound by the acts of other officers in pursuance of the conspiracy and subject to criminal penalties for such acts, the *White* case does not touch the self-incrimination problems posed by this Act.

In *Boyd* v. *United States*[33] the Supreme Court declared "unconstitutional and void" a statute which merely imposed economic pressure to produce incriminating documents. State courts have invalidated various statutes that compelled self-incrimination,[34] including two that re-

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[31] In finding unions similar to corporations, the Court enumerated features common to both which are clearly inapplicable to criminal conspiracies: "Duly elected union officers have no authority to do or sanction anything other than that which the union may lawfully do"; "no member or officer has the right to use [the union's books and records] for criminal purposes * * *"; "the actions of one individual member no more bind the union than they bind another individual member unless there is proof that the union authorized or ratified the acts in question"; and "the members are not subject to either criminal or civil liability for the acts of the union or its officers as such unless it is shown that they personally authorized or participated in the particular acts." 322 U.S. at 702.

[32] Dennis v. United States, 341 U.S. 494, 516-17 (1951); Frankfeld v. United States, 198 F.2d 679 (4th Cir. 1952).

[33] 116 U.S. 616, 638 (1886).

[34] In re DeWar, 148 A. 489 (Vt. 1930) (statute requiring persons convicted of intoxication to disclose name of person from whom liquor obtained held "unconstitutional and void"); People v. Reardon, 90 N.E. 829 (N.Y. 1910) (statute

quired members of the Communist Party to register,[35] I would do the same with the present statute. Section 14(a)[36] permits a "party aggrieved" by respondent's order to obtain judicial review. Plainly the Communist Party is "aggrieved." Therefore it may challenge the legality of the Board's order even though the constitutional rights invaded are those of other persons and not of the Party itself.[37]

The Government and my brethren would postpone determination of constitutionality until a Communist Party official has declined to register for the Party on self-incrimination grounds. First, they say that an official may register voluntarily. But as I have pointed out, the coercion to register precludes voluntary compliance as a matter of law. In *Boyd* the Supreme Court held a statutory disclosure requirement "void" although, theoretically at least, someone within its scope might at some time have voluntarily made the required disclosures. Second, they argue that a Communist Party official might suffer no "substantial detriment" either because he had already disclosed his Communist affiliations in other proceedings or because he had already been convicted under the Smith Act. But the privilege can never be lost in any such

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compelling individual to submit to investigation of books and papers kept in private business for purpose of furnishing evidence in criminal prosecution held to violate self-incrimination clause of State constitution); State v. Simmons Hardware Co., 18 S.W. 1125 (Mo. 1892) (statute requiring officers of every corporation to inform Secretary of State whether company is violating State anti-trust law held void).

[35] People v. McCormick, 228 P.2d 349 (Cal. 1951); Maryland v. Perdew, 19 U.S.L. WEEK 2357 (Md. C.C., Allegany Cty., 1951).

[36] 50 U.S.C. § 793(a) (1952).

[37] National Coal Ass'n v. Federal Power Comm'n, 89 U.S.App. D.C. 135, 191 F.2d 462 (1951); Associated Industries v. Ickes, 134 F.2d 694 (2d Cir. 1943).

way. "The privilege is not waived by testimony given in a previous proceeding, even in the same case." [38] It is waived only by testimony in the same proceeding. Hence the individuals referred to by my brethren as having admitted Communist Party affiliations at the hearing before the Board did not thereby waive their privilege.[39] And the previous conviction of some Communist Party officials confers no immunity upon them from further prosecution based upon later Communist affiliation. Third, it is urged that the privilege "must be specifically asserted at the time a particular question is asked * * *." [40] But that doctrine applies only where it is not plain from the inquiry itself that incriminating disclosures are de-

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[38] United States v. Steffen, 103 F.Supp. 415, 417 (N.D. Cal. 1951); see also Marcello v. United States, 196 F.2d 437 (5th Cir. 1952); United States v. Field, 193 F.2d 109 (2d Cir. 1951); United States v. Peckhart, 103 F.Supp. 417 (N.D.Cal. 1952); United States v. Malone, 111 F.Supp. 37 (N.D.Cal. 1953) (waiver before grand jury held not to bar privilege at trial on indictment returned by same grand jury); Note, 36 A.L.R. 2d 1403 (1954). Other state authorities are collected in United States v. Steffen, *supra*, 103 F. Supp. at 417, n. 4. See WIGMORE § 2276(4) (3d ed. 1940).

[39] In the three-judge court suit brought by the Communist Party (see n. 1, *supra*), one of the grounds urged for enjoining hearings before the Board was that to properly defend itself at such hearings Communist Party officials would necessarily have to testify and that such testimony would necessarily entail their admission of Communist Party affiliations. Those officials who testified at the hearing did so only after denial of relief in that suit. Moreover, they testified more than two years ago. A fresh disclosure of continued Party office would clearly constitute a "substantial detriment," particularly in view of the intervening Board determination that the Party is a Communist-action organization.

[40] Brief for Government, p. 56.

manded.[41] It is plain here. Since any person who comes forward, even to claim the privilege, thereby identifies himself as a Communist Party functionary,[42] to require him to claim the privilege would, in the words

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[41] In a judicial or legislative proceeding, where most questions asked will not necessarily require incriminating answers, the tribunal must be put on notice that in a particular instance the Fifth Amendment may apply. See, *e.g.*, Vajtauer v. Commissioner, 273 U.S. 103, 113 (1927), where the Court said: "It is for the tribunal conducting the trial to determine what weight should be given to the contention of the witness that the answer sought will incriminate him, *a determination which it cannot make if not advised of the contention.* The privilege may not be relied on and must be deemed waived if *not in some manner fairly brought to the attention of the tribunal which must pass upon it.*" [Emphasis supplied.] Similarly, under a revenue statute requiring all taxpayers to give information about their sources of income either in a return or an investigation, the enforcing authorities must be put on notice that as to a particular taxpayer the Fifth Amendment may bar the required disclosure. See United States v. Sullivan, 274 U.S. 259, 263 (1927), where the Court said: "If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all." The matter was well expressed by the Seventh Circuit in Murdock v. United States, 62 F.2d 926, 927 (1932): "* * * a citizen from whom information is sought under a statute enacted pursuant to authority granted to Congress by the Sixteenth Amendment may invoke or waive the protection provided by the Fifth Amendment. And likewise the courts will compel the production of information, *subject, however, to the right of said taxpayer to justify his refusal so to do by showing facts that bring him within the protection of the Fifth Amendment.* Thus construed, the statute under consideration is not unconstitutional." [Emphasis supplied.]

[42] This is so because the only persons within the class required to act are Communist functionaries. As in the case of the hypothetical bank robber statute, to claim the privi-

of Chief Justice Marshall, "strip him of the privilege which the law allows * * *."[43]

In reviewing administrative action, the court "may adjust its relief to the exigencies of the case in accordance with equitable principles governing judicial action."[44] Equitable principles, even in the absence of a statute providing for judicial review, justify the relief I would grant in this case. *Truax* v. *Raich* is in point. There the complainant was an alien employee who was threatened with discharge because of a state statute which penalized only the employer for employing more than a certain percentage of aliens. It did not penalize employees. The Supreme Court held the threatened injury to the complainant brought the case "within the class in which, if the unconstitutionality of the act is shown, equitable relief may be had."[45] And Government officers have been enjoined "from bringing criminal proceedings to compel obedience to unconstitutional requirements."[46]

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lege is to admit that one is within the class to which the statute relates.

[43] United States v. Burr, 25 Fed.Cas. 38, 40, No. 14692(e) (C.C.Va. 1807); see also Hoffman v. United States, 341 U.S. 479, 486 (1951), where the Court declared: "* * * if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee."

[44] Ford Motor Co. v. National Labor Relations Board, 305 U.S. 364, 373 (1939); United States v. Morgan, 307 U.S. 183, 191 (1939); see Davis, ADMINISTRATIVE LAW 727 (1951).

[45] 239 U.S. 33, 39 (1915). See also Terrace v. Thompson, 263 U.S. 197 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[46] Philadelphia Co. v. Stimson, 223 U.S. 605, 621 (1912). See also Ex parte Young, 208 U.S. 123 (1908); and cases cited n. 45, *supra*.

Since Congress has enlarged the area of incrimination with regard to the Communist Party, and since the Supreme Court has found the enlargement permissible, we must see that the constitutional guarantee against compulsory self-incrimination is co-extensive with the widened danger.

The Fifth Amendment, as Dean Griswold has said, "is a clear and eloquent expression of our basic opposition to collectivism, to the unlimited power of the state. It would never be allowed by Communists, and thus it may well be regarded as one of the signs which sets us off from Communism." [47]

Since I would void the Act on Fifth Amendment grounds, I do not consider the petitioner's other contentions.

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[47] Griswold, *The Fifth Amendment As a Symbol*, HARV. LAW SCHOOL RECORD (Oct. 21, 1954).

## Opinion of January 9, 1958

## UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11850

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,
Petitioner,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD,
Respondent.

On Petition for Review of Order of the Subversive Activities Control Board and on Further Hearing Following Further Proceedings before the Subversive Activities Control Board on Remand Pursuant to the Judgment of the Supreme Court.

Decided January 9, 1958

Before PRETTYMAN, BAZELON and DANAHER, Circuit Judges.

PRETTYMAN, *Circuit Judge*: This is the second time this case has been here. After our decision upon the first petition [1] the Supreme Court ordered the case remanded

[1] *Communist Party of U. S.* v. *Subversive Activities Control Board*, 96 U. S. App. D. C. 66, 223 F. 2d 531 (1954).

to the Subversive Activities Control Board for reconsideration under Section 14(a) of the Subversive Activities Control Act [2] in the light of allegations that the testimony of three witnesses, Crouch, Johnson and Matusow, who had testified for the Government at the original hearing, was perjured.[3] The Board struck the testimony of those witnesses and issued a Modified Report and an order based thereon. The Party petitions for review of that order.

## I

The Party renews all the points of law it presented upon its first petition to this court. Upon reexamination we adhere to, and now reaffirm, the views we expressed in our opinion in that case.

## II

Section 3(3)(a) of the Act [4] provides:

"SEC. 3. For the purposes of this title—

* * *

"(3) The term 'Communist-action organization' means—

"(a) any organization in the United States (other than a diplomatic representative or mission of a foreign government accredited as such by the Department of State) which (i) is substantially directed, dominated, or controlled by the foreign gov-

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[2] 64 Stat. 1001 (1950), 68 Stat. 780 (1954), 50 U. S. C. A. §793(a).

[3] *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115, 100 L. Ed. 1003, 76 S. Ct. 663 (1956).

[4] 64 Stat. 989, 50 U. S. C. A. §782(3)(a).

ernment or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title; * * *."

In the language of this litigation the foregoing definition is said to have two components, a control component and an objective component. The Party says the findings of the Board are not supported by a preponderance of the evidence, in that the evidence does not support the finding as to control within the meaning of the control component and does not support the finding as to objectives within the meaning of the objectives component. The point rests upon a construction of the quoted section of the statute.

The Party says the control component means a relationship in which the Soviet Union exercises an enforceable power to exact compliance with its demands, and the Party adds of course that there is no showing that the Soviet has any means of enforcing conformity by the Party with Soviet desires. But we think this construction of the statute would be erroneous. In the first place, and conclusively, Section 13(e) of the statute [5] makes the matter clear. That section says: "In determining whether any organization is a 'Communist-action organization', the Board shall take into consideration" a list of eight subjects. Among these items are such things as "the extent to which its views and policies do not deviate from those of such foreign government" and "the extent to which it reports to such foreign government". These items demonstrate that the definition of a Communist-action organization was not intended by the Congress to be restricted to organizations which are subject to enforceable demands of the Soviet Union. In the second place the words of Section 3(3) do not necessarily imply enforceable power. The words are "substantially directed, dominated, or con-

[5] 64 Stat. 999, 50 U. S. C. A. § 792(e).

trolled". The statute uses the word "substantially". An organization or a person may be substantially under the direction or domination of another person or organization by voluntary compliance as well as through compulsion. This is especially true if voluntary compliance is simultaneous in time with the direction and is undeviating over a period of time and under variations of direction. If the Soviet Union directs a line of policy and an organization voluntarily follows the direction, the terms of this statutory definition would be met.

As to the objectives component of the definition the Party says this clause in the statute requires proof that the accused organization operates primarily to advance three objectives: (1) overthrow of the Government by any means necessary, including force and violence, and (2) establishment of a Communist totalitarian dictatorship, which (3) will be subservient to the Soviet Union. The Party says the Board found only the first of these three objectives and that its finding is not supported by the evidence and is based in large part on misrepresentations of the evidence. The Party derives its construction of the objectives component by analyzing Section 2 of the statute. That section is a recitation of fifteen findings made by the Congress. In these fifteen findings the Party discerns findings as to the objectives of the world Communist movement. As thus discerned the Party describes these objectives in three parts, as we have just indicated.

The Board clearly concluded in the affirmative on each of the foregoing objectives. See its Modified Report [6] at pages 39, 89-90, 194-202, 204. Its conclusions were clearly supported by a preponderance of the evidence. It would prolong this opinion beyond permissible length even to sketch that evidence. It is referred to at length in the Modified Report. So, even if we accept the Party's analysis of Section 2—we intimate no opinion upon whether

[6] Available from the Government Printing Office.

or not that analysis is accurate—we think the objectives component of the definition of a Communist-action organization has been met.

III

The Party says the Board's finding with reference to a world Communist movement, if authorized by the Act, is not supported by the evidence. By "if authorized by the Act" the Party is referring to the section of the Act (Section 2) which contains a congressional finding upon the existence and characteristics of the world Communist movement. The Party says that in view of that finding the subject may not be litigated. We discussed that matter in our former opinion. The finding made by the Board is, in our view, supported by ample evidence in this record. So, whether that finding is superfluous or not, the fact is established, either by the congressional finding or by the Board finding, or by both.

IV

The Party says that the order of the Board must be set aside because the Board refused to require production of alleged reports made to the Federal Bureau of Investigation by Government witnesses. Reports said to have been made by four witnesses—Scarletto, Gitlow, Budenz and Markward—are involved. The Party moved for the production of these reports both at the original trial and at the hearing after remand.

*Scarletto.*

The Board affirmatively stated that Scarletto's testimony was not credited. It said:

> "Relevant to this issue petitioner's witness Scarletto testified concerning a meeting of a Party club where sabotage of United States efforts in the Korean War were discussed, however, this testimony was rendered questionable on cross-examination and is not credited."

The Party's objective in demanding production of Scarletto's alleged report to the F.B.I. was to impeach him as a witness. Since the Board did not credit the testimony that objective was achieved. The Party accomplished the full purpose it sought from the production of the report. We need therefore consider this point no further.

*Gitlow.*

Gitlow was for years a high official of the Communist Party—a member of the Executive Committee of the Communist Internationale, a member of the Executive Committee of the Profintern, and head of American delegations to Moscow in 1928 and 1929. In 1929 he was expelled from the Party because of a difference with Joseph Stalin on the question of the leadership of the American Communist Party. Over a decade later, in about 1940, Gitlow turned over to the F.B.I. all documents and papers in his possession pertaining to the Party, including a quantity of minutes of meetings of top committees. A few weeks later he dictated for the F.B.I., over a period of weeks, memoranda explaining and interpreting those documents.

Gitlow was not at any time an employee of the F.B.I. He never at any time made to the F.B.I. contemporaneous reports of events.

Much of Gitlow's direct testimony before the Board consisted of his identification of documents which he had delivered to the F.B.I. He explained those documents on the witness stand.

While Gitlow was testifying before the Board he was shown a document, which he said was a copy of his interpretation of certain minutes and documents which he had submitted to the F.B.I. He was asked whether this document refreshed his recollection. He replied that it did not—"Not at all." The Government gave counsel for the Party the memorandum with which the Government attempted to refresh the witness's recollection. The dispute here concerns the remaining memoranda.

The Party moved that the Attorney General be directed to produce for the inspection of the Party the so-called explanatory memoranda.

The problem posed is this: Where a witness, approximately contemporaneously with turning over to the F.B.I. quantities of minutes of Party meetings, wrote for the F.B.I. interpretations and explanations of those documents, and the witness testified before this Board at length in explanation of the same documents, must his explanatory memoranda be produced upon request?

The first point here concerns the status of the documents involved; they are official possessions of the F.B.I. The Government repeatedly urges that they are confidential. Only in its brief here, and only in one sentence, does it claim they are privileged. There is a vast difference between confidential and privileged. Almost any communication, even an ordinary letter, may be confidential. Such a document may not relate to any matter of high public concern. But privileged means that the contents are of such character that the law as a matter of public policy protects them against disclosure. A communication from a person to his banker may be confidential, but it is not privileged; certain of his communications to his doctor or his lawyer are not only confidential but also privileged; the law does not permit their disclosure even under *subpoena* by a court. So, too, with Government documents. Some are privileged, such, for example, as the President's advices in the conduct of foreign affairs and some papers relating to the internal security of the nation.

The Government did not claim before the Board in the present proceeding that the documents here involved are privileged. No factual allegations as to privilege have been made. We cannot consider an unsupported claim made only in the brief here that the doctrines of privilege apply. That the documents are merely confidential does not protect them against compulsory disclosure. Of course this does not mean such documents must be produced upon

every demand; good cause for intrusion into confidential files and materiality and relevancy must be shown. The law in that area is well settled.

We must next consider the contention of the Government that the Party has waived its right to the Gitlow memoranda. The Gitlow testimony and its accompanying incidents occurred at the original hearing before the Board. The production of the explanatory memoranda was demanded at that time. In its petition for review in this court the Party asserted error (No. 14 of grounds for relief) in the refusal of the Board to order production of documentary evidence but without specification of that evidence. In its brief the Party asserted the point as question number 5. It does not refer us to any place in the argument portion of its brief on that appeal where the production of the Gitlow memoranda was mentioned, and we find none. The matter seems not to have been mentioned in the Supreme Court.

The Government argues that failure to raise the point in the Supreme Court spells abandonment of the point by the Party. We do not think so. Rule 23(c) of the Rules of the Supreme Court provides for a statement of the questions presented for review. It provides that the statement of a question will be deemed to include every subsidiary question "fairly comprised therein" and that only such questions will be considered by the Court. But that seems to us not to be a basis for concluding that all questions not stated or "fairly comprised" in a statement are abandoned. To be sure, if a judgment is affirmed by the Supreme Court, all questions presented and all which might have been presented are *res judicata*. But, if the judgment is reversed or vacated on a single point (*e.g.*, a constitutional question and the only point presented to the Court), other claims of error are not foreclosed upon a retrial or reconsideration upon a general remand. Of course, if the Supreme Court reverses and directs that a certain final judgment be entered, the whole controversy

is ended. We are here considering a reversal or vacation with a remand, as, for example, "for further proceedings in accordance with this opinion." Such a remand, or a general unqualified remand, means that the appellate court and trial court are to reconsider the case on all other points. Those points remain open after the Supreme Court's disposition of the case before it. By way of illustration, if an appellant urges six errors in this court, one of which is a constitutional question, and being unsuccessful here goes to the Supreme Court on that one point and is there successful, he is not precluded from urging his view of the correct ruling on his other points when he again tries or argues his case in the appellate or trial court. If this were not so, almost every petition to the Supreme Court would be burdened with a plethora of "questions presented" in which the Court has no interest and should have none. We think the Party did not abandon points raised in this court but not mentioned in the Supreme Court.

So the problem becomes this: Did the Party abandon this point when it stated the point in its petition for review and its brief but did not argue it here? We think a party in this court does not abandon points noted in both his petition and his brief but not argued. He takes a calculated risk. If the judgment is affirmed here, all points which are raised or which could have been raised are closed to further controversy. But if the judgment is reversed on one point the other points, preserved by notation, remain available for further contest. We conclude that the Party did not abandon its contention in respect to the Gitlow memoranda.

The Government next argues that, when the Board first refused production of the memoranda, the Party had a remedy and that remedy was exclusive. It was to apply to this court for leave to adduce additional evidence, *i.e.*, the memoranda, under Section 14(a) of the statute.[7] That

[7] *Supra* note 2.

section provides: "If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material, the court may order such additional evidence to be taken before the Board and to be adduced upon the proceeding in such manner and upon such terms and conditions as to the court may seem proper." The Government relies upon *Consolidated Edison Co.* v. *National Labor Relations Board.*[8] We agree that we are bound by that case. The facts there were that when the Government rested its case before the Board the Company announced it would present two witnesses. It did so and then proffered two more witnesses, present in the hearing room, whose testimony would be material but short. The examiner rejected the proffer. In the Court of Appeals for the Second Circuit the Company urged that the rejection was error amounting to denial of due process. That court said:

> "These witnesses were at hand, their testimony would have been short, and would have entailed no appreciable delay in closing the hearings. It was vital testimony on the issue of the petitioners' motive in discharging him. Denial of leave to introduce it appears to us unreasonable and arbitrary. However, the petitioners have not applied to this court for the taking of additional evidence, as they might under section 10(e), 29 U.S.C.A. § 160(e)."[9]

The court did not consider the point further and directed enforcement of the Board's order. In the Supreme Court the Company again presented the point, *inter alia.* The Court said:

> "* * * An offer of proof was made which showed the testimony to be highly important with respect to

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[8] 305 U. S. 197, 83 L. Ed. 126, 59 S. Ct. 206 (1938).

[9] *Consolidated Edison Co.* v. *National Labor Relations Board,* 95 F. 2d 390, 397 (1938).

the reasons for the discharge. It was brief and could have been received at once without any undue delay in the closing of the hearing.

"We agree with the Court of Appeals that the refusal to receive the testimony was unreasonable and arbitrary. Assuming, as the Board contends, that it had a discretionary control over the conduct of the proceeding, we cannot but regard this action as an abuse of discretion. But the statute did not leave the petitioners without remedy. The court below pointed to that remedy, that is, to apply to the Court of Appeals for leave to adduce the additional evidence; on such an application and a showing of reasonable grounds the court could have ordered it to be taken. § 10(e)(f). Petitioners did not avail themselves of this appropriate procedure."[10]

The Court did not discuss the point further and affirmed the Court of Appeals judgment with modification not material here.

As we read the opinion and decision in the *Consolidated Edison* case it means that, when proffered evidence is denied receipt by the trial tribunal in a case in which a statute similar to Section 19(e) of the National Labor Relations Act[11] applies, the profferor must apply to the appropriate United States Court of Appeals for permission to adduce the additional evidence; if he fails so to move he cannot successfully present the point on appeal. The rule applies even though the evidence is "highly important"

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[10] *Supra* note 8, 305 U. S. at 226.

[11] 49 Stat. 454 (1935), 61 Stat. 148 (1947), 29 U. S. C. A. § 160(e), reading in pertinent part: "If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript."

and is brief and immediately available and rejection of it is "unreasonable and arbitrary". Other courts have so read that opinion.[12]

It may be said that the ruling we have just outlined creates a right to interlocutory relief in such cases, to multiple appeals to the appellate courts, and gives no effect to the provision of the Labor Relations Act which requires that to secure permission to adduce additional evidence the movant must show "that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board". It may also be, as the Eighth Circuit has held,[13] that the petition for review in such a case should be treated as a motion to adduce the additional evidence. But if that were correct we do not see why the petition was not so treated in the *Consolidated Edison* case. There is much force to these various suggestions, and perhaps we misconstrue the opinion of the Supreme Court. But we are bound by the opinion as we read it.

The statute in the case at bar is substantially identical with the pertinent part of the statute involved in the *Consolidated Edison* case. The Party did not move in this court for permission to adduce additional evidence in the Gitlow memoranda.

The situation here differs somewhat from that in *Consolidated*. In that case the Company had its evidence ready to proffer. Here the Party must first secure the evidence by an order directed to the Government. But the Board on the remand refused to reopen this hearing to receive

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[12] *National Labor Relations Board* v. *Fairchild Engine & Airplane Corp.*, 145 F. 2d 214 (4th Cir. 1944); *National Labor Relations Board* v. *National Laundry Co.* 78 U. S. App. D. C. 184, 138 F. 2d 589 (D. C. Cir. 1943); *California Lumbermen's Council* v. *Federal Trade Comm'n*, 103 F. 2d 304 (9th Cir. 1939).

[13] *Mississippi Valley Structural Steel Co.* v. *National Labor Relations Board*, 145 F. 2d 664 (1944).

any additional evidence on Gitlow's credibility. The purpose of the request for production was to offer additional evidence of Gitlow's perjury. Without this as its purpose the Party could not obtain an order for production. If the evidence, even if produced, could not be got into the record, it need not be produced. So it seems to us that the right to adduce is a necessary prerequisite to an order of production. Thus we conclude that the rule of *Consolidated Edison* applies here. The converse can be argued, and the argument is not unreasonable. It can be said that the production of the documents is a necessary preliminary to a motion to adduce the evidence into the record; *i.e.*, the evidence cannot be proffered until it is in hand and its relevancy and materiality are shown to the satisfaction of the court, as the statute provides. But it seems to us this latter is not the correct view; it would mean that the Government could be required to produce documents which are not, or may not be, admissible in evidence; *e.g.*, if a record has been closed, an order of reopening ought to be made before an order of production is granted. When the statute says a movant must "show to the satisfaction of the court" that the evidence is material, it does not mean he must actually produce the evidence for the court to see; it means he must show that the evidence is in existence and what he expects to prove by it. We think, as we have indicated, that, where a proceeding is in such state that certain evidence for some reason cannot be put in the record without permission to do so, the permission must be obtained before compulsory process for production of the evidence is issued. We do not consider whether, if the motion to adduce were granted, the Government must then produce, inasmuch as this latter may involve questions of privilege, relevancy, etc.

We are of opinion that under the *Consolidated Edison* case the point respecting the refusal to order production of the Gitlow memoranda is not available to the Party

upon this petition for review. Its contentions in respect to these memoranda are rejected.

*Budenz.*

Budenz was a prominent member of the Party for ten years (1935-1945), being for part of that time the managing editor of the *Daily Worker*. The Party demanded the production of two alleged reports made by this witness to the F.B.I. The first report is alleged to have dealt with a so-called Starobin letter and the other with an alleged conversation between Budenz and a man named Weiner.

It appears that in May, 1945, Starobin, who was the foreign editor of the *Daily Worker*, sent a letter from San Francisco to that paper in New York. It was said to have disclosed that D. Z. Manuilsky, a representative of the Communist Internationale, conveyed either commands or advice to the American Communists concerning their policy and program. There appears to have been discussion in the letter concerning the attitude of the "French Comrades". After Budenz left the Party he went to the F.B.I. and had many conversations with representatives of that office concerning many matters involving the Party. Among other things he is said to have made an oral statement to the F.B.I. concerning the Starobin letter.

On the witness stand before the Board Budenz testified concerning the Starobin letter. The letter was not produced; the testimony as to its last whereabouts was that it was taken upon receipt to the "top floor" of the offices of the *Daily Worker*. Under cross-examination Budenz testified to an account of the letter which he had included in his book, *This Is My Story*. He also said he had testified on the same subject before the un-American Activities Committee. He could not recall specifically whether the advice transmitted by Starobin originated with the "French Comrades" or with Manuilsky. The Starobin letter was pertinent to the case before the Board upon the question

whether the Party received directives, etc., from Communist headquarters in Russia.

The Party demanded that the Attorney General produce "all reports made by this witness to the Federal Bureau of Investigation dealing with the so-called Starobin letter."

Budenz was at no time an agent of the F.B.I. There is no evidence or indication that he ever at any time made a written report to the F.B.I. concerning the Starobin letter. The position of the Party is premised upon the assumption that if Budenz talked to an agent of the F.B.I., as he said he did, the agent made some written report of the conversation. It is such a report, if there is one, that is involved here.

The second Budenz report dealt, as we have said, with an alleged conversation between him and one Weiner. Budenz was for a time (1937-1940) editor of the *Midwest Daily Record*, "a Communist-controlled, organized and financed newspaper". The paper had financial problems, and Budenz testified that he and Morris Childs, the leader of the Communist Party in Illinois, made a trip to New York for a conference with Robert William Weiner, who was then in charge of Communist Party funds. Budenz testified before the Board: "Childs asked him if we couldn't get some money from abroad." He testified that, in the terminology used very frequently in the Party, "abroad" meant Moscow. On cross-examination, Budenz was asked whether in any of his books, writings, or published testimony he had ever related the alleged conversation of Childs, Weiner and himself. Budenz replied that it was his remembrance that he had, somewhere, and then he added, "I certainly have told the Federal Bureau of Investigation about it." Counsel for the Party, cross-examining, said: "I didn't ask you about that. I didn't ask you what you told the Federal Bureau of Investigation. That is private."

The present position of the Party on this point is that, if Budenz did in fact tell the F.B.I. about the conversation, the agent to whom he spoke certainly made a written report of it. The Party demands production of that report, if there is one.

In respect to the two written reports sought in connection with the Budenz testimony, a query immediately arises because it is not shown there were any reports. Could the Attorney General be required to answer whether there were any such reports? Be that as it may, a dispositive fact is that if there were such reports they were not by Budenz; if these documents exist they are reports by agents recounting conversations with Budenz. Is the Party entitled to production, for impeachment purposes, of written accounts made by a third party? Would Budenz be impeached if it were shown that a third party—not presented—had written that he (Budenz) had said so-and-so? We think he would not. Such reports would not be admissible unless the author was put on the stand and subjected to cross-examination. This is a classic situation requiring application of the hearsay rule. The reports, if there are any, are statements made by an unidentified third person purporting to show what a witness had said or done. The hearsay rule applies to writings. Still further, even in a criminal case under the new statute [14] the reports here involved are not required to be produced. The new act of Congress requires the production of "statements" but defines statements as those written, signed or approved by the witness himself, or "a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital * * * recorded contemporaneously". Surely the executive files of the Government are not to be invaded more easily and with less basis in a regulatory administrative proceeding of this sort than they would be in a criminal prosecution.

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[14] Pub. L. No. 85-269, 71 Stat. 595 (Sept. 2, 1957).

We conclude on this point that the action of the Board in refusing to order production of the alleged reports involved in the Budenz testimony must be affirmed.

*Markward.*

Mrs. Mary Stalcup Markward was an active agent for the F.B.I. from May, 1943, until October, 1949. She testified before the Board that she had inquired of the F.B.I. how she as a patriotic American citizen could help the Government in this connection and that an agent told her the way would be to join the Communist Party and furnish information. She joined the Northeast Club of the Party of Washington, D. C., and thereafter held various offices in that organization, including those of press director, treasurer, membership secretary, and chairman.

Markward was a witness for the Government upon the original hearing before the Subversive Activities Control Board. She testified in regard to a so-called Frankfeld statement and in regard to money received by her from the Government. She was vigorously attacked on cross examination. During that hearing the Party moved for production of a report by Markward to the F.B.I. concerning the Frankfield statement and at the end of the case moved for production of all F.B.I. records relating to payments made to Markward. Both motions were denied.

In its remand the Supreme Court ordered the elimination from the case of the testimony of three witnesses, Crouch, Johnson and Matusow; it did not mention Markward. While the case was pending before the Board on the remand, the Party moved this court to direct a reopening in order that it might present further testimony showing that Markward was a perjurer. We denied the motion but in our order gave permission to the Board to reopen to receive testimony concerning Markward's statements about an Annie Lee Moss. The Board reopened for that purpose. Markward returned to the witness

stand and was exhaustively cross-examined. The Party moved for production of the transcript of a security hearing in respect to Annie Lee Moss, in which Markward had testified concerning Moss, and of reports by Markward to the F.B.I. concerning Moss.

The Party now presents three issues in respect to the production of F.B.I. reports in connection with the testimony by Markward. The first issue relates to the Frankfeld statement, the second to Annie Lee Moss, and the third to payments to Markward by the F.B.I. The Party also presents an issue concerning the production of the transcript of a Security Board hearing on Annie Lee Moss.

(a) The facts concerning the Frankfeld statement were: Markward testified before the Board that at a meeting of the District Committee of the Communist Party in March, 1949, at Baltimore, Maryland, a statement made by Phil Frankfeld, District chairman, was discussed. She said: 'Phil Frankfeld had made a statement to the Baltimore Sun along the same line, stating that the members of the Communist Party would not bear arms in any conflict between the United States and the Soviet Union." On cross examination the witness was asked the following questions and made the following answers:

> "Q. You stated here on page 5890 that Phil Frankfeld had made a statement to the Press, to the Baltimore Sun, specifically, along the same line, that the members of the Communist Party would not bear arms in any conflict between the United States and the Soviet Union. Now you say he did not make that statement or that he did make the statement to the Baltimore Sun; which is it? A. He made the statement in the meeting in which we were discussing the statement he had made to the Batlimore Sun, and my recollection very evidently has confused the actual statement he made to the Sun and the discussion of the statement he made to the Sun.

> "Q. So your recollection was confused on the subject, was it not? A. It was confused on the actual wording of what he said to the Sun."

Being asked whether she had made a report in writing to the F.B.I. with respect to what Frankfeld had said regarding possible conflict between the Soviet Union and the United States, the witness replied, "I made a report at that time of exactly what transpired at that meeting."

The Party moved for production of the F.B.I. report, on the ground that "there is a clear conflict between her testimony on direct examination and what she alleges the content of that report is, as well as the exhibits themselves." The motion was denied.

When the Board reopened the hearing after the remand, and pursuant to our order granting that permission, it ordered the Attorney General to produce for inspection *in camera* by the Board Markward's report to the F.B.I. concerning the Baltimore meeting in March, 1949. The report was produced, inspected *in camera*, and then sealed. Production to the Party was refused. The Board said:

> "Our review of the document revealed that, though the phraseology of the witness' testimony at the hearing was not there contained, it reported statements by Frankfeld which when read in the light of the relevant exhibits, *e.g.*, Pet. Exs. 331 (Foster, Dennis statement), 332 (Frankfeld statement), 333 (Thorez statement), and 334 (Togliatti statement) [statements by Communist Party leaders on the subject of force and violence] led us to conclude that production is not warranted. The report also contains other statements substantiating testimony she gave at the hearing on what transpired at the Party meeting, in addition to still other matters not here relevant. In short, from our knowledge of the record we concluded that no substantial credibility question was presented."

This is not a criminal proceeding, nor is it a civil action as that term describes judicial proceedings. It is an administrative action, conducted under the provisions of the Subversive Activities Control Act.[15] The pertinent section is Section 13 of the Act.[16] The Act requires a verified petition, public hearings, oral testimony, receipt of evidence, subpoenas upon request of the respondent, the right to counsel, cross examination, and a transcript of the testimony taken stenographically. It requires a report in writing by the Board, stating its findings of fact and its order, the latter to be published in the *Federal Register* when it has become final.

The statute clearly describes an adjudication as that term is used in the Administrative Procedure Act.[17] "To be sure, the laws under which these agencies operate prescribe the fundamentals of fair play." Their proceedings must "satisfy the pertinent demands of due process".[18]

If this were a civil action in a court, or if it were a criminal case, the Party would be entitled to the production of these reports.[19] The question here is whether production is one of the fundamentals of fair play required in an administrative proceeding. We think it is.

The question is a very narrow one. The Government has not claimed privilege. It was established that Markward did make a report to the F.B.I. at or about the time of the event and that this report related to the subject of her testimony. Her credibility was vigorously attacked

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[15] Title I of the Internal Security Act of 1950, 64 Stat. 987, 50 U. S. C. A. § 781 *et seq.*

[16] 64 Stat. 998, 50 U. S. C. A. § 792.

[17] 60 Stat. 237 (1946), as amended, 5 U. S. C. A. § 1001 *et seq.*

[18] *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 143-144, 84 L. Ed. 656, 60 S. Ct. 437 (1940).

[19] Fed. R. Civ. P. 34; *Jencks* v. *United States*, 353 U. S. 657, 1 L. Ed. 2d 1103, 77 S. Ct. 1007 (1957); Pub. L. No. 85-269, 71 Stat. 595 (Sept. 2, 1957).

at precisely the point of this testimony—what Frankfeld said at the Baltimore meeting.[20] The testimony was important; it bore upon the problem, pertinent under Section 13(e)(8) of the Act, whether American Communists would bear arms in a war between the United States and the Soviet Union.

We hold that, where the Government places on the stand a witness who testifies about an event long past, and it is shown that this witness at or about the time of the event made a written report to the Government concerning that event, and the testimony is material, and the credibility of the witness in her testimony upon this precise point is attacked, the Government upon demand must produce the report made by the witness. We think simple justice, the fundamentals of fair play, require no less. The opinion of the Supreme Court in the *Jencks* case,[21] as we read it, is based upon the elementary proposition that the interest of the United States is that justice be done. The same elementary proposition applies here and leads to the same result. We must therefore remand with directions to the Board to direct the production of Markward's report to the F.B.I. concerning the Frankfeld matter.

(b) The facts relating to the Annie Lee Moss issue were: Mrs. Markward had testified in a Security Board hearing involving Moss in the Department of Defense and in the "Foreign Born" case before the Subversive Activities Control Board. In both cases she had said that an Annie Lee Moss was a member of the Northeast Club of the Communist Party in Washington, D. C., during the time the witness herself was a member.

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[20] Although the request for production of Markward's F. B. I. report on the Frankfeld statement was made at the original hearing, the Party preserved this point on appeal by its motion of August 17, 1956, to adduce additional evidence.

[21] *Supra* note 19.

In a written motion filed with the Board upon the remand the Party demanded production of the Moss security hearing transcript. The Attorney General filed the transcript under seal for *in camera* inspection by the Board. In its order reopening the hearing the Board denied the motion to produce, saying:

> "We have reviewed the documents in the *Moss* proceeding submitted by petitioner for inclusion in the record and *in camera* inspection by the Board. The review evidences, in the light of its motion, that respondent seeks to retry the *Moss* Security Hearing and probe the actions and mental processes of the Security Board and the Defense Department, and this is not a function of the Board. But even if this were permissible, our review reveals that respondent's showing that witness Markward testified falsely in the *Moss* proceeding and was disbelieved in that proceeding is not supported. The Board will, therefore, not permit testimony to be adduced going to the question of whether witness Markward was disbelieved in the *Moss* Security Hearing."

When the case was reopened and Markward returned to the witness stand, she was questioned on cross-examination concerning her identification of Moss as a member of the Party. She said: "I have never recognized her as a person whom I knew as a member of the Communist Party. My testimony has been as to what the records had to say about a person by the name of Annie Lee Moss." The aim of the cross-examination obviously was to establish that the witness had identified Moss personally and to lay a foundation for showing that this was perjury. Mrs. Markward answered affirmatively when asked whether she stated in reports to the F.B.I. that Annie Lee Moss was a member of the Communist Party. Thereupon the Party asked for the production of the F.B.I. report, or reports, on the matter. The Board refused production.

During this reopened hearing the Party renewed its demand for production of the Moss security hearing transcript. The motion was denied. In announcing that ruling the Chairman said that Mrs. Markward's identification of Mrs. Moss in the security hearing was confined to "her recollection of that name and an address in party records for certain years, none later than 1946, and that identification was not based on personal identification." The Chairman further said that "Since adequate foundation for production of the Moss transcript does not now exist in our view, it has not been ordered."

Thus the demands for the production of documents in the course of Markward's cross-examination respecting the Moss matter were (1) Markward's reports to the F.B.I. concerning Moss and (2) the transcript of the Defense Department security hearing on Moss. The Board denied the first and, after inspecting the second *in camera*, denied its production to the Party.

Pursuant to the principles heretofore recited in this opinion relative to the Frankfeld matter, we are of opinion that we must direct the Board to order the production of the above-mentioned documents, *i.e.*, the witness Markward's report to the F.B.I. and her testimony in the security hearing concerning Annie Lee Moss. The latter (the testimony) may be excised so that only relevant parts need be produced.

(c) The facts respecting the payments of money to Markward by the F.B.I. were: Mrs. Markward testified at the original hearing:

> "Q. While you were supplying the Federal Bureau of Investigation with information, Mrs. Markward, were you paid any salary by them? What sort of financial arrangements did you have with them? A. I was not paid a salary by the Federal Bureau of Investigation. Nothing I did for my government

was contingent upon receipt of any money from the Federal Bureau of Investigation or from any other government agency.

* * *

"Q. Did you receive any money from them at all? A. I did receive contributions to the expense of the work I was doing from time to time.

"Q. What sort of things would they be? Make exactly clear just what sort of arrangements you had. A. In this type of activity I was doing, it was very necessary to pay dues, to make contributions, to buy literature, that type of thing, and other incidental things.

"Q. Transportation to Washington. A. Yes, that was part of it."

After the close of the evidence in the original hearing the Party moved that the Board reopen the hearing in order to permit it (the Party) to prove that Markward testified falsely "in answering questions as to whether they [several witnesses] had been paid for their services as informers and as to the amount of such payments"; and "[i]n order to permit Respondent [Party] to obtain, by subpoena or by order of the Panel, the records of the Petitioner with regard to the amounts paid by or at the direction of Petitioner to each of Petitioner's witnesses." The Board denied the motion.

In a criminal case in the United States District Court for the Southern District of New York, *United States* v. *Flynn, et al.*, a *subpoena duces tecum* had been served upon the Attorney General requiring production of all vouchers, receipts, cancelled checks, and other records showing all payments ever made by the Department of Justice or any of its constituent divisions and bureaus to Mary Stalcup Markward (and others). In lieu of production of such records the prosecution supplied the defendants with figures setting forth "all payments of which

it has knowledge made by United States Marshals to the aforesaid persons." It was stipulated in the *Flynn* case that Mrs. Markward had received a total of $24,026.45 during the years 1943 through 1952. This stipulation became part of the record in that case and thus was public. This occurred after the original hearing before the Board in the present proceeding.

After remand to the Board the Party renewed its request for an opportunity to prove that Markward had testified falsely concerning the receipt of money from the Government. The motion was again denied.

We do not rely upon *Jencks* v. *United States*, *supra*, or upon Public Law No. 85-269 for our conclusion that the records of Markward's compensation from the F.B.I. must be produced, since these records are not "statements" of the witness but are rather records of an executive department maintained in the course of carrying out its functions. Our conclusion is based on the general proposition, exemplified by Rule 34 of the Federal Rules of Civil Procedure, that, where one party to an action is shown to have documentary evidence contradictory to the testimony of one of its witnesses, production of such documents is required upon request of an opposing party.

(d) The Blumberg matter. The essence of the Blumberg situation is: Markward testified at the trial of one Blumberg, a public proceeding in a United States District Court. Her pertinent reports to the F.B.I. were produced, and she was cross-examined at length upon that foundation. In the present proceeding the Board admitted in evidence proffered portions of the transcript of the Blumberg trial, consisting in large part of the cross-examination of Markward. It refused to permit recross-examination of Markward upon her testimony at the Blumberg trial. It also refused to admit in evidence the F.B.I. reports in that case. It did consider, in evaluating Markward's testimony, the testimonial inconsistencies which could be

noted in the Blumberg transcript. We think the action of the Board was not unreasonable. We will not reverse on the point.

V

The Party says the order of the Board must be set aside because it relied on the tainted testimony of the witness Markward.

Since, as we have already said, we are remanding for the receipt of further evidence concerning this witness, if such evidence be offered after production of the documents involved, we do not now consider this point.

VI

The Party says the order must be set aside because the Board applied biased standards of credibility, based findings on misrepresentations of the evidence, and relied on tainted testimony. The first two of these allegations do not require discussion, as we find no support for them in the record. The third requires discussion.

The Party says the testimony of the witnesses Honig, Budenz and Gitlow was "tainted" and therefore should have been stricken. It argued this point to us upon the first appeal and also to the Supreme Court. It argues the point at length in its brief now before us. The Board, in its Memorandum Opinion on the motion to strike, says that, while it recognizes that the Supreme Court remanded specifically for the elimination of the testimony of Crouch, Johnson and Matusow and that therefore technically no other allegations of "taint" were before it on the remand, it conceives the spirit of the Supreme Court's opinion to permit its reevaluation of the testimony of the witnesses Honig, Budenz and Gitlow. It made that reevaluation and concluded there was no warrant to strike their testimony.

The Supreme Court did not mean in its opinion in this case that whenever testimony is challenged as perjurious it must be expunged or disregarded. Challenges to veracity and charges of falsity are commonplaces in the courtroom. The customary charge to a jury is that, if a juror believes a witness has consciously lied about a material matter, he is at liberty to disbelieve—may disbelieve, not must—the whole of that witness's testimony.[22] The charge of perjury on the part of Crouch, Johnson and Matusow was not challenged or denied by the Government. The Court specifically gave the Board the option of holding "a hearing to ascertain the truth of petitioner's allegations, and if the testimony of the three witnesses is discredited, it must not leave that testimony part of the record."[23] As to the witnesses Honig, Budenz and Gitlow the charges of perjury are vigorously disputed by the Government and have been twice examined by the Board. We find no clear error in its conclusions upon the matter. The credibility of witnesses must be left in large part of the hearer of the testimony, a proposition too elementary to require citation of authority. We affirm the Board on this point.

VII

The Party urges that the case must be remanded because the Board in its Modified Report modified its original findings for reasons not arising from expunging the testimony of Crouch, Johnson and Matusow or the additional evidence by Markward. Its argument is that the Board could have done one or the other of two things: (1) It could have simply expunged the tainted testimony and reappraised the evidence in the light of that elimination. This would have been a reexamination under Section

[22] See 3 Wigmore, Evidence § 1010 (3d ed. 1940).

[23] *Supra* note 3, 351 U. S. at 125.

14(a) of the Act, which is what the Supreme Court and this court told the Board to do. But, says the Party, in such a proceeding the ultimate point at issue is the validity of the original order, which means its validity as of the time of its adoption, and subsequent events are not to be considered in support of it. (2) The Board could have embarked upon the consideration of a new order, taking into account all relevant data and events occurring up to the close of those proceedings. In that event, says the Party, the original order would be deemed to be abandoned and should be rescinded on the record. This would not have been a mere Section 14(a) proceeding but would have been a new proceeding with new issues. The Party says the Board actually took neither of these two alternative courses but, instead, reconsidered its original order, bringing to its support subsequent events, and made new findings not in its original findings.

We think the basic position of the Party as to the two alternatives is correct, but we do not find that the Board followed the composite course the Party asserts was followed.

The nub of the Party's contention, from a practical point of view, is that the Party upon the remand sought the admission into evidence of certain events which it says took place after the Board's original order and which tend to show the independence of the Party from domination, etc., by those in control of the world Communist movement. The Board rejected the proffer as improper under the remand under Section 14(a) of the Act.

It seems obvious to us that in a Section 14(a) remand proceeding directed by the Supreme Court the Board could expunge the testimony of Crouch, Johnson and Matusow and then make revised findings if it found the expunction required revised findings. Such is the purpose of the remand. It seems equally obvious that the Board, in reexamining its findings after the expunction, could

cite additional or other bits of evidence in the record to support its findings. Neither commissions nor courts always cite every bit of evidence in a record supporting the findings, however desirable and commendable that practice may be. Nothing prevents later citation of any or all evidence in the record supporting a given conclusion or finding. We think the Board did no more than what we have described as these proper courses.

The Party refers us to twelve instances as the more important examples of invalid revisions by the Board of its original report. We have examined each of the twelve carefully. We find that the record does not support the Party's allegations. The record shows that the revisions (1) followed from the expunction of the Crouch-Matusow-Johnson testimony relied upon in part in the original report, (2) cited in support of a finding some evidence in the original record but not specifically cited in that report, or (3) were mere rearrangements or rephrasings. Thus, for example, the *History of the Communist Party of the Soviet Union* was in the original record as Petitioner's Exhibit 330, the *Programme of the Communist International* was Petitioner's Exhibit 125, and the report by Gilbert Green was mentioned in the original report at page 63 of the Joint Appendix. The findings on "Reporting" (point 3), "Secret Practices" (point 4), "Discipline and Democratic Centralism" (point 6), "World Communist Movement" (point 7), and "Force and violence" (point 10) were originally based in part upon the testimony of Crouch, Johnson and Matusow. The Party says that, whereas the Board in its first report keyed its findings to the specific criteria in Section 13(e) of the Act, in its Modified Report it keyed some of them directly to the definition in Section 3(3). But, as we have said, the criteria of Section 13(e) are directed to a determination within the bounds of Section 3(3). We find no merit in the point. We find no merit in the point (number 2) concerning the changes in the Board's findings as to

"Directives and Policies". The Board certainly retained the substance of its original findings. And the same should be said of point 5, "Marxism-Leninism". As to point 8, "Party name", the Board commented on its significance in the original report. In point 9, "Foreign representatives", the Party complains that the Board dropped a finding as to J. Peters. That original finding was based in part at least upon the testimony of Crouch and Matusow. The Party complains that in the Modified Report the Board said it scrutinized with care the testimony of Honig, Scarletto and Cummings. It did this, as we have said, in accordance with the spirit of the remand. We find no error.

The evidence cited by the Board in connection with "Anti-Imperialism" (point 12) was all in the original record, with one exception. It develops that Exhibit 484, referred to by the Party in this point of its brief, was never admitted in evidence; in fact it was denied admission. It is cited and quoted in two places in the Modified Report—pages 94 and 120. Upon the remand the Board will strike references to that exhibit and eliminate it as support for any findings. This may necessitate reappraisal of the remaining support for some findings. If so, that reappraisal shall be made and the findings revised accordingly. We affirm the Board on point 12 in all other respects questioned by the Party.

With the exception just noted we affirm the Board upon the point discussed under part VII of this opinion.

## CONCLUSION

In summary we remand to the Board for the production of the reports by the witness Markward to the F.B.I. as indicated in the course of this opinion. The remand for this purpose is a remand under Section 14(a) of the statute. On all other points (with the exception noted under part VII) we affirm the Board.

We are authorized to say that Judge Bazelon adheres to the view set forth in his dissenting opinion filed earlier in this case, that the Act violates the Fifth Amendment and hence it is unnecessary for him to reach other issues presented in that connection. He agrees with (1) the remand for the purposes we have outlined in part IV of this opinion, and (2) the denial of the Party's request for discovery with respect to the witness Scarletto. He disagrees with the denial as to (1) reports alleged to have been made to the F.B.I. by the witnesses Gitlow and Budenz, and (2) matters in the *Blumberg* case affecting the witness Markward. On the question discussed in part VII—whether the Board's revised report is improper under the mandate of the Supreme Court and this court—it is his position that, since the Board's action in response to the instant mandate may again change the Report, decision should be withheld at this time.

*Remanded.*

## Memorandum of April 11, 1958

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,850

April Term, 1958

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COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,
Petitioner,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD,
Respondent.

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MEMORANDUM TO ACCOMPANY ORDERS ON PETITIONER'S MOTIONS TO ADDUCE ADDITIONAL EVIDENCE AND THE PETITION FOR REHEARING.

Before:

PRETTYMAN, BAZELON and DANAHER,

*Circuit Judges, in Chambers.*

We have before us two motions of petitioner, the Communist Party of the United States of America. One is for leave to adduce additional evidence and the other is supplemental to the first one.

As far as the motions relate to statements alleged to have been made by the witness Gitlow, we adhere to the views expressed in our opinion promulgated January 9, 1958, and to the ruling there made. We think the denial of the claim for the production of that material was proper.

As far as the motions relate to statements given to the Federal Bureau of Investigation by the witness Budenz, the

motions are granted. We adopt for present purposes the definition of "statements" contained in Public Law No. 85-269, 71 Statute 385 (September 2, 1957), not because the statute is binding in this proceeding but because it embodies succinctly the rule of law we think is applicable. The Board will therefore direct the Attorney General to produce all statements made by the witness Budenz to the Federal Bureau of Investigation concerning subjects as to which Budenz testified; specifically the Starobin letter and the conversation with Weiner. As to mere memoranda, including those recorded without his knowledge, made by third persons, including Federal Bureau of Investigation agents, not produced as witnesses, concerning conversations with Budenz, we adhere to the views expressed in the opinion of January 9, 1958.

The Party contends that our opinion of January 9, 1958, is not clear in that in it we said, "On all other points (with the exception noted under Part VII) we affirm the Board", thereby implying, says the Party, that we affirmed the Board's findings of fact. The contention is obviously without merit. We remanded the case for the production of material demanded for cross-examination purposes, and this production clearly might result in a re-evaluation of some testimony and a re-examination of some findings. Under those circumstances we certainly did not intend to affirm at that same time the findings of fact theretofore made. We affirmed the Board on its conclusions of law except insofar as we noted disapproval of these conclusions. No clarification seems necessary.

Petitioner's petition for rehearing and modification of the opinion of the Court will be denied.

Per curiam.

Dated: April 11, 1958.

Judge Bazelon adheres to his views heretofore expressed in this case.

## Opinion of July 30, 1959

### UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,850

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,
Petitioner,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD,
Respondent.

On Petition for Review of Order of the Subversive Activities Control Board and on Further Hearing Following Further Proceedings before the Subversive Activities Control Board pursuant to Remand by this Court on January 9, 1958

Decided July 30, 1959

Before PRETTYMAN, Chief Judge, and BAZELON and DANAHER, Circuit Judges.

PRETTYMAN, *Chief Judge*: A Modified Report of the Subversive Activities Control Board following a second remand of this case is now before us for review. We affirmed the original report,[1] but the Supreme Court remanded for reconsideration in the light of allegations that

[1] *Communist Party of U. S.* v. *Subversive Act. Con. Bd.*, 96 U. S. App. D. C. 66, 223 F. 2d 531 (1954).

the testimony of three witnesses was perjured.[2] The Board struck the testimony of those witnesses, reexamined its findings and issued a Modified Report. We reviewed that Modified Report and remanded the case for the production of reports made by the witness Markward to the F.B.I. upon certain matters as to which she had testified, and for reexamination of certain findings as to which an exhibit of the Government had been erroneously cited and quoted. Thereafter it developed that the F.B.I. had made recordings of statements made to its agents by the witness Budenz, a fact not known to Government counsel at the time of the earlier proceedings, and in a supplemental order we directed that this matter be included in the remand and that statements made by Budenz to the F.B.I. on certain matters be produced to the Party. The Board followed the instructions upon the remand, reexamined its findings and conclusions, made changes, and issued its Modified Report upon Second Remand, now before us.

The Party iterates all points of law made by it upon the original consideration of the case by us and repeated by it upon our second consideration. Upon those points we adhere to the views heretofore expressed by us. The Party also asserts, as it has consistently asserted in both of the prior considerations, that many of the findings of the Board are not supported by a preponderance of the evidence; and it emphasizes that the present evidence in the record, reduced as it is by the striking of parts of the original evidence and by the conclusions of the Board now holding unacceptable certain other testimony, does not show a preponderance in support of the findings. We have examined the Modified Report in the light of these averments and think the findings are amply supported. The Party also makes specific points as applicable to the Report presently under review. We now examine those points.

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[2] 351 U. S. 115 (1956).

I

In our original opinion in this matter we struck,[3] as not supported by a preponderance of the evidence, a finding respecting the purposes of the secret practices of the Party. The Board has let the finding remain in its Modified Report on Second Remand. The Party says the court must therefore again remand to the Board, for an administrative redetermination in the light of the striking of this finding. We do not see why we should do so. We did not find it necessary to reverse the order of the Board, or to remand, when we first struck the finding. No new evidence on the point has been added since then, and so we adhere to our first conclusion, but the necessity for remand is now no greater than it was. And we think the Board is entitled to adhere to its view on the point until our view of it has been tested in the Supreme Court.

II

Government's witness Gitlow was expelled from the Party in 1929. In about 1940 he delivered to the F.B.I. all documents in his possession respecting the Party. He dictated, over a period of time, memoranda explaining the documents. On the witness stand before the Board he identified and explained the documents. The Party moved for production of the 1940 memoranda. The motion was denied. In our opinion of January 9, 1958,[4] our second opinion in the matter, being after the proceedings before the Board consequent to the remand by the Supreme Court, we held, in accordance with our reading of the opinion in *Consolidated Edison Co.* v. *National Labor Relations Board*,[5] that the point was not available to the

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[3] *Supra* note 1, 96 U. S. App. D. C. at 109-110, 223 F. 2d at 574-575.

[4] *Communist Party of U. S.* v. *Subversive Act. Con. Bd.*, 102 U. S. App. D. C. 395, 254 F. 2d 314 (1958).

[5] 305 U. S. 197 (1938).

Party, since it had not pursued its remedy when its motion to produce was denied by the Board at the original hearing. That remedy was a motion to adduce additional evidence under Section 14(a) of the Act.[6] After our decision the Party made such a motion in this court. We denied it. The Party now argues the case must be remanded for receipt of the Gitlow memoranda, since, it says, it has remedied the procedural defect we found in its original position. But we think a litigant cannot cure procedural defects *nunc pro tunc* after an appellate court has passed upon his contentions in the matter. Litigants frequently must make tactical decisions in the course of a trial. Also they frequently make mistakes. But, after the resultant judgment has been reviewed upon appeal, they cannot unilaterally cure their mistakes by offering to take some missing step. So to do would be to prolong indefinitely almost all litigation. Analogies are unreliable support for reasoning, but we suggest an illustration. If a litigant in an ordinary lawsuit fails to make a motion, such as to suppress, or for a mistrial, or for a directed verdict, and the appellate court holds he was not entitled to certain relief because he had not asked for it by timely motion, he canot thereafter proffer the motion and thus correct the defect and acquire a right to retrial. Failure of a trial tribunal to grant a motion not made is not reversible error, and appellate courts rarely remand for the correction of such omissions by parties litigant. No circumstance requiring such an extraordinary step by us is present here.

## III

With its brief upon this appeal the Party filed a motion to adduce as additional evidence all statements filed by all witnesses who testified for the Attorney General before the Board. This is the third time this case has been

[6] 64 Stat. 1001 (1950), as amended, 50 U. S. C. A. § 793(a).

here. The motion comes too late, and in any event it is not supported by any authority respecting the production of such documents. In the *Jencks* case[7] the Supreme Court quoted with approval from its opinion in *Gordon* v. *United States*,[8] disapproving fishing expeditions.

## IV

Upon the remand after our opinion of January 9, 1958, the Board struck the testimony of the witness Budenz in respect to the Starobin letter and the Weiner conversation. The Party says it should have struck all of Budenz's testimony, upon either or both of two grounds, (1) all his testimony was tainted with perjury and (2) Budenz being ill after his statements to the F.B.I. on the two matters mentioned had been produced, the Party was denied the right to cross-examine him in the light of those statements. We agree with the Board on the point. Without elaborating, it is enough to say we have examined Budenz's statements again and think his testimony is not shown to have been false or tainted with perjury. It seems to us that the various accounts given by him upon different occasions, under different questioning, of the Starobin and Weiner incidents bear a solid similarity in essentials and differ no more than truthful accounts under such conditions may well differ—indeed, if truthful, do often differ—in details, in expressions of speech, and in passing emphasis.

The disadvantage suffered by the Party, by reason of Budenz's illness and unavailability for cross-examination after the Starobin and Weiner documents (reports to the F.B.I) had been produced, was cured by the Board's striking Budenz's testimony on those two matters. We see no necessity for striking more of his testimony on account of this shortening of his cross-examination. The Party says

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[7] *Jencks* v. *United States*, 353 U. S. 657 (1957).
[8] 344 U. S. 414 (1953).

if it had been able to cross-examine in the light of the reports it might have been able to develop such a taint of perjury as to destroy all his testimony. We think not. Budenz had already been cross-examined extensively on these subjects. The possible conflicts between his testimony and his F.B.I. reports can readily be discerned, the reports having been produced. Those discrepancies are not such as to indicate perjury, much less the habit of perjury essential to be shown to taint all the witness's testimony. By securing a striking of the testimony on the two matters directly involved, the Party achieved all it could hope to achieve from these reports.

V

The Party says the Board should be required to strike all the testimony of the witness Markward, because her sworn statements concerning the Frankfeld incident and her testimony about her payments from the F.B.I. were false. The Board struck her testimony as to those two matters but declined to strike the rest of her evidence. We think the statements about the Frankfeld matter were not demonstrated to be false. She testified to her understanding of certain statements by one Thorez, by the Americans, Dennis and Foster, and by Frankfeld. In none of these statements were the words "not bear arms against the Soviet Union" used, but she gave that meaning to such expressions as "American Communists would oppose such 'an unjust, agressive, imperialist war' and would work 'with all democratic forces' to bring that war to an end." To us the meaning she gave was a permissible inference from the face of the words.

The Party says Markward's testimony about the payments made to her by the F.B.I. was so false as to taint her entire testimony and to require that all of it be stricken. It was established from the beginning of this case that Markward was a paid informant for the Government. She characterized the payments she received as expense money,

including within that term amounts expended by her for certain ordinary living expenses while she was working for the Government. She was vague in her recollection of exact amounts and dates, but she was specific in saying she received no salary and had no formal financial arrangements. The F.B.I. records of its payments to her were produced to the Party. Upon the basis of those accounts the Board held that Markward's testimony on the matter was "not acceptable", and it took this fact into account in evaluating her entire testimony. The Board concluded that Markward's testimony on all matters "should be assayed with caution." The Board also pointed out that "findings based upon her testimony are minimal; and the effect of her entire testimony upon the Board's Modified Report is inconsequential." We will not disturb these conclusions of the Board. The credibility of witnesses must be left largely to the trier of the facts; this is the rule as to both trial courts and administrative agencies. And in this connection it should be remarked that the definition of "expenses" is a vague and uncertain prescription. An expense under some circumstances is not an expense under others. A businessman's dinner at home or in his home town is not an expense; when he is on a business trip, it is one; and so on *ad infinitum*, as the casebooks readily show.

Moreover, in respect to the striking of both the Budenz testimony and the Markward testimony, we know of no rule that the trier of facts is required to disregard all the testimony of a witness whom he finds to have testified falsely in one respect. He may do so, but he is not required to do so. Instructions to juries on the point are commonplace in the courtroom. Such instructions are always that the jury *may*—never that it *must*—disregard the testimony of a witness whom it believes to have testified falsely on a material matter as to which he could not be mistaken. A rule of law compelling the trier of facts to disregard all the evidence of such a witness would not only be a revolutionary doctrine in our jurisprudence but a wholly undesirable doctrine.

## VI

By concentrating on segments of the evidence and expanding their importance by discussion, to the exclusion of all the rest of the evidence, the Party seeks to have us believe there are no other significant features in the record. But the facts beyond dispute are that there is a Communist Party in Europe, based upon Marxism-Leninism, and in power in Soviet Russia; that our present petitioner was for years a member of the Communist International, and its separation from that organization was not accompanied by a repudiation, either of objectives or of methods; that it is by its own choice named the Communist Party of the United States of America, a self-imposed description not to be ignored without reason; that it once forsook the line laid down by the Communist Party abroad but, upon being severely brought to task by a leading European Communist in an open letter to Communists, reorganized itself, even to the extent of expelling its erring leader, and went back to the line; and that, save for that period of waywardness, it has never differed from the program and policy of the Communist Party abroad and has always adhered to that program and policy even in sharp changes. These major characteristics in the facts cannot be overlooked.

Guilt by association is a concept we will not even entertain for consideration, but this proceeding is not to determine guilt. It is to ascertain characteristics, and association is surely one of the best-known sources of information about characteristics. Many proverbs attest to its common acceptance—not as proof of the commission of any certain act but as evidence of character and probable characteristics. Of course such *prima facie* indications can be readily and conclusively contradicted by facts. But an uncontradicted series of facts such as we have outlined as being in this record is admissible and acceptable evidence of characteristics, policy and program. One who attaches himself by intellectual affiliation to a cause, assumes

the name of the cause, puts on the habiliments of the cause, and adheres to the course of the cause is not mistreated if it be inferred *prima facie* he is part of the cause. In the case at bar there is additional specific evidence. The preponderance of all the evidence supports the conclusion of the Board. Its order will be

*Affirmed.*

BAZELON, *Circuit Judge*, concurring in part and dissenting in part: Notwithstanding my disagreement with the Court's two earlier opinions in this case and its orders of April 11, 1956 and June 16, 1958, I treat them as controlling in considering the points discussed by the majority in the present opinion.

As to Point I, I would reverse and remand because of the Board's violation of our original opinion of December 23, 1954, 96 U.S.App.D.C. 66, 109-10, 223 F.2d 531, 574-75 (1954). A finding which we there ordered stricken is now still relied on by the Board.

As to Points II, III and V (as to Markward), I concur only in the result reached by the majority.

As to Point IV, I would reverse and remand. By fault of the Government, the Party was precluded from obtaining use of Budenz's statement for purposes of cross-examining him while he was still available. Without such cross-examination the Party is denied its right to show the extent, if any, to which the rest of Budenz's testimony is tainted. If, upon the remand I would order, Budenz were not available, his entire testimony would have to be stricken.

In light of my disposition of Points I and IV, I do not reach consideration of Point VI—namely, whether the Board's order is supported by a preponderance of the evidence.

# APPENDIX B: JUDGMENT BELOW

## UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,850 SEPTEMBER TERM, 1958

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COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,
Petitioner,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD,
Respondent.

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On Petition for Review of Order of the Subversive Activities Control Board and on Further Hearing Following Further Proceedings before the Subversive Activities Control Board pursuant to Remand by this Court on January 9, 1958.

Before:

PRETTYMAN, *Chief Judge*, and BAZELON and DANAHER, *Circuit Judges.*

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JUDGMENT

This case came on to be heard on the record from the Subversive Activities Control Board and on the Modified Report issued by the Board following the second remand of this case by this court on January 9, 1958, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the order of the Subversive Activities Control Board on review herein is affirmed.

Per CHIEF JUDGE PRETTYMAN.

Dated: July 30, 1959.

# APPENDIX C: STATUTES INVOLVED

## Subversive Activities Control Act

The Internal Security Act of 1950, 64 Stat. 987, 50 U. S. C. 781 ff., as amended, provides in part as follows:

AN ACT

To protect the United States against certain un-American and subversive activities by requiring registration of Communist organizations, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America and Congress assembled*, That this Act may be cited as the "Internal Security Act of 1950".

### TITLE I—SUBVERSIVE ACTIVITIES CONTROL

SECTION 1. (a) This title may be cited as the "Subversive Activities Control Act of 1950."

(b) Nothing in this Act shall be construed to authorize, require, or establish military or civilian censorship or in any way to limit or infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States and no regulation shall be promulgated hereunder having that effect.

NECESSITY FOR LEGISLATION

SEC. 2. As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress hereby finds that—

(1) There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration

into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization.

(2) The establishment of a totalitarian dictatorship in any country results in the suppression of all opposition to the party in power, the subordination of the rights of individuals to the state, the denial of fundamental rights and liberties which are characteristic of a representative form of government, such as freedom of speech, of the press, of assembly, and of religious worship, and results in the maintenance of control over the people through fear, terrorism, and brutality.

(3) The system of government known as a totalitarian dictatorship is characterized by the existence of a single political party, organized on a dictatorial basis, and by substantial identity between such party and its policies and the government and governmental policies of the country in which it exists.

(4) The direction and control of the world Communist movement is vested in and exercised by the Communist dictatorship of a foreign country.

(5) The Communist dictatorship of such foreign country, in exercising such direction and control and in furthering the purpose of the world Communist movement, establishes or causes the establishment of, and utilizes, in various countries, action organizations which are not free and independent organizations, but are sections of a world-wide Communist organization and are controlled, directed, and subject to the discipline of the Communist dictatorship of such foreign country.

(6) The Communist action organizations so established and utilized in various countries, acting under such control, direction, and discipline, endeavor to carry out the objective of the world Communist movement by bringing about the overthrow of existing governments by any available means, including force if necessary, and setting up Communist totalitarian dictatorships which will be subservient to the most powerful existing Communist totalitarian dictatorship. Although such organizations usually designate themselves as political parties, they are in fact constituent elements of the world-wide Communist movement and promote the objectives of such movement by conspiratorial and coercive tactics, instead of through the democratic processes of a free elective system or through the freedom-preserving means employed by a political party which operates as an agency by which people govern themselves.

(7) In carrying on the activities referred to in paragraph (6), such Communist organizations in various countries are organized on a secret, conspiratorial basis and operate to a substantial extent through organizations, commonly known as "Communist fronts", which in most instances are created and maintained, or used, in such manner as to conceal the facts as to their true character and purposes and their membership. One result of this method of operation is that such affiliated organizations are able to obtain financial and other support from persons who would not extend such support if they knew the true purposes of, and the actual nature of the control and influence exerted upon, such "Communist fronts".

(8) Due to the nature and scope of the world Communist movement, with the existence of affiliated

constituent elements working toward common objectives in various countries of the world, travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement.

(9) In the United States those individuals who knowingly and willfully participate in the world Communist movement, when they so participate, in effect repudiate their allegiance to the United States, and in effect transfer their allegiance to the foreign country in which is vested the direction and control of the world Communist movement.

(10) In pursuance of communism's stated objectives, the most powerful existing Communist dictatorship has, by the methods referred to above, already caused the establishment in numerous foreign countries of Communist totalitarian dictatorships, and threatens to establish similar dictatorships in still other countries.

(11) The agents of communism have devised clever and ruthless espionage and sabotage tactics which are carried out in many instances in form or manner successfully evasive of existing law.

(12) The Communist network in the United States is inspired and controlled in large part by foreign agents who are sent into the United States ostensibly as attaches of foreign legations, affiliates of international organizations, members of trading commissions, and in similar capacities, but who use their diplomatic or semi-diplomatic status as a shield behind which to engage in activities prejudicial to the public security.

(13) There are, under our present immigration laws, numerous aliens who have been found to be

deportable, many of whom are in the subversive, criminal, or immoral classes who are free to roam the country at will without supervision or control.

(14) One device for infiltration by Communists is by procuring naturalization for disloyal aliens who use their citizenship as a badge for admission into the fabric of our society.

(15) The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such preparation by Communist organizations in other countries have aided in supplanting existing governments. The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States.

DEFINITIONS

SEC. 3. For the purposes of this title—

(1) The term "person" means an individual or an organization.

(2) The term "organization" means an organization, corporation, company, partnership, association, trust foundation, or fund; and includes a group of persons, whether or not incorporated, permanently or temporarily associated together for joint action on any subject or subjects.

(3) The term "Communist-action organization" means—

(a) any organization in the United States (other than a diplomatic representative or mission of a foreign government accredited as such by the Department of State) which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title; and

(b) any section, branch, fraction, or cell of any organization defined in subparagraph (a) of this paragraph which has not complied with the registration requirements of this title.

(4) The term "Communist-front organization" means any organization in the United States (other than a Communist-action organization as defined in paragraph (3) of this section) which (A) is substantially directed, dominated, or controlled by a Communist-action organization, and (B) is primarily operated for the purpose of giving aid and support to a Communist-action organization, a Communist foreign government, or the world Communist movement referred to in section 2 of this title.

(4A) The term "Communist-infiltrated organization" means any organization in the United States (other than a Communist-action organization or a Communist-front organization) which (A) is substantially directed, dominated, or controlled by an individual or individuals who are, or who within three years have been actively engaged in, giving aid or support to a Communist-action organization, a Communist foreign government, or the world Communist movement referred to in section 2 of this title, and (B) is serving, or within three years has served, as a means for (i) the giving of aid or support to any such organization, government, or movement, or (ii) the impairment of the military strength of the United States or its industrial capacity to furnish logistical or other material support required by its Armed Forces: *Provided, however,* That any labor organization which is an affiliate in good standing of a national federation or other labor organization whose policies and activities have been directed to opposing Communist organizations, any Communist foreign government, or the world Communist movement, shall be presumed prima facie not to be a "Communist-infiltrated organization."[1]

(5) The term "Communist organization" means any Communist-action organization, Communist-front organization, or Communist-infiltrated organization.[2]

(6) The term "to contribute funds or services" includes the rendering of any personal service and the making of any gift, subscription, loan, advance, or deposit, of money or of anything of value, and also the making of any contract, promise, or agreement to contribute funds or services, whether or not legally enforcible.

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[1] Added by sec. 7(a) of the Communist Control Act of 1954, 68 Stat. 777.

[2] As amended by sec. 7(b) of the Communist Control Act of 1954, 68 Stat. 778.

(7) The term "facility" means any plant, factory or other manufacturing, producing or service establishment, airport, airport facility, vessel, pier, water-front facility, mine, railroad, public utility, laboratory, station, or other establishment or facility, or any part, division, or department of any of the foregoing. The term "defense facility" means any facility designated and proclaimed by the Secretary of Defense pursuant to section 5(b) of this title and included on the list published and currently in effect under such subsection, and which is in compliance with the provisions of such subsection respecting the posting of notice of such designation.

(8) The term "publication" means any circular, newspaper, periodical, pamphlet, book, letter, post card, leaflet, or other publication.

(9) The term "United States", when used in a geographical sense, includes the several States, Territories, and possessions of the United States, the District of Columbia, and the Canal Zone.

(10) The term "interstate or foreign commerce" means trade, traffic, commerce, transportation, or communication (A) between any State, Territory, or possession of the United States (including the Canal Zone), or the District of Columbia, and any place outside thereof, or (B) within any territory or possession of the United States (including the Canal Zone), or within the District of Columbia.

(11) The term "Board" means the Subversive Activities Control Board created by section 12 of this title.

(12) The term "final order of the Board" means an order issued by the Board under section 13 of this title, which has become final as provided in section 14 of this title.

(13) The term "advocates" includes advises, recommends, furthers by overt act, and admits belief in; and the giving, loaning, or promising of support or of money or anything of value to be used for advocating any doctrine shall be deemed to constitute the advocating of such doctrine.

(14) The term "world communism" means a revolutionary movement, the purpose of which is to establish eventually a Communist totalitarian dictatorship in any or all the countries of the world through the medium of an internationally coordinated Communist movement.

(15) The terms "totalitarian dictatorship" and "totalitarianism" mean and refer to systems of government not representative in fact, characterized by (A) the existence of a single political party, organized on a dictatorial basis, with so close an identity between such party and its policies and the governmental policies of the country in which it exists, that the party and the government constitute an indistinguishable unit, and (B) the forcible suppression of opposition to such party.

(16) The term "doctrine" includes, but is not limited to, policies, practices, purposes, aims, or procedures.

(17) The giving, loaning, or promising of support or of money or any other thing of value for any purpose to any organization shall be conclusively presumed to constitute affiliation therewith; but nothing in this paragraph shall be construed as an exclusive definition of affiliation.

(18) "Advocating the economic, international, and governmental doctrines of world communism" means advocating the establishment of a totalitarian Communist dictatorship in any or all of the countries of the world through the medium of an internationally coordinated Communist movement.

(19) "Advocating the economic and governmental doctrines of any other form of totalitarianism" means advocating the establishment of totalitarianism (other than world communism) and includes, but is not limited to, advocating the economic and governmental doctrines of fascism and nazism.

CERTAIN PROHIBITED ACTS

SEC. 4. (a) It shall be unlawful for any person knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship, as defined in paragraph (15) of section 3 of this title, the direction and control of which is to be vested in, or exercised by or under the domination or control of, any foreign government, foreign organization, or foreign individual: *Provided, however,* That this subsection shall not apply to the proposal of a constitutional amendment.

(b) It shall be unlawful for any officer or employee of the United States or of any department or agency thereof, or of any corporation the stock of which is owned in whole or in major part by the United States or any department or agency thereof, to communicate in any manner or by any means, to any other person whom such officer or employee knows or has reason to believe to be an agent or representative of any foreign government or an officer or member of any Communist organization as defined in paragraph (5) of section 3 of this title, any information of a kind which shall have been classified by the President (or by the head of any such department, agency, or corporation with the approval of the President) as affecting the security of the United States, knowing or having reason to know that such information has been so classified, unless such officer or employee shall have been specifically authorized by the President, or by the head of the department,

agency, or corporation by which this officer or employee is employed, to make such disclosure of such information.

(c) It shall be unlawful for any agent or representative of any foreign government, or any officer or member of any Communist organization as defined in paragraph (5) of section 3 of this title, knowingly to obtain or receive, or attempt to obtain or receive, directly or indirectly, from any officer or employee of the United States or of any department or agency thereof or of any corporation the stock of which is owned in whole or in major part by the United States or any department or agency thereof, any information of a kind which shall have been classified by the President (or by the head of any such department, agency, or corporation with the approval of the President) as affecting the security of the United States, unless special authorization for such communication shall first have been obtained from the head of the department, agency, or corporation having custody of or control over such information.

(d) Any person who violates any provision of this section shall, upon conviction thereof, be punished by a fine of not more than $10,000, or imprisonment for not more than ten years, or by both such fine and such imprisonment, and shall, moreover, be thereafter ineligible to hold any office, or place of honor, profit, or trust created by the Constitution or laws of the United States.

(e) Any person may be prosecuted, tried, and punished for any violation of this section at any time within ten years after the commission of such offense, notwithstanding the provisions of any other statute of limitations: *Provided*, That if at the time of the commission of the offense such person is an officer or employee of the United States or of any department or agency thereof, or of any corporation the stock of which is owned in whole or in major part by the United States or any department or agency

thereof, such person may be prosecuted, tried, and punished for any violation of this section at any time within ten years after such person has ceased to be employed as such officer or employee.

(f) Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. The fact of the registration of any person under section 7 or section 8 of this title as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute.

EMPLOYMENT OF MEMBERS OF COMMUNIST ORGANIZATIONS

SEC. 5. (a) When a Communist organization, as defined in paragraph (5) of section 3 of this title, is registered or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful—

(1) For any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

(A) in seeking, accepting, or holding any nonelective office or employment under the United States, to conceal or fail to disclose the fact that he is a member of such organization; or

(B) to hold any nonelective office or employment under the United States; or

(C) in seeking, accepting, or holding employment in any defense facility, to conceal or fail to disclose the fact that he is a member of such organization; or

(D) if such organization is a Communist-action organization, to engage in any employment in any defense facility; or

(E) to hold office or employment with any labor organization, as that term is defined in section 2(5) of the National Labor Relations Act, as amended (29 U. S. C. 152), or to represent any employer in any matter or proceeding arising or pending under that Act.[3]

(2) For any officer or employee of the United States or of any defense facility, with knowledge or notice that such organization is so registered or that such order has become final—

(A) to contribute funds or services to such organization; or

(B) to advise, counsel or urge any person, with knowledge or notice that such person is a member of such organization, to perform, or to omit to perform, any act if such act or omission would constitute a violation of any provision of subparagraph (1) of this subsection.

(b) The Secretary of Defense is authorized and directed to designate and proclaim, and from time to time revise, a list of facilities, as defined in paragraph (7) of section 3 of this title, with respect to the operation of which he finds and determines that the security of the United States requires the application of the provisions of subsection (a) of this section. The Secretary shall cause such list as designated and proclaimed, or any revision thereof, to be promptly published in the Federal Register, and shall promptly notify the management of any facility so listed; whereupon such management shall immediately post con-

[3] Added by sec. 6 of the Communist Control Act of 1954, 68 Stat. 777.

spicuously, and thereafter while so listed keep posted, notice of such designation in such form and in such place or places as to give reasonable notice thereof to all employees of, and to all applicants for employment in, such facility.

### Denial of Passports to Members of Communist Organizations

Sec. 6. (a) When a Communist organization as defined in paragraph (5) of section 3 of this title is registered, or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful for any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

(1) to make application for a passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States; or

(2) to use or attempt to use any such passport.

(b) When an organization is registered, or there is in effect a final order of the Board requiring an organization to register, as a Communist-action organization, it shall be unlawful for any officer or employee of the United States to issue a passport to, or renew the passport of, any individual knowing or having reason to believe that such individual is a member of such organization.

### Registration and Annual Reports of Communist Organizations

Sec. 7. (a) Each Communist-action organization (including any organization required, by a final order of the Board, to register as a Communist-action organization) shall, within the time specified in subsection (c) of this sec-

tion, register with the Attorney General, on a form prescribed by him by regulations, as a Communist-action organization.

(b) Each Communist-front organization (including any organization required, by a final order of the Board, to register as a Communist-front organization) shall, within the time specified in subsection (c) of this section, register with the Attorney General, on a form prescribed by him by regulations, as a Communist-front organization.

(c) The registration required by subsection (a) or (b) shall be made—

(1) in the case of an organization which is a Communist-action organization or a Communist-front organization on the date of the enactment of this title, within thirty days after such date;

(2) in the case of an organization becoming a Communist-action organization or a Communist-front organization after the date of the enactment of this title, within thirty days after such organization becomes a Communist-action organization or a Communist-front organization, as the case may be; and

(3) in the case of an organization which by a final order of the Board is required to register, within thirty days after such order becomes final.

(d) The registration made under subsection (a) or (b) shall be accompanied by a registration statement, to be prepared and filed in such manner and form as the Attorney General shall by regulations prescribe, containing the following information:

(1) The name of the organization and the address of its principal office.

(2) The name and last-known address of each individual who is at the time of filing of such registra-

tion statement, and of each individual who was at any time during the period of twelve full calendar months next preceding the filing of such statement, an officer of the organization, with the designation or title of the office so held, and with a brief statement of the duties and functions of such individual as such officer.

(3) An accounting, in such form and detail as the Attorney General shall by regulations prescribe, of all moneys received and expended (including the sources from which received and the purposes for which expended) by the organization during the period of twelve full calendar months next preceding the filing of such statement.

(4) In the case of a Communist-action organization, the name and last-known address of each individual who was a member of the organization at any time during the period of twelve full calendar months preceding the filing of such statement.

(5) In the case of any officer or member whose name is required to be shown in such statement, and who uses or has used or who is or has been known by more than one name, each name which such officer or member uses or has used or by which he is known or has been known.

(6) A listing, in such form and detail as the Attorney General shall by regulation prescribe, of all printing presses and machines including but not limited to rotary presses, flatbed cylinder presses, platen presses, lithographs, offsets, photo-offsets, mimeograph machines, multigraph machines, multilith machines, duplicating machines, ditto machines, linotype machines, intertype machines, monotype machines, and all other types of printing processes, typesetting machines or any mechanical devices used

or intended to be used, or capable of being used to produce or publish printed matter or material, which are in the possession, custody, ownership, or control of the Communist-action or Communist-front organization or its officers, members, affiliates, associates, group, or groups in which the Communist-action or Communist-front organization, its officers or members have an interest.[4]

(e) It shall be the duty of each organization registered under this section to file with the Attorney General on or before February 1 of the year following the year in which it registers, and on or before February 1 of each succeeding year, an annual report, prepared and filed in such manner and form as the Attorney General shall by regulations prescribe, containing the same information which by subsection (d) is required to be included in a registration statement, except that the information required with respect to the twelve-month period referred to in paragraph (2), (3), or (4) of such subsection shall, in such annual report, be given with respect to the calendar year preceding the February 1 on or before which such annual report must be filed.

(f)(1) It shall be the duty of each organization registered under this section to keep, in such manner and form as the Attorney General shall by regulations prescribe, accurate records and accounts of moneys received and expended (including the sources from which received and purposes for which expended) by such organization.

(2) It shall be the duty of each Communist-action organization registered under this section to keep, in such manner and form as the Attorney General shall by regulations prescribe, accurate records of the names and addresses of the members of such organization and of persons who actively participate in the activities of such organization.

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[4] Added by P. L. 557, 83d Cong., 2d Sess., 68 Stat. 586.

(g) It shall be the duty of the Attorney General to send to each individual listed in any registration statement or annual report, filed under this section, as an officer or member of the organization in respect of which such registration statement or annual report was filed, a notification in writing that such individual is so listed; and such notification shall be sent at the earliest practicable time after the filing of such registration statement or annual report. Upon written request of any individual so notified who denies that he holds any office or membership (as the case may be) in such organization, the Attorney General shall forthwith initiate and conclude at the earliest practicable time an appropriate investigation to determine the truth or falsity of such denial, and, if the Attorney General shall be satisfied that such denial is correct, he shall thereupon strike from such registration statement or annual report the name of such individual. If the Attorney General shall decline or fail to strike the name of such individual from such registration statement or annual report within five months after receipt of such written request, such individual may file with the Board a petition for relief pursuant to section 13(b) of this title.

(h) In the case of failure on the part of any organization to register or to file any registration statement or annual report as required by this section, it shall be the duty of the executive officer (or individual performing the ordinary and usual duties of an executive officer) and of the secretary (or individual performing the ordinary and usual duties of the secretary) of such organization, and of such officer or officers of such organization as the Attorney General shall by regulations prescribe, to register for such organization, to file such registration statement, or to file such annual report, as the case may be.

REGISTRATION OF MEMBERS OF COMMUNIST-ACTION ORGANIZATIONS

SEC. 8 (a) Any individual who is or becomes a member of any organization concerning which (1) there is in effect a final order of the Board requiring such organization to register under section 7(a) of this title as a Communist-action organization, (2) more than thirty days have elapsed since such order has become final, and (3) such organization is not registered under section 7 of this title as a Communist-action organization, shall within sixty days after said order has become final, or within thirty days after becoming a member of such organization, whichever is later, register with the Attorney General as a member of such organization.

(b) Each individual who is or becomes a member of any organization which he knows to be registered as a Communist-action organization under section 7(a) of this title, but to have failed to include his name upon the list of members thereof filed with the Attorney General, pursuant to the provisions of subsections (d) and (e) of section 7 of this title, shall, within sixty days after he shall have obtained such knowledge, register with the Attorney General as a member of such organization.

(c) The registration made by any individual under subsection (a) or (b) of this section shall be accompanied by a registration statement to be prepared and filed in such manner and form, and containing such information, as the Attorney General shall by regulations prescribe.

KEEPING OF REGISTERS; PUBLIC INSPECTION; REPORTS TO PRESIDENT AND CONGRESS

SEC. 9. (a) The Attorney General shall keep and maintain separately in the Department of Justice—

(1) a "Register of Communist-Action Organizations", which shall include (A) the names and

addresses of all Communist-action organizations registered under section 7, (B) the registration statements and annual reports filed by such organizations thereunder, and (C) the registration statements filed by individuals under section 8; and

(2) a "Register of Communist-Front Organizations", which shall include (A) the names and addresses of all Communist-front organizations registered under section 7, and (B) the registration statements and annual reports filed by such organizations thereunder.

(b) Such registers shall be kept and maintained in such manner as to be open for public inspection: *Provided*, That the Attorney General shall not make public the name of any individual listed in either such register as an officer or member of any Communist organization until sixty days shall have elapsed after the transmittal of the notification required by section 7(g) to be sent to such individual, and if prior to the end of such period such individual shall make written request to the Attorney General for the removal of his name from any such list, the Attorney General shall not make public the name of such individual until six months shall have elapsed after receipt of such request by the Attorney General, or until thirty days shall have elapsed after the Attorney General shall have denied such request and shall have transmitted to such individual notice of such denial, whichever is earlier.

(c) The Attorney General shall submit to the President and to the Congress on or before June 1 of each year (and at any other time when requested by either House by resolution) a report with respect to the carrying out of the provisions of this title, including the names and addresses of the organizations listed in such registers and (except to the extent prohibited by subsection (b) of this section) the names and addresses of the individuals listed as members of such organizations.

(d) Upon the registration of each Communist organization under the provisions of this title, the Attorney General shall publish in the Federal Register the fact that such organization has registered as a Communist-action organization, or as a Communist-front organization, as the case may be, and the publication thereof shall constitute notice to all members of such organization that such organization has so registered.

USE OF THE MAILS AND INSTRUMENTALITIES OF INTERSTATE OR FOREIGN COMMERCE

SEC. 10. It shall be unlawful for any organization which is registered under section 7, or for any organization with respect to which there is in effect a final order of the Board requiring it to register under section 7, or determining that it is a Communist-infiltrated organization,[5] or for any person acting for or on behalf of any such organization—

(1) to transmit or cause to be transmitted, through the United States mails or by any means or instrumentality of interstate or foreign commerce, any publication which is intended to be, or which it is reasonable to believe is intended to be, circulated or disseminated among two or more persons, unless such publication, and any envelope, wrapper, or other container in which it is mailed or otherwise circulated or transmitted, bears the following, printed in such manner as may be provided in regulations prescribed by the Attorney General, with the name of the organization appearing in lieu of the blank: "Disseminated by ————————, a Communist organization"; or

(2) to broadcast or cause to be broadcast any matter over any radio or television station in the

[5] Reference to Communist-infiltrated organizations added by sec. 8(a) of the Communist Control Act of 1954, 68 Stat. 778.

United States, unless such matter is preceded by the following statement, with the name of the organization being stated in place of the blank: "The following program is sponsored by ————————, a Communist organization[4]".

DENIAL OF TAX DEDUCTIONS AND EXEMPTIONS

SEC. 11. (a) Notwithstanding any other provisions of law, no deduction for Federal income-tax purposes shall be allowed in the case of a contribution to or for the use of any organization if at the time of the making of such contribution (1) such organization is registered under section 7, or (2) there is in effect a final order of the Board requiring such organization to register under section 7 or determining that it is a Communist-infiltrated organization.[6]

(b) No organization shall be entitled to exemption from Federal income tax, under section 101 of the Internal Revenue Code, for any taxable year if at any time during such taxable year (1) such organization is registered under section 7, or (2) there is in effect a final order of the Board requiring such organization to register under section 7 or determining that it is a Communist-infiltrated organization.[7]

SUBVERSIVE ACTIVITIES CONTROL BOARD

SEC. 12. (a) There is hereby established a board, to be known as the Subversive Activities Control Board, which shall be composed of five members, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three members of the Board shall be members of the same political party. The terms of office of the members of the Board in office on the date of enactment of the Subversive Activities Control Board Tenure

[6] See footnote 5.
[7] See footnote 5.

Act shall expire at the time they would have expired if such Act had not been enacted. The term of office of each member of the Board, appointed after the date of enactment of the Subversive Activities Control Board Tenure Act shall be for five years from the date of expiration of the term of his predecessor, except, that (1) the term of office of that member of the Board who is designated by the President and is appointed to succeed one of the two members of the Board whose terms expire on August 9, 1955 shall be for four years from the date of expiration of the term of his predecessor, and (2) the term of office of any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be for the remainder of the term of his predecessor. Upon the expiration of his term of office a member of the Board shall continue to serve until his successor shall have been appointed and shall have qualified.[8] The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

(b) Any vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board, and three members of the Board shall, at all times, constitute a quorum. The Board shall have an official seal which shall be judicially noticed.

(c) The Board shall at the close of each fiscal year make a report in writing to the Congress and to the President stating in detail the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees of the Board, and an account of all moneys it has disbursed.

(d) Each member of the Board shall receive a salary of $20,000 a year,[9] shall be eligible for reappointment, and

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[8] Provisions relating to tenure amended by the Subversive Activities Control Board Tenure Act, 69 Stat. 539.

[9] Orginally $12,500. Raised to present figure for Board members and $20,500 for the Board Chairman by secs. 105 and 106 of the Federal Executive Pay Act of 1956, P. L. 854, 84th Cong., 2d Sess.

shall not engage in any other business, vocation, or employment.

(e) It shall be the duty of the Board—

(1) upon application made by the Attorney General under section 13(a) of this title, or by any organization under section 13(b) of this title, to determine whether any organization is a "Communist-action organization" within the meaning of paragraph (3) of section 3 of this title, or a "Communist-front organization" within the meaning of paragraph (4) of section 3 of this title; and

(2) upon application made by the Attorney General under section 13(a) of this title, or by any individual under section 13(b) of this title, to determine whether any individual is a member of any Communist-action organization registered, or by final order of the Board required to be registered, under section 7(a) of this title; and

(3) upon any application made under subsection (a) or subsection (b) of section 13A of this title, to determine whether any organization is a Communist-infiltrated organization.[10]

(f) Subject to the civil-service laws and Classification Act of 1949, the Board may appoint and fix the compensation of a chief clerk and such examiners and other personnel as may be necessary for the performance of its functions.

(g) The Board may make such rules and regulations, not inconsistent with the provisions of this title, as may be necessary for the performance of its duties.

(h) There are hereby authorized to be appropriated to the Board such sums as may be necessary to carry out its functions.

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[10] Added by sec. 9(a) of the Communist Control Act of 1954, 68 Stat. 778.

REGISTRATION PROCEEDINGS BEFORE BOARD [11]

SEC. 13. (a) Whenever the Attorney General shall have reason to believe that any organization which has not registered under subsection (a) or subsection (b) of section 7 of this title is in fact an organization of a kind required to be registered under such subsection, or that any individual who has not registered under section 8 of this title is in fact required to register under such section, he shall file with the Board and serve upon such organization or individual a petition for an order requiring such organization or individual to register pursuant to such subsection or section, as the case may be. Each such petition shall be verified under oath, and shall contain a statement of the facts upon which the Attorney General relies in support of his prayer for the issuance of such order.

(b) Any organization registered under subsection (a) or subsection (b) of section 7 of this title, and any individual registered under section 8 of this title, may, not oftener than once in each calendar year, make application to the Attorney General for the cancellation of such registration and (in the case of such organization) for relief from obligation to make further annual reports. Within sixty days after the denial of any such application by the Attorney General, the organization or individual concerned may file with the Board and serve upon the Attorney General a petition for an order requiring the cancellation of such registration and (in the case of such organization) relieving such organization of obligation to make further annual reports. Any individual authorized by section 7(g) of this title to file a petition for relief may file with the Board and serve upon the Attorney General a petition for an order requiring the Attorney General to strike his name from the registration statement or annual report upon which it appears.

[11] "Registration" added by sec. 9(b) of the Communist Control Act of 1954, 68 Stat. 778.

(c) Upon the filing of any petition pursuant to subsection (a) or subsection (b) of this section, the Board (or any member thereof or any examiner designated thereby) may hold hearings, administer oaths and affirmations, may examine witnesses and receive evidence at any place in the United States, and may require by subpoena the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records deemed relevant, to the matter under inquiry. Subpoenas may be signed and issued by any member of the Board or any duly authorized examiner. Subpoenas shall be issued on behalf of the organization or the individual who is a party to the proceeding upon request and upon a statement or showing of general relevance and reasonable scope of the evidence sought. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States at any designated place of hearing. Witnesses summoned shall be paid the same fees and mileage paid witnesses in the district courts of the United States. In cases of disobedience to a subpena, the Board may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence. Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpena issued to any person, issue an order requiring such person to appear (and to produce documentary evidence if so ordered) and give evidence relating to the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. No person shall be held liable in any action in any court, State or Federal, for any damages resulting from (1) his production of any documentary

evidence in any proceeding before the Board if he is required, by a subpena issued under this subsection, to produce the evidence; or (2) any statement under oath he makes in answer to a question he is asked while testifying before the Board in response to a subpoena issued under this subsection, if the statement is pertinent to the question.

(d)(1) All hearings conducted under this section shall be public. Each party to such proceeding shall have the right to present its case with the assistance of counsel, to offer oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. An accurate stenographic record shall be taken of the testimony of each witness, and a transcript of such testimony shall be filed in the office of the Board.

(2) Where an organization or individual declines or fails to appear at a hearing accorded to such organization or individual by the Board pursuant to this section, the Board may, without further proceedings and without the introduction of any evidence, enter an order requiring such organization or individual to register or denying the application of such organization or individual, as the case may be. Where in the course of any hearing before the Board or any examiner thereof a party or counsel is guilty of misbehavior which obstructs the hearing, such party or counsel may be excluded from further participation in the hearing.

(e) In determining whether any organization is a "Communist-action organization", the Board shall take into consideration—

(1) the extent to which its policies are formulated and carried out and its activities performed, pursuant to directives or to effectuate the policies of the foreign government or foreign organization in which

is vested, or under the domination or control of which is exercised, the direction and control of the world Communist movement referred to in section 2 of this title; and

(2) the extent to which its views and policies do not deviate from those of such foreign government or foreign organization; and

(3) the extent to which it receives financial or other aid, directly or indirectly, from or at the direction of such foreign government or foreign organization; and

(4) the extent to which it sends members or representatives to any foreign country for instruction or training in the principles, policies, strafegy, or tactics of such world Communist movement; and

(5) the extent to which it reports to such foreign government or foreign organization or to its representatives; and

(6) the extent to which its principal leaders or a substantial number of its members are subject to or recognize the disciplinary power of such foreign government or foreign organization or its representatives; and

(7) the extent to which, for the purpose of concealing foreign direction, domination, or control, or of expediting or promoting its objectives, (i) it fails to disclose, or resists efforts to obtain information as to, its membership (by keeping membership lists in code, by instructing members to refuse to acknowledge membership, or by any other method); (ii) its members refuse to acknowledge membership therein; (iii) it fails to disclose, or resists efforts to obtain information as to, records other than membership lists; (iv) its meeting are secret; and (v) it otherwise operates on a secret basis; and

(8) the extent to which its principal leaders or a substantial number of its members consider the allegiance they owe to the United States as subordinate to their obligations to such foreign government or foreign organization.

(f) In determining whether any organization is a "Communist-front organization", the Board shall take into consideration—

(1) the extent to which persons who are active in its management, direction, or supervision, whether or not holding office therein, are active in the management, direction, or supervision of, or as representatives of, any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2; and

(2) the extent to which its support, financial or otherwise, is derived from any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2; and

(3) the extent to which its funds, resources, or personnel are used to further or promote the objectives of any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2; and

(4) the extent to which the positions taken or advanced by it from time to time on matters of policy do not deviate from those of any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2.

(g) If, after hearing upon a petition filed under subsection (a) of this section, the Board determines—

(1) that an organization is a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such organization an order requiring such organization to register as such under section 7 of this title; or

(2) that an individual is a member of a Communist-action organization (including an organization required by final order of the Board to register under section 7(a)), it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such individual an order requiring him to register as such under section 8 of this title.

(h) If, after hearing upon a petition filed under subsection (a) of this section, the Board determines—

(1) that an organization is not a Communist-action organization or Communist-front organization as the case may be, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney General an order denying his petition for an order requiring such organization to register as such under section 7 of this title; and send a copy of such order to such organization; or

(2) that an individual is not a member of any Communist-action organization, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney General an order denying his petition for an order requiring such individual to register as such member under section 8 of this title; and send a copy of such order to such individual.

(i) If, after hearing upon a petition filed under subsection (b) of this section, the Board determines—

(1) that an organization is not a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney General an order requiring him to cancel the registration of such organization and relieve it from the requirement of further annual report; and send a copy of such order to such organization; or

(2) that an individual is not a member of any Communist-action organization, or (in the case of an individual listed as an officer of a Communist-front organization) that an individual is not an officer of a Communist-front organization, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney General an order requiring him to (A) strike the name of such individual from the registration statement or annual report upon which it appears or (B) cancel the registration of such individual under section 8, as may be appropriate; and send a copy of such order to such individual.

(j) If, after hearing upon a petition filed under subsection (b) of this section, the Board determines—

(1) that an organization is a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such organization an order denying its petition for the cancellation of its registration and for relief from the requirement of further annual reports; or

(2) that an individual is a member of a Communist-action organization, or (in the case of an individual listed as an officer of a Communist-front organization) that an individual is an officer of a

Communist-front organization, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such individual an order denying his petition for an order requiring the Attorney General (A) to strike his name from any registration statement or annual report on which it appears or (B) to cancel the registration of such individual under section 8, as the case may be.

(k) When an order of the Board requiring registration of a Communist organization becomes final under the provisions of section 14(b) of this title, the Board shall publish in the Federal Register the fact that such order has become final, and publication thereof shall constitute notice to all members of such organization that such order has become final.

PROCEEDINGS WITH RESPECT TO COMMUNIST-INFILTRATED ORGANIZATIONS [12]

SEC. 13A. (a) Whenever the Attorney General has reason to believe that any organization is a Communist-infiltrated organization, he may file with the Board and serve upon such organization a petition for a determination that such organization is a Communist-infiltrated organization. In any proceeding so instituted, two or more affiliated organizations may be named as joint respondents. Whenever any such petition is accompanied by a certificate of the Attorney General to the effect that the proceeding so instituted is one of exceptional public importance, such proceeding shall be set for hearing at the earliest possible time and all proceedings therein before the Board or any court shall be expedited to the greatest practicable extent.

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[12] Section added by sec. 10 of the Communist Control Act of 1954, 68 Stat. 778.

(b) Any organization which has been determined under this section to be a Communist-infiltrated organization may, within six months after such determination, file with the Board and serve upon the Attorney General a petition for a determination that such organization no longer is a Communist-infiltrated organization.

(c) Each such petition shall be verified under oath, and shall contain a statement of the facts relied upon in support thereof. Upon the filing of any such petition, the Board shall serve upon each party to such proceeding a notice specifying the time and place for hearing upon such petition. No such hearing shall be conducted within twenty days after the service of such notice.

(d) The provisions of subsections (c) and (d) of section 13 shall apply to hearings conducted under this section, except that upon the failure of any organization named as a party in any petition filed by or duly served upon it pursuant to this section to appear at any hearing upon such petition, the Board may conduct such hearing in the absence of such organization and may enter such order under this section as the Board shall determine to be warranted by evidence presented at such hearing.

(e) In determining whether any organization is a Communist-infiltrated organization, the Board shall consider—

(1) to what extent, if any, the effective management of the affairs of such organization is conducted by one or more individuals who are, or within three years have been, (A) members, agents, or representatives of any Communist organization, and Communist foreign government, or the world Communist movement referred to in section 2 of this title, with knowledge of the nature and purpose thereof; or (B) engaged in giving aid or support to any such organization, government, or movement with knowledge of the nature and purpose thereof;

(2) to what extent, if any, the policies of such organization are, or within three years have been, formulated and carried out pursuant to the direction or advice of any member, agent, or representative of any such organization, government, or movement;

(3) to what extent, if any, the personnel and resources of such organization are, or within three years have been used to further or promote the objectives of any such Communist organization, government, or movement;

(4) to what extent, if any, such organization within three years has received from, or furnished to or for the use of, any such Communist organization, government, or movement any funds or other material assistance;

(5) to what extent, if any, such organization is, or within three years has been, affiliated in any way with any such Communist organization, government, or movement;

(6) to what extent, if any, the affiliation of such organization or of any individual or individuals who are members thereof or who manage its affairs, with any such Communist organization, government, or movement is concealed from or is not disclosed to the membership of such organization; and

(7) to what extent, if any, such organization or any of its members or managers are, or within three years have been, knowingly engaged—

(A) in any conduct punishable under section 4 or 15 of this Act or under chapters 37, 105, 115 of title 18 of the United States Code; or

(B) with intent to impair the military strength of the United States or its industrial capacity to furnish logistical or other support re-

quired by its armed forces, in any activity resulting in or contributing to any such impairment.

(f) After hearing upon any petition filed under this section, the Board shall (1) make a report in writing in which it shall state findings as to the facts and its conclusion with respect to the issues presented by such petition, (2) enter its order granting or denying the determination sought by such petition, and (3) serve upon each party to the proceeding a copy of such order. Any order granting any determination on the question whether any organization is a Communist-infiltrated organization shall become final as provided in section 14(b) of this Act.

(g) When any order has been entered by the Board under this section with respect to any labor organization or employer (as these terms are defined by section 2 of the National Labor Relations Act, as amended, and which are organizations within the meaning of section 3 of the Subversive Activities Control Act of 1950), the Board shall serve a true and correct copy of such order upon the National Labor Relations Board and shall publish in the Federal Register a statement of the substance of such order and its effective date.

(h) When there is in effect a final order of the Board determining that any such labor organization is a Communist-action organization, a Communist-front organization, or a Communist-infiltrated organization, such labor organization shall be ineligible to—

(1) act as representative of any employee within the meaning or for the purposes of section 7 of the National Labor Relations Act, as amended (29 U. S. C. 157);

(2) serve as an exclusive representative of employees of any bargaining unit under section 9 of such Act, as amended (29 U. S. C. 159);

(3) make, or obtain any hearing upon, any charge under section 10 of such Act (29 U. S. C. 160); or

(4) exercise any other right or privilege, or receive any other benefit, substantive or procedural, provided by such Act for labor organizations.

(i) When an order of the Board determining that any such labor organization is a Communist-infiltrated organization has become final, and such labor organization theretofore has been certified under the National Labor Relations Act, as amended, as a representative of employees in any bargaining unit—

(1) a question of representation affecting commerce, within the meaning of section 9(c) of such Act, shall be deemed to exist with respect to such bargaining unit; and

(2) the National Labor Relations Board, upon petition of not less than 20 per centum of the employees in such bargaining unit or any person or persons acting in their behalf, shall under section 9 of such Act (notwithstanding any limitation of time contained therein) direct elections in such bargaining unit or any subdivision thereof (A) for the selection of a representative thereof for collective bargaining purposes, and (B) to determine whether the employees thereof desire to rescind any authority previously granted to such labor organization to enter into any agreement with their employer pursuant to section 8(a) (3)(ii) of such Act.

(j) When there is in effect a final order of the Board determining that any such employer is a Communist-infiltrated organization, such employer shall be ineligible to—

(1) file any petition for an election under section 9 of the National Labor Relations Act, as amended

(29 U. S. C. 157), or participate in any proceeding under such section; or

(2) make or obtain any hearing upon any charge under section 10 of such Act (29 U. S. C. 160); or

(3) exercise any other right or privilege or receive any other benefit, substantive or procedural, provided by such Act for employers.

JUDICIAL REVIEW

SEC. 14. (a) The party aggrieved by any order entered by the Board under subsection (g), (h), (i), or (j) of section 13, or subsection (f) of section 13A,[18] may obtain a review of such order by filing in the United States Court of Appeals for the District of Columbia, within sixty days from the date of service upon it of such order, a written petition praying that the order of the Board be set aside. A copy of such petition shall forthwith be transmitted by the clerk of the court to the Board, and thereupon the Board shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon the filing of such petition the court shall have jurisdiction of the proceeding and shall have power to affirm or set aside the order of the Board; but the court may in its discretion and upon its own motion transfer any action so commenced to the United States Court of Appeals for the circuit wherein the petitioner resides. The findings of the Board as to the facts, if supported by the preponderance of the evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material, the court may order such additional evidence to be taken before the

[18] Matter between commas added by section 11 of the Communist Control Act of 1954, 68 Stat. 780.

Board and to be adduced upon the proceeding in such manner and upon such terms and conditions as to the court may seem proper. The Board may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by the preponderance of the evidence shall be conclusive, and its recommendations, if any, with respect to action in the matter under consideration. If the court shall set aside an order issued under subsection (j) of section 13 it may, in the case of an organization, enter a judgment canceling the registration of such organization and relieving it from the requirement of further annual reports, or in the case of an individual, enter a judgment requiring the Attorney General (A) to strike the name of such individual from the registration statement or annual report on which it appears, or (B) cancel the registration of such individual under section 8, as may be appropriate. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in title 28, United States Code, section 1254.

(b) Any order of the Board issued under section 13, or subsection (f) of section 13A,[14] shall become final—

(1) upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; or

(2) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Board has been affirmed or the petition for review dismissed by a United States Court of Appeals, and no petition for certiorari has been duly filed; or

(3) upon the denial of a petition for certiorari, if the order of the Board has been affirmed or the

[14] See footnote 13.

petition for review dismissed by a United States Court of Appeals; or

(4) upon the expiration of ten days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Board be affirmed or the petition for review dismissed.

PENALTIES

SEC. 15. (a) If there is in effect with respect to any organization or individual a final order of the Board requiring registration under section 7 or section 8 of this title—

(1) such organization shall, upon conviction of failure to register, to file any registration statement or annual report, or to keep records as required by section 7, be punished for each such offense by a fine of not more than $10,000, and

(2) each individual having a duty under subsection (h) of section 7 to register or to file any registration statement or annual report on behalf of such organization, and each individual having a duty to register under section 8, shall, upon conviction of failure to so register or to file any such registration statement or annual report, be punished for each such offense by a fine of not more than $10,000, or imprisonment for not more than five years, or by both such fine and imprisonment.

For the purposes of this subsection, each day of failure to register, whether on the part of the organization or any individual, shall constitute a separate offense.

(b) Any individual who, in a registration statement or annual report filed under section 7 or section 8, willfully makes any false statement or willfully omits to state any fact which is required to be stated or which is necessary to

make the statements made or information given not misleading, shall upon conviction thereof be punished for each such offense by a fine of not more than $10,000, or by imprisonment for not more than five years, or by both such fine and imprisonment. For the purposes of this subsection—

(1) each false statement wilfully made, and each willful omission to state any fact which is required to be stated, or which is necessary to make the statements made or information given not misleading, shall constitute a separate offense; and

(2) each listing of the name or address of any one individual shall be deemed to be a separate statement.

(c) Any organization which violates any provision of section 10 of this title shall, upon conviction thereof, be punished for each such violation by a fine of not more than $10,000. Any individual who violates any provision of section 5, 6, or 10 of this title shall, upon conviction thereof, be punished for each such violation by a fine of not more than $10,000 or by imprisonment for not more than five years, or by both such fine and imprisonment.

APPLICABILITY OF ADMINISTRATIVE PROCEDURE ACT

SEC. 16. Nothing in this title shall be held to make the provisions of the Administrative Procedure Act inapplicable to the exercise of functions, or the conduct of proceedings, by the Board under this title.

EXISTING CRIMINAL STATUTES

SEC. 17. The foregoing provisions of this title shall be construed as being in addition to and not in modification of existing criminal statutes.

* * *

## Immigration and Nationality Act

Pertinent provisions of sections 22 and 25 of the Subversive Activities Control Act have been carried forward in the Immigration and Nationality Act, 66 Stat. 163 adopted June 27, 1952, 8 U. S. C. secs. 1182, 1251, 1424, 1451, as follows:

SEC. 212. (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * *

(28) Aliens who are, or at any time have been, members of any of the following classes:

* * *

(E) Aliens not within any of the other provisions of this paragraph, who are members of or affiliated with any organization during the time it is registered or required to be registered under section 7 of the Subversive Activities Control Act of 1950, unless such aliens establish that they did not have knowledge or reason to believe at the time they became members of or affiliated with such an organization (and did not thereafter and prior to the date upon which such organization was so registered or so required to be registered have such knowledge or reason to believe) that such organization was a Communist organization.

SEC. 241. (a) Any alien in the United States (including any alien crewman) shall, upon the order of the Attorney General, be deported who—

* * *

(6) is or at any time has been, after entry, a member of any of the following classes of aliens:

* * *

(E) Aliens not within any of the other provisions of this paragraph, who are members of or affiliated with any organization during the time it is registered or required to be registered under section 7 of the Subversive Activities Control Act of 1950, unless such aliens establish that they did not have knowledge or reason to believe at the time they became members of or affiliated with such organization (and did not thereafter and prior to the date upon which such organization was so registered or so required to be registered have such knowledge or reason to believe) that such organization was a Communist organization.

SEC. 313. (a) Notwithstanding the provisions of section 405(b), no person shall hereafter be naturalized as a citizen of the United States—

* * *

(2) * * * (G) who, regardless of whether he is within any of the other provisions of this section, is a member of or affiliated with any Communist-action organization during the time it is registered or required to be registered under the provisions of section 7 of the Subversive Activities Control Act of 1950; or (H) who, regardless of whether he is within any of the other provisions of this section, is a member of or affiliated with any Communist-front organization during the time it is registered or required to be registered under section 7 of the Subversive Activities Control Act of 1950, unless such alien establishes that he did not have knowledge or reason to believe at the time he became a member of or affiliated with such an organization (and did not thereafter and prior to the date upon which such organization was so registered or so required

to be registered have such knowledge or reason to believe) that such organization was a Communist-front organization.

SEC. 340. * * * (c) If a person who shall have been naturalized after the effective date of this Act [15] shall within five years next following such naturalization become a member of or affiliated with any organization, membership in or affiliation with which at the time of naturalization would have precluded such person from naturalization under the provisions of section 313, it shall be considered prima facie evidence that such person was not attached to the principles of the Constitution of the United States and was not well disposed to the good order and happiness of the United States at the time of naturalization, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the revocation and setting aside of the order admitting such person to citizenship and the cancellation of the certificate of naturalization as having been obtained by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively.

## Communist Control Act

The Communist Control Act of 1954, 68 Stat. 775, 50 U. S. C. 841-44, provides in part as follows:

### FINDINGS OF FACT

SEC. 2. The Congress hereby finds and declares that the Communist Party of the United States, although purport-

[15] The introductory clause of section 25(d) of the Subversive Activities Control Act read "If a person who shall have been naturalized after January 1, 1951 * * *."

edly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. It constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution. Unlike political parties, which evolve their policies and programs through public means, by the reconciliation of a wide variety of individual views, and submit those policies and programs to the electorate at large for approval or disapproval, the policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement. Its members have no part in determining its goals, and are not permitted to voice dissent to party objectives. Unlike members of political parties, members of the Communist Party are recruited for indoctrination with respect to its objectives and methods, and are organized, instructed, and disciplined to carry into action slavishly the assignments given them by their hierarchical chieftains. Unlike political parties, the Communist Party acknowledges no constitutional or statutory limitations upon its conduct or upon that of its members. The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful political means. The peril inherent in its operation arises not from its numbers, but from its failure to acknowledge any limitation as to the nature of its activities, and its dedication to the proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power render its existence a clear, present and continuing danger to the security of the United States. It is the means whereby individuals are seduced into the service of the world Communist movement, trained to do its bidding, and directed and controlled in the conspiratorial performance of their

revolutionary services. Therefore, the Communist Party should be outlawed.

PROSCRIBED ORGANIZATIONS

SEC. 3. The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the Government of the United States, or the government of any State, Territory, District, or possession thereof, or the government of any political subdivision therein by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are hereby terminated: *Provided, however,* That nothing in this section shall be construed as amending the Internal Security Act of 1950, as amended.

SEC. 4. Whoever knowingly and willfully becomes or remains a member of (1) the Communist Party, or (2) any other organization having for one of its purposes or objectives the establishment, control, conduct, seizure, or overthrow of the Government of the United States, or the government of any State or political subdivision thereof, by the use of force or violence, with knowledge of the purpose or objective of such organization shall be subject to all the provisions and penalties of the Internal Security Act of 1950, as amended, as a member of a "Communist-action" organization.

(b) For the purpose of this section, the term "Communist Party" means the organization now known as the Communist Party of the United States of America, the

Communist Party of any State or subdivision thereof, and any unit or subdivision of any such organization, whether or not any change is hereafter made in the name thereof.

SEC. 5. In determining membership or participation in the Communist Party, or any other organization defined in this Act, or knowledge of the purpose or objective of such party or organization, the jury, under instructions from the court, shall consider evidence, if presented, as to whether the accused person:

(1) Has been listed to his knowledge as a member in any book or any of the lists, records, correspondence, or any other document of the organization;

(2) Has made financial contribution to the organization in dues, assessments, loans, or in any other form;

(3) Has made himself subject to the discipline of the organization in any form whatsoever;

(4) Has executed orders, plans, or directives of any kind of the organization;

(5) Has acted as an agent, courier, messenger, correspondent, organizer, or in any other capacity in behalf of the organization;

(6) Has conferred with officers or other members of the organization in behalf of any plan or enterprise of the organization;

(7) Has been accepted to his knowledge as an officer or member of the organization or as one to be called upon for services by other officers or members of the organization;

(8) Has written, spoken or in any other way communicated by signal, semaphore, sign, or in any other form of communication orders, directives, or plans of the organization;

(9) Has prepared documents, pamphlets, leaflets, books, or any other type of publication in behalf of the objectives and purposes of the organization;

(10) Has mailed, shipped, circulated, distributed, delivered, or in any other way sent or delivered to others material or propaganda of any kind in behalf of the organization;

(11) Has advised, counseled or in any other way imparted information, suggestions, recommendations to officers or members of the organization or to anyone else in behalf of the objectives of the organization;

(12) Has indicated by word, action, conduct, writing or in any other way a willingness to carry out in any manner and to any degree the plans, designs, objectives, or purposes of the organization;

(13) Has in any other way participated in the activities, planning, actions, objectives, or purposes of the organization;

(14) The enumeration of the above subjects of evidence on membership or participation in the Communist Party or any other organization as above defined, shall not limit the inquiry into and consideration of any other subject of evidence on membership and participation as herein stated.

* * * [16]

SEC. 12. If any provision of this title or the application thereof to any person or circumstances is held invalid, the remainder of the title, and the application of such provisions to other persons or circumstances, shall not be affected thereby.

---

[16] The omitted sections amend the Subversive Activities Control Act.

## Social Security Act

The Social Security Act, as amended, provides in part as follows, 70 Stat. 824, 828, 839, 42 U. S. C. 410:

(a) The term "employment" means * * * any service, of whatever nature, performed after 1950 * * * (A) by a person for the employee employing him, irrespective of the residence or citizenship of either, (i) within the United States * * * except that, in the case of service performed after 1950, such term shall not include—

* * *

(17) Service in the employ of any organization which is performed (A) in any quarter during any part of which such organization is registered, or there is in effect a final order of the Subversive Activities Control Board requiring such organization to register, under the Internal Security Act of 1950, as amended, as a Communist-action organization, a Communist-front organization, or a Communist-infiltrated organization, and (B) after June 30, 1956.

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No. 527 12

# In the Supreme Court of the United States

OCTOBER TERM, 1959

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA, PETITIONER

*v.*

SUBVERSIVE ACTIVITIES CONTROL BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## MEMORANDUM FOR THE RESPONDENT

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# In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 537

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA, PETITIONER

*v.*

SUBVERSIVE ACTIVITIES CONTROL BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## MEMORANDUM FOR THE RESPONDENT

### OPINIONS BELOW

The original opinion of the Court of Appeals, Judge Bazelon dissenting, is reported at 223 F. 2d 531 (Pet. App. A, pp. 1–89).

The second opinion of the Court of Appeals, Judge Bazelon dissenting in part and concurring in part, is reported at 254 F. 2d 314 (Pet. App. A, pp. 91–121). An unreported memorandum having reference to this opinion appears in Appendix A to the petition, pp. 122–123 (R. 2821–2822),[1] and an order clarifying the latter memorandum appears at R. 2831–2832.

[1] Like petitioner, we shall use "R." to refer to the printed record (pages 1–2169) filed with the Court at the October Term, 1955 (No. 48). Pages 2171–2871 refer to the proceedings before the Subversive Activities Control Board and the court below subsequent to this Court's remand, as contained in the certified record.

The third opinion of the Court of Appeals, Judge Bazelon dissenting in part and concurring in part (Pet. App. A, pp. 124–132), has not yet been reported.

The Modified Report of the Subversive Activities Control Board appears at R. 2403–2615 (Mod. Rep. 1–205), and the Modified Report of the Board on Second Remand at R. 2375–2402 (2d Mod. Rep. 1–22).

## JURISDICTION

The judgment of the Court of Appeals was entered on July 30, 1959 (Pet. App. B, p. 133), and a petition for rehearing (R. 2846–2848) was denied on August 27, 1959 (R. 2849). The petition for a writ of certiorari was filed on November 23, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 and Section 14(a) of the Subversive Activities Control Act of 1950 (see Pet. App. C, pp. 170–171).

## QUESTIONS PRESENTED

1. Whether the Subversive Activities Control Act of 1950, as amended, is unconstitutional on its face or as applied in this case (Pet. Ques. 1).

2. Whether the order of the Subversive Activities Control Board rests upon a proper construction and application of the Act (Pet. Ques. 2).

3. Whether the order of the Board is supported by the preponderance of the evidence (Pet. Ques. 3).

4. Whether it was error to refuse to strike all of Budenz' testimony because it was not possible for the witness, due to illness, to be subjected to cross-examination with the use of his F.B.I. statements on the Starobin and Childs-Weiner matters (Pet. Ques. 4).

5. Whether in the particular circumstances the petitioner was entitled to the production of statements by the Attorney General's witnesses relating to their direct testimony (Pet. Ques. 5).

6. Whether the court below, having sustained the ultimate finding of the Board as supported by other findings and by the preponderance of the evidence, erred in refusing to remand because a subsidiary finding of the Board lacked evidentiary support (Pet. Ques. 6).

## STATUTES INVOLVED

The pertinent provisions of the Subversive Activities Control Act of 1950 (Title I of the Internal Security Act of [September 23,] 1950, c. 1024, 64 Stat. 987, 50 U.S.C. 781 *ff.*), as amended, the Immigration and Nationality Act [of June 27, 1952], c. 477, 66 Stat. 163, the Communist Control Act of [August 24,] 1954, c. 886, 68 Stat. 775, and the Social Security Amendments of [Act of August 1,] 1956, c. 836, 70 Stat. 824, 42 U.S.C. 410, are set forth in Appendix C to the petition for certiorari, pp. 134–181.

## STATEMENT

On November 22, 1950, the Attorney General filed with the Subversive Activities Control Board (the "Board") a petition under Section 13(a) of the Subversive Activities Control Act of 1950 (the "Act"), for an order directing the present petitioner, the Communist Party of the United States, to register with him as a "Communist-action organization" as required by Section 7 (a), (c) and (d) of the Act (R. 143–159). Hearings and the taking of evidence com-

menced April 23, 1951, before a hearing panel of three Board members and continued to July 1, 1952 (R. 1–2).

On October 20, 1952, the hearing panel issued a recommended decision, finding the petitioner to be a Communist-action organization and recommending that it be ordered to register as such. On April 20, 1953, the Board issued its Report (R. 1–137) and Order (R. 138) directing the petitioner to register. The Report concluded that "[u]pon the overwhelming weight of the evidence in this proceeding, we find that [petitioner] is substantially directed, dominated, and controlled by the Soviet Union, which controls the world Communist movement referred to in Section 2 of the Act; and that [petitioner] operates primarily to advance the objectives of such world Communist movement" (R. 132).

On June 17, 1953, the Party filed under Section 14(a) of the Act a petition in the United States Court of Appeals for the District of Columbia Circuit for review of the Board's Order (R. 139–142). On December 23, 1953, that court, with Judge Bazelon dissenting, affirmed the Board's Order. *Communist Party of the United States* v. *Subversive Activities Control Board,* 223 F. 2d 531 (Pet. App. A, pp. 1–89). At the same time, the court denied (without a separate opinion) a motion of the petitioner for leave to adduce additional evidence going to the credibility of three of the Attorney General's witnesses (Crouch, Johnson, and Matusow). The court struck two of the Board's subsidiary findings of fact (223 F. 2d at 574, 575; Pet. App. A, pp. 72, 74), and concluded, after reviewing the evidence (223 F. 2d at 565–576;

Pet. App. A, pp. 55–75), that the ultimate finding was supported by a preponderance of the evidence.[2]

This Court granted a petition for certiorari on May 31, 1955. 349 U.S. 943. After argument, the Court, pointing out that the Government had not denied the allegations as to the credibility of the three witnesses (351 U.S. 115, 121), found that the denial by the Court of Appeals of the motion for leave to adduce additional evidence was erroneous, and without deciding other issues, reversed and remanded the case to the Board for hearing or such other action as the Board might take in order to make certain that its findings were based on "untainted" evidence. *Communist Party* v. *Subversive Activities Control Board,* 351 U.S. 115, 125.

Following the remand, the Board expunged the testimony of the three witnesses, Crouch, Johnson, and Matusow (Memorandum Opinion and Order of August 10, 1956, R. 2171–2191). On November 5, 1956, the Court of Appeals, on petitioner's motion, entered an order empowering the Board to entertain a motion relating to alleged perjury by another witness, Markward (R. 2757).

Petitioner made a motion to that effect before the Board, which granted it in part (R. 2206–2212). In December 1956, before the Board, counsel for petitioner exhaustively cross-examined Markward (R. 2231–2253, 2271–2275).

[2] The opinion also referred to the denial of the motion for leave to adduce additional evidence, stating that the credibility of witnesses is primarily for the trier of fact, and that there had been full opportunity for cross-examination of the witnesses and their testimony was supported by masses of other evidence (223 F. 2d at 565; Pet. App. A, p. 54).

On December 18, 1956, the Board issued its "Modified Report" (Mod. Rep. 1–205; R. 2403–2615) in which, after reconsidering the record (excluding the testimony expunged), it concluded "that the evidence establishes beyond doubt that [petitioner] is substantially directed, dominated, and controlled by the Soviet Union * * * and operates primarily to advance the objectives of such world movement" (Mod. Rep. 204; R. 2609). The Board recommended that the Court of Appeals affirm the Board's order requiring registration (Mod. Rep. 205; R. 2610).

On review, the Court of Appeals, on January 9, 1958, remanded the case for production to the petitioner of certain reports made to the F.B.I. by Markward, but affirmed the action of the Board on all other points. *Communist Party of the United States* v. *Subversive Activities Control Board,* 254 F. 2d 314; Pet. App. A, pp. 91–121. Subsequently, on April 11, 1958, the Court enlarged the scope of the remand order to include the production of "statements"—as defined by 18 U.S.C. 3500—made by the witness Budenz to the F.B.I. (R. 2820).[3]

[3] After the Court of Appeals' opinion of January 9, 1958, government counsel discovered, in the files of the F.B.I., mechanical recordings of an interview of Budenz with the F.B.I., which had been recorded without Budenz' knowledge (R. 2804–2806), and the existence of which had not previously been known to counsel or to the Board. The Board reported this discovery to the court, by an affidavit of counsel, whereupon the court by an order of April 11, 1958 (R. 2819), construed by an order of June 16, 1958 (R. 2831), remanded to the Board for production of all "statements" of Budenz relating to the "Starobin letter" and the "Childs-Weiner conversation." (Those items are described, *infra*, pp. 18–19).

The hearing before the Board was reopened before a Member of the Board sitting as Examiner. He granted in part and denied in part petitioner's motions to strike the testimony of Budenz and for the production of documents, reevaluated the credibility of the witnesses Markward and Budenz, re-examined the evidence, and recommended certain modifications in the Modified Report and that the Board affirm its determination that petitioner is a Communist-action organization as defined in the Act (2d Mod. Rep. 9–12; R. 2386–2389).

Exceptions to this recommendation were filed and argued, and on February 9, 1959, the Board issued its Modified Report on Second Remand, reaffirming the findings and conclusions of its Modified Report of December 18, 1956, with certain changes and modifications (2d Mod. Rep. 1–22; R. 2375–2399).

On July 30, 1959, the Court of Appeals affirmed this order of the Board, Judge Bazelon concurring in part and dissenting in part (Pet. App. A, pp. 124–132).

## DISCUSSION AND ARGUMENT

### I

### THE CONSTITUTIONALITY OF THE ACT AND ITS CONSTRUCTION AND APPLICATION BY THE BOARD

The first two questions raised by the petitioner are substantially the same as those presented by it in the former petition at the 1954 Term.[4] For that reason

[4] Compare the present "Questions Presented" (Pet. 4–5; and see Pet. 18–59) with the questions urged in the former petition (No. 718, Oct. Term, 1954, pp. 2–3, 42–76).

we do not oppose the granting of the petition for a writ of certiorari on the issues comprised within those two questions.

## II

### A REVIEW OF THE EVIDENCE BY THIS COURT IS NOT REQUIRED

However, we urge that certiorari should not be granted on petitioner's Question 3, *i.e.*, whether the order of the Board is supported by the preponderance of the evidence in the present record (Pet. 4).

A. Section 14 of the Act provides for review of the order of the Board by the Court of Appeals, and that "[t]he findings of the Board as to the facts, if supported by the preponderance of the evidence, shall be conclusive." The court below recognized that the "preponderance of the evidence" standard of the Act allowed greater latitude for judcial review than do other statutes, and also imposed a "laborious task" upon the reviewing court (223 F. 2d at 562; Pet. App. A, p. 49). Accordingly, on each of the three occasions when the Board's order was before it, the court made a painstaking and exhaustive review of the evidence. See 223 F. 2d at 565–576, Pet. App. A, pp. 55–76; 254 F. 2d at 331–333, Pet. App. A, pp. 117–121; R. 2837, Pet. App. A, p. 126.

Since the Court of Appeals has the "normal and primary" responsibility for reviewing the findings of the Board, and has carefully done so on three occasions, with the final result that the court found that the Board's findings are "amply supported" (Pet. App. A, p. 125), it would seem that further review by

this Court is not necessary. *National Labor Relations Board* v. *American Insurance Co.*, 343 U.S. 395, 409–410; *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502–503; *Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396, 397–404; *Peurifoy* v. *Commissioner*, 358 U.S. 59, 61.

B. In this Court, the petitioner adopts the same approach to the facts which it followed in the court below: disregarding all the rest of the evidence, it concentrates on certain segments and expands them to produce the impression that there is nothing else significant in the record. But the record on which the Board made its findings consists of more than 14,000 pages of testimony from 19 witnesses for the Attorney General, and 3 for the petitioner, and more than 500 exhibits.[5] All of that record must be taken into account.

A brief review of important parts of the evidence will demonstrate the error in petitioner's selective approach.

1. In its Modified Report the Board said:

> Our reconsideration of the record as expunged leads to the conclusion that the evidence establishes beyond doubt that [petitioner] is substantially directed, dominated, and controlled by the Soviet Union, which controls the world Communist movement referred to in section 2 of the Act, and operates primarily to advance the objectives of such world movement * * *. [Mod. Rep. 204; R. 2609.]

[5] The findings of the Board are set out in a Modified Report and a supplement of over 200 pages (R. 2375–2615), with numerous quotations from exhibits and testimony.

This is the finding of ultimate fact which brings the petitioner within the definition of a "Communist-action organization" in Section 3(3) of the Act.

On the record, the control of petitioner by the Soviet Union is shown by ample evidence. In 1934, one of petitioner's leaders wrote in an article:

> * * * The leading role of the Communist Party of the Soviet Union in the Comintern needs neither explanation nor apology. A party that has opened up the epoch of the world revolution * * * is cheerfully recognized and followed as the leading party of the world Communist movement. [Quoted at Mod. Rep. 46; R. 2451.]

Again, in 1950, the statement appeared in an Party publication (*Political Affairs*) that:

> * * * The Soviet Union is the embodiment and leader of the forces of proletarian internationalism. * * * [T]he Communist Party of the Soviet Union * * * is the leading Communist Party of the world. * * * It is leading the fight for Socialism. * * * Communists [recognize] the leading role of the Communist Party of the Soviet Union. [Quoted at Mod. Rep. 120; R. 2525.]

This control via the leadership of the Soviet Union is enforced by a requirement of rigid discipline within the Party. As the Court of Appeals said in its first opinion (223 F. 2d at 574; Pet. App. A, pp. 72–73):

> The Board * * * found that an iron discipline exists throughout the world Communist movement, which requires unquestioned devotion to the program laid down by the Soviet Union, and that the Party has recognized and accepted that requirement. * * *

> The requirement of iron discipline within the Communist movement is one of the basic principles of the movement. It is the "democratic centralism" so vigorously insisted upon by Communist leaders * * *. The evidence * * * included the Classics, many publications, categorical assertions by witnesses on the stand, and incidents in which those who departed from the Communist program were expelled from the Party, including, among others, the experiences of Gitlow in 1929, Kornfeder in 1934, * * * Lautner in 1950, Tompkins in 1951, and the demotion of Browder in 1945. Identification of the Soviet Union as the leader of the world Communist movement is amply shown. * * * We think the finding on this point is supported by a clear preponderance of the proof.

The finding of "control" implies a prediction that the Party, the entity controlled, will act in the future in accordance with the leadership of the Soviet Union. Taking petitioner's own words at their face value, petitioner has admitted and even vaunted Soviet control in that sense.

Other evidence showed that at least from 1920 to 1940 petitioner was a part of the Soviet-controlled and dominated organization of Communist parties throughout the world known as the Communist International or "Comintern" (Mod. Rep. 41–69, 91–96; R. 2446–2474, 2496–2501). See 223 F. 2d at 569; Pet. App. A, p. 63. In 1940, petitioner announced its disaffiliation from the Comintern in order to avoid having to register as a foreign agent under the Voorhis Act (Mod. Rep. 93, R. 2498). An abundance of evidence, however, established that this "disaffiliation"

was merely formal, and that during the period since 1940 petitioner continued to adhere to and to follow the rules and tactics of the world Communist movement and has never differed from the program and policy of the Communist Party of the Soviet Union.

To a degree unusual with "political" parties, petitioner—before and after the 1940 "disaffiliation"—has regulated and patterned itself on the "Marxist-Leninist Classics," such as the writings of Stalin, the *History of the Communist Party of the Soviet Union,*[6] *Foundations of Leninism,* and Dimitroff's *Report to the Seventh Congress* (Mod. Rep. 37–38; R. 2442–2443). These books set forth the objectives, the strategies and tactics, and the rules for the world Communist movement (Mod. Rep. 7–40; R. 2412–2445). In 1945, Party leader Dennis urged a return to the study of the classics (Mod. Rep. 37; R. 2442).[7] The objectives, the strategies and the tactics of the movement being thus set out in the classics, and petitioner's leaders having been in large part trained and indoctrinated in the Soviet Union (particularly

[6] The *History* was written with the immediate participation of Stalin and authorized by the Central Committee of the Communist Party of the Soviet Union. In about 1939 or 1940, petitioner joined with the Communist parties of France, Great Britain, Germany, and Italy in adopting a resolution concerning its use "in the successful mastering of Bolshevism by the Communists of the capitalist countries" and as "one of the greatest events in the life of the Communist world movement * * *." (Quoted in Mod. Rep. 34; R. 2443.)

[7] For specific programs carried out by petitioner because the "Classics" required such action, see Mod. Rep. 98–99, R. 2503–2504 (revision of policy and internal reorganization in 1945); Mod. Rep. 123–128, R. 2528–2533 (opposition to "imperialism"); Mod. Rep. 131–139, R. 2536–2544 (major programs).

at the Lenin School), the petitioner has been and is (as the Court of Appeals found) an obedient follower of the tenets of Marxism-Leninism. One of those basic tenets is the leadership of the Soviet Union. See 223 F. 2d at 571; Pet. App. A, p. 66.[8]

2. Foreign domination or control is an element of the definition in Section 3(3) of the Act of a "Communist-action organization." The same terms appear in Section 13(e), which sets out eight tests or criteria for the Board to take into consideration in determining whether an organization comes within Section 3(3). Those criteria are types of evidence, but not necessarily the only ones, which could form the basis for an ultimate finding of domination or control. The Board made specific findings of the extent to which the petitioner met all of these criteria and the court below held that those specific or subsidiary findings were supported by a preponderance of the evidence in all but one instance.[9]

Section 13(e)(2) provides that the Board shall consider the extent to which the views or policies of the organization "do not deviate" from those of the foreign government or organization. The petitioner does not attempt to deny the identity of its program and policy with those of the Soviet Union,[10] and a few

[8] Petitioner keeps itself current on Soviet policies by maintaining a "correspondent" in Moscow for the *Daily Worker*, and by following the authoritative statements of *Pravda* and other Soviet organs (Mod. Rep. 117; R. 2522).

[9] The lone exception we discuss *infra*, pp. 26–27.

[10] Petitioner does contend (Pet. 55–56) that there must be a showing in each instance that the Soviet view antedated the petitioner's, and that a similarity of "non-seditious" views is immaterial. But a consistent identity of views and policies,

specific instances will show the record support for the Board's "non-deviation" finding. A notorious one is the petitioner's abrupt about-face in its attitude towards Nazi Germany at the time of the Hitler-Stalin pact in 1939 (Mod. Rep. 152; R. 2557). Another is the reversal in 1948 of petitioner's attitude towards the Tito Government in Yugoslavia, following the Soviet Union's bitter denunciation of that government (Mod. Rep. 153; R. 2558). In addition, the Board took into account petitioner's complete acceptance of and adherence to the rules and principles of Marxism-Leninism and its "non-deviation" in regard to some 45 major international questions, over the past 30 years (Mod. Rep. 156–157; R. 2561–2562); and the court below mentioned many of these items in its opinion holding the finding supported by a preponderance of the evidence (223 F. 2d at 572; Pet. App. A, p. 68).

In attacking the finding that the "reporting" element of Section 13(e)(5) applied, petitioner urges that there was a "total absence of evidence" to support the finding, and that " 'Reporting' has a rational tendency to prove foreign control only if the report is made to facilitate supervision of the accused organization" (Pet. 56). But the Board found, and set out the evidence, that supervision was found to have been exercised on occasion by Soviet agents in the United States, and that reports were made by so-called published "greetings" to the Soviet Union and by letters and visits to Russia by members of petitioner (Mod.

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seditious or not, is a legitimate basis for an inference of control, and which party to the relationship made its view public first is immaterial.

Rep. 103–105, 167–178; R. 2508–2510, 2572–2583). The Court of Appeals held that "[t]here is a preponderance of evidence * * * to support a conclusion that upon occasion leaders of the Party report to representatives of the Soviet Union" (223 F. 2d at 574; Pet. App. A, p. 72).

Similarly, the Board found, with ample citation of evidence (Mod. Rep. 194–202; R. 2599–2607), that petitioner's "leaders and a substantial portion of its membership consider the allegiance they owe to the United States as subordinate to their loyalty and obligations to the Soviet Union" (Mod. Rep. 202; R. 2607). And the Court of Appeals approved, saying, "Certainly prior to 1941 the leaders of the Party USA declared fealty to the Soviet rulers, and the same men are now leaders of the Party" (223 F. 2d at 575; Pet. App. A, p. 74).

Petitioner also attacks the evidence of the existence of a "world Communist movement," basing the challenge on its own interpretation of the term (Pet. 58–59). The court below held, however, that the Board's finding on this point was "supported by a clear preponderance of the evidence" (223 F. 2d at 568; 254 F. 2d at 320; Pet. App. A, pp. 61, 95). The Board recited the evidence at length in its Modified Report, pages 41 to 90 (R. 2446–2495).

Petitioner's main argument is that the evidence did not prove that it operates primarily to advance the objectives of the world Communist movement (Pet. 60–63). Eschewing any attempt to assay the record as a whole, it says that the evidence does not support a finding that it "advocates violent overthrow" of the

government (Pet. 60) or that it has the objective of establishing in this country a "totalitarian dictatorship" subservient to the Soviet Union (Pet. 61–62). The Board found, on the contrary, that petitioner "has as a fundamental purpose, which it constantly seeks to further, the overthrow of the Government of the United States by any means, including force and violence if necessary" (Mod. Rep. 202; R. 2607), and also that "there is inside our borders a disciplined organization [petitioner] which under Soviet Union control seeks, by unconstitutional means, to install a Soviet style [Communist] dictatorship in the United States, just as other Communist Parties in other countries have done" (Mod. Rep. 204, also 89; R. 2609, 2494). In support, the Board cited an abundance of evidence.[11]

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[11] See also Mod. Rep. 197–201; R. 2602–2060; also Mod. Rep. 196–197; R. 2601–2602.

The Board recognized that petitioner would, of course, be entirely satisfied to obtain control by a political coup such as took place in Czechoslovakia, with the Soviet Union standing in the wings (Mod. Rep. 90; R. 2495); that if for some reason a government should voluntarily accede to a dictatorship of the proletariat, or should not choose to defend itself from lawless attack, force would not be necessary (Mod. Rep. 40, fn. 1; R. 2445). This does not mean, however, that petitioner does not plan to incite to force and violence if deemed necessary, and the evidence shows that it does so plan. The Board also noted, in effect, that some dictatorships of the proletariat are controlled by a national Communist Party in alliance with the Soviet Union. This does not negative subservience, as petitioner argues it does. The theory of the world Communist movement, as amply revealed by the record, is that the national Communist Party will lead and direct the dictatorship in the particular country but the national Party itself will do so under the direction and control of the Soviet Union.

3. It is feasible in this memorandum to advert only to a small amount of the evidence underlying the factual findings made by the Board, and to give but a few illustrative citations to the Modified Report and the opinions of the Court of Appeals. A large number of the Board's findings were based upon documentary evidence. The bulk of the exhibits consisted of official Communist Party documents, including reports made by Party leaders to meetings of official Party boards, committees, and other groups; study and teaching materials used in Party schools and other meetings; resolutions and programs adopted by the Party and its leadership; and various authoritative Party writings.

No single piece of evidence can serve to prove the ultimate issues in determining whether an organization is a "Communist-action organization," as defined in the Act. Such a determination must rest upon a consideration of the record as a whole. As the Board commented with respect to petitioner: "Being the type of organization it is—prolific in its writings and, by its own admission, frequently obscure in some of its activities—it is necessary to piece together a myriad of activities and official statements to ascertain its nature and status" (Mod. Rep. 5; R. 2410). This was done by the Board, and the court below, after repeated careful scrutiny, has correctly sustained the findings of the Board as supported by the preponderance of the evidence. For these reasons, we respectfully suggest that this Court should decline to grant review on petitioner's Question 3.

## III

### THERE WAS NO ERROR IN THE REFUSAL TO STRIKE ALL OF THE TESTIMONY OF BUDENZ

Budenz, a former editor of the *Daily Worker*, testified for the Attorney General at the original Board hearing. His direct examination lasted almost two days and he was cross-examined for about five days (R. 2298). His testimony included eight pages of direct examination and thirty pages of cross-examination relating to the Starobin letter; on the Childs-Weiner conversation there were two pages of direct examination and ten pages of cross (R. 2299). The cross-examination on these subjects was based in part on prior statements made by him.[12]

At the original hearing, the petitioner moved for the production of any F.B.I. reports of interviews with Budenz concerning the Starobin letter and the Childs-Weiner conversation,[13] but the Board denied the motions (*ibid.*). Following the first remand by this Court, the Board again denied similar motions (R. 2217–2218, 2225), and the Court of Appeals affirmed on the ground that there did not appear to be any such "statement" as defined in 18 U.S.C. 3500 (254 F. 2d at 324–326; Pet. App. A, pp. 104–107).

In response to a petition for rehearing filed by petitioner, the Board filed with the court an affidavit of counsel for the Attorney General stating that counsel

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[12] In a book he wrote and statements he had made before Congressional committees (R. 2299).

[13] Petitioner did not request any other "statement" of Budenz (see *infra*, pp. 24–26).

had just discovered in the F.B.I. files recordings of an interview with Budenz which had been recorded without notice to Budenz and which referred to the Starobin and Childs-Weiner matters (R. 2811–2813; see footnote 3, *supra*, p. 6). The court thereupon enlarged the order of remand to include "statements", as defined by 18 U.S.C. 3500, made by Budenz to the F.B.I. in regard to the Starobin and Weiner matters (R. 2820).

The Examiner (*supra*, p. 7) considered the recordings *in camera* and excerpts dealing with the two matters were furnished to petitioner (2d Mod. Rep. 10–12; R. 2387–2389). It developed, however, that the ill health of Budenz had made it impossible, as the parties agreed, to recall him for further cross-examination (*ibid.*).

The petitioner then moved to strike all the testimony of Budenz (2d Mod. Rep. 11; R. 2388). The Board, however, as recommended by the Examiner, concluded that "the fair thing [was] to strike the testimony on the Starobin letter and the Weiner conversation", but to permit the remainder of the witness' testimony to stand (2d Mod. Rep. 14; R. 2391). The Court of Appeals affirmed on the point (Pet. App. A, pp. 128–129).

This disposition of a situation which is admittedly unusual was entirely reasonable. Budenz had previously been cross-examined at length for nearly five days—and in the original transcript the examination, direct and cross, devoted to the Starobin and Childs-Weiner matters takes up only 50 pages (R. 2299) out

of a total in excess of 700 pages on all matters.[14] The Board pointed out that none of Budenz' other testimony was dependent upon, or inseparable from, his testimony on the Starobin and Childs-Weiner matters, and that much of his other testimony was corroborated by other credited evidence, either documentary or oral; moreover, in his other testimony Budenz was specific as to names, dates, and places, but petitioner made no attempt to rebut his testimony by witnesses who were available (2d Mod. Rep. 13–14; R. 2390–2391).

The rule is that under such special circumstances the remaining direct testimony of the witness may in the discretion of the trier of the facts be permitted to stand, since the deprivation of cross-examination as to the discrete matters does not constitute a material loss. See 5 Wigmore, *Evidence* (3d ed., 1940), § 1390. On this record it would seem that the cross-examination of Budenz, on behalf of petitioner, as to matters not stricken was extensive and substantially accomplished its purpose. Cf. *United States* v. *Toner,* 173 F. 2d 140, 144 (C.A. 3); *Jaiser* v. *Milligan,* 120 F. Supp. 599, 604 (D. Neb.).

Petitioner's principal contention appears to be that the loss of opportunity for further cross-examination prevented it from establishing that *all* of Budenz' testimony should have been stricken as "tainted," within *Mesarosh* v. *United States,* 352 U.S. 1. But there is a wide gap between mistake or failure of memory and perjury; and there is no sufficient basis in this case for believing that further cross-examination of Budenz

[14] Direct: Tr. 13787 *ff.;* Cross: Tr. 13957 *ff.;* Redirect: Tr. 14530; Recross: Tr. 14553 *ff.*

as to the Starobin and Childs-Weiner matters would reveal perjury as to the non-stricken testimony. On the whole record and bearing in mind the opportunities petitioner had to attack Budenz' testimony by the original cross-examination as well as by other evidence, the Board made a fair disposition of the question, and the court below so held (Pet. App. A, pp. 128–129).[15]

## IV

### THE REFUSAL TO ORDER THE PRODUCTION OF PRIOR STATEMENTS OF THE ATTORNEY GENERAL'S WITNESSES WAS PROPER[16]

#### A. THE GITLOW MEMORANDA

The Attorney General's witness Gitlow, whose background is discussed at length by the court below (254 F. 2d at 320–324; Pet. App. A, pp. 96–104; *id.*, 126–127), turned over in 1940 to the F.B.I a mass of documents and minutes pertaining to the petitioner's early activities (R. 2253). About the same time he dictated for the F.B.I numerous "explanatory memoranda" interpreting those documents (R. 2255–2257), a task which took him three weeks to complete (Tr. 2256). At the proceedings before the Board, much of Gitlow's direct testimony consisted of his identification and explanation of some of the documents which he had delivered to the F.B.I. (254 F. 2d at 320; Pet. App. A, p. 96). In the course of Gitlow's direct tes-

[15] Petitioner's statement that the Attorney General and the Board were "responsible" for depriving it of its right to cross-examine with the aid of F.B.I. statements (Pet. 66) is an attempt to base "responsibility" on the taking of a legal position which had at that time respectable, and perhaps majority, support in the reported cases.

[16] Question Presented "4" (Pet. 5; and see *id.*, 68–73).

timony, counsel for the Attorney General used two memoranda to refresh the witness' recollection (R. 2257); these were turned over to the petitioner (*ibid.*). Thereafter, petitioner's counsel requested the hearing panel to order production of all documents—and the corresponding explanatory memoranda—in the possession of the F.B.I. and, additionally, any other memoranda pertaining to any statements which Gitlow may have given to the F.B.I. The request was denied (R. 2257).

It is petitioner's present claim (Pet. 68–70) that the Court of Appeals' denial of its subsequent motion for leave to adduce as additional evidence the Gitlow "memorandum" [*sic*] "violated accepted standards of fair play" (Pet. 70). We submit that the court below was amply justified in its ruling.

1. There is no basis for the contention (Pet. 69) that the Court of Appeals misapplied the rule of *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197. The Board's original denial of production of the Gitlow memoranda was in issue on the first appeal and the court, after an exhaustive review of the record, affirmed the Board's order of registration. During the Board proceedings under the first remand, motions for the production of the Gitlow documents were made again. The Board reviewed its original denial in the light of this Court's opinion and, there being no supervening circumstances requiring otherwise, affirmed it (R. 2187–2189, 2225). Petitioner raised the issue again in its appeal following the first remand, and the court below in its January 9, 1958, opinion ruled that petitioner was foreclosed

in the matter, having failed to follow the prescribed and exclusive remedy of Section 14(a) by filing a motion to adduce additional evidence (254 F. 2d at 323–324; Pet. App. A, pp. 102–104). When petitioner then filed such a motion, the court below merely adhered to its earlier ruling that petitioner was precluded by not having followed the exclusive remedy of the statute (order of April 11, 1958; Pet. App. A, pp. 122–123). In its latest opinion, the Court of Appeals reaffirmed its earlier holding (Pet. App. A, pp. 126–127).

Contrary to petitioner's suggestion that the Court of Appeals has unreasonably "extended" the *Consolidated Edison* doctrine (Pet. 70), we submit that refusal to order production of prior statements which might have possible impeachment value—assuming that the demand was properly made—is far less grievous than refusal to receive vital testimony, as in the *Consolidated Edison* case. The opinion of the Court there states (305 U.S. at 226):

> We agree with the Court of Appeals that the refusal to receive the testimony was unreasonable and arbitrary. * * * But the statute did not leave the petitioners without remedy. The court below pointed to that remedy, that is, to apply to the Court of Appeals for leave to adduce the additional evidence * * * [under a statutory provision almost identical with that contained in Section 14(a)].

Having failed to avail itself of the statutory remedy, the petitioner in the *Consolidated Edison* case was precluded from presenting the point on appeal. We believe the principle applies with equal, if not *a fortiori*, force where, as here, a collateral issue is at

stake and the complaining party fails to pursue the proper remedy."[17]

2. Moreover, even under *Jencks* v. *United States*, 353 U.S. 657, petitioner's notice was bad in form as far too broad.[18] What it demanded was *all* the documents Gitlow turned over to the F.B.I., *all* the explanatory memoranda—termed "the memorandum" by petitioner (Pet. 68)—and *all* other memoranda written by the witness or transcribed by the F.B.I. and in its possession.

B. THE BUDENZ STATEMENTS TO THE F.B.I.

The petitioner contends (Pet. 70–72) that the Court of Appeals should have granted its January 24, 1958, motion (R. 2797–2801) for the production of so much of the mechanical recordings and of F.B.I. memoranda of subsequent interviews with Budenz as related to any part of that witness' direct testimony before the Board.

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[17] Petitioner is factually incorrect in referring to but one memorandum. It was apprised at the Board proceedings of the existence of a multitude of such memoranda (R. 2255, 2257). It is clear that before the Board petitioner chose to refer to all these memoranda in the singular (R. 2256; Tr. 2768, 2770), and that its motion was designed to embrace all of them.

[18] Petitioner's counsel demanded:

> First, all of the documents which this witness says he turned over to the Federal Bureau of Investigation.
>
> Second, the memorandum, so-called explanatory memorandum, which this witness testified that he prepared and turned over to the Federal Bureau of Investigation.
>
> Third, any other memorandum, either written by this witness or transcribed by the F.B.I. from an oral statement made by him, in the possession of the F.B.I. [R. 2256.]

The court below ruled (R. 2831) that—

> The Party is entitled to the production of statements made to the F.B.I. by Budenz, *in so far as it demanded such statements at the original hearing before the Board.* It could not [now] make a valid blanket demand for any and all statements made to the F.B.I. by Budenz concerning any (unspecified) subject about which he testified. * * * The F.B.I. statements demanded by the Party at the hearing concerned the Starobin letter and the Weiner conversation. * * * [Emphasis added.]

Since (as already indicated) it subsequently developed that "statements" did exist as to the Starobin and Weiner matters, the court below ordered them produced.

titioner asserts that it did not request production before the Board of the other Budenz statements because in ruling on its Gitlow motion the Board had "established a principle" that prior statements to the F.B.I. were producible only upon a showing of inconsistency (Pet. 71). The record does not support that statement. According to the record, the only reason assigned by the Board for its ruling was that "the record fails to disclose any factual situation justifying the granting of the [motion]" (Tr. 2886). Petitioner was not foreclosed, and should not have considered itself foreclosed, from demanding other statements if it desired them. It did not do so and cannot now complain.

### C. PRIOR STATEMENTS OF OTHER WITNESSES

During the second remand proceedings before the Board, petitioner for the first time demanded *all*

"statements" of *all* the Attorney General's witnesses on *all* subject matters of their testimony (R. 2338). By a motion filed with the court below on April 14, 1959 (R. 2833), petitioner—also for the first time—requested all such "statements," seeking to justify the belated demands by the factually erroneous contention that, having been denied production of the Gitlow memoranda at the original hearing, petitioner did not make the demands in respect to subsequent witnesses because it considered such demands would have been "fruitless."

We submit that the Court of Appeals' decision holding the demand to be too late is entirely proper. The court said (Pet. App. A, p. 127):

> * * * If a litigant in an ordinary lawsuit fails to make a motion * * *, and the appellate court holds he was not entitled to certain relief because he had not asked for it by timely motion, he cannot thereafter proffer the motion and thus correct the defect and acquire a right to retrial. Failure of a tribunal to grant a motion not made is not reversible error * * *.

## V

### THE FINDINGS AS TO PETITIONER'S "SECRET PRACTICES"

Petitioner also suggests that the court below erred in failing to remand again to the Board when it held that the revised finding as to the purpose of petitioner's secret practices (Mod. Rep. 179–193; R. 2584–2598) was not supported by a preponderance of the

evidence (Pet. 73–74). The finding in question, however, went only to Section 13(e)(7), one of the eight standards or criteria found in Section 13(e) of the Act. The court below originally affirmed the order of the Board because it held that its ultimate finding had ample support in other basic findings, which in turn were supported by the preponderance of the evidence (223 F. 2d at 576; Pet. App. A, p. 76), and it did so again in its last review (Pet. App. A, pp. 126, 132). That being so, and even if we assume for the present purposes that the holding of the court as to the "purpose" finding was correct, another remand would have served no useful purpose. The questioned finding could be properly treated as of minor importance and separable (see *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S 17, 20), since on the Modified Report as a whole there is no room for conflicting inferences; it is clear that the Board's order would have been the same if the "purpose" finding had been omitted altogether. See *Sec'y of Agriculture* v. *United States*, 347 U.S. 645, 653; *Colorado Interstate Co.* v. *Federal Power Commission*, 324 U.S. 581, 595.

## CONCLUSION

The first two of the Questions Presented in the petition (Pet. 4) raise questions of importance, and we do not oppose the grant of certiorari thereon. The remaining Questions (Nos. 3, 4, 5, 6; Pet 4–5), however, do not present problems that appear to require or warrant review by this Court, and therefore we

respectfully suggest that any grant of certiorari in this case should be limited to Questions 1 and 2.

Respectfully submitted.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

No. 12

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,
*Petitioner*,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

## REPLY FOR PETITIONER


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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

No. 537

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,
*Petitioner,*

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## REPLY FOR PETITIONER

A grant of certiorari should not be limited to Questions 1 and 2, as suggested by respondent. The four other questions presented are also of importance and have been wrongly decided below. Two of these were accepted by the Court in its grant of certiorari in this case at the 1954 Term (349 U. S. 843). Cf. present Ques-

tions 3 and 6 with Questions 7 and 2, respectively, in Petition in No. 718, Oct. Term, 1954. Respondent's opposition to review of these questions is inconsistent with its statement that it does not oppose certiorari on Questions 1 and 2 because these "are substantially the same as those presented by [petitioner] in the former petition in the 1954 Term" (Mem. 7-8).

### I. The sufficency of the evidence (Question 3)

The cases cited by respondent stand for the proposition that the Court will not overturn a Court of Appeals decision reviewing an administrative determination of fact if the Court of Appeals made a "fair assessment" of the record. *Pearifoy* v. *Commissioner*, 358 U. S. 59, 61, and other cases cited Mem. 9. But the same cases demonstrate that in an important controversy the Court will grant certiorari on a sufficiency-of-the-evidence question in order to determine whether the court below *did* fairly assess the record.

There can be no doubt as to the importance of this case in terms of its immediate and far-reaching consequences, the magnitude of the legal issues, and its effect on the nation's international repute. For reasons to which we will soon allude, there is ample reason to believe that the court below did not fairly assess the record, and this in a case where the utmost caution was necessary to insure that the decisional process would not be affected by the prevalent animus against petitioner. Nor should the Court so confine review as to require an unnecessary decision of the intricate constitutional issues in the case.

It was for these reasons, we believe, that when the Court granted certiorari in this case in the October,

1954 Term, it did not exclude review of the sufficiency of the evidence or otherwise limit the writ.

There is no more reason now than in the 1954 Term for the Court to be deterred by respondent's ominous references to the size of the administrative record (Mem. 9). It is as true now as it was then that a study of the hearing record is unnecessary to determine the evidence issue. The issue can be resolved from the opinion below and the Second Modified Report of the Board. For this reason the evidentiary discussion in our petition has almost without exception accepted the Board's evidentiary findings, loaded though they are. Our approach has been to show that these findings do not support the Board's intermediate and ultimate findings.[1]

[1] The last opinion of the court below summarized the evidence against petitioner in a paragraph (R. 2842; Pet. App. 134; quoted in Pet. 17-18). This summary clearly shows that the court did not fairly assess the record, that it misunderstood the requirements of the Act, and that the Board's order is not supported by the evidence.

Under the Act an organization may not be found to be a Communist-action organization unless the preponderance of the evidence establishes, inter alia, that at the time of the administrative proceeding the organization (1) is under Soviet control, and (2) operates

[1] It is also true that the hearing record was artificially swollen by the indiscriminate admission of thoroughly remote and irrelevant evidence offered by the Attorney General. This explains why, despite the "14,000 pages of testimony" (Mem. 9), the Modified Report acknowledged that "the really vital part of [the Attorney General's] case is documentary evidence which to a considerable extent needs relatively little oral illumination" (R. 2409, fn. 2). The unstricken testimony selected for printing occupies approximately 900 printed pages.

to advance the seditious objectives attributed by section 2 of the Act to the world Communist movement. Neither of these components can be derived from the court's summary, which states only the following: (1) that before 1940, petitioner was a member of the Communist International and has not since repudiated the International's objectives or methods; (2) that petitioner "is *by its own choice* named the Communist Party of the United States of America" (emphasis added); (3) that petitioner reorganized itself in 1945 after criticism of its policies by a French Communist; and (4) that petitioner agrees with "the program and policy of the Communist Party abroad." Nothing is said in the summary, and nothing could be said, that at any time after 1940 petitioner received foreign directives or supervision—though these are indispensable elements of foreign control (Pet. 49)—or that petitioner advances seditious objectives.

The fact is that the court below thought it had fulfilled its obligation to review the facts when it found what was never disputed—that petitioner believes in Communist principles and agrees with Soviet views. Bemused by the popular sterotypes of Communism, the court thought that foreign control and the advancement of seditious objectives are inevitable ingredients of Communism, and that no other proof was required. It revealed this attitude in the next paragraph when it explained: "One who attaches himself by intellectual affiliation to a cause, assumes the name of the cause, puts on the habiliments of the cause, and adheres to the course of the cause is not mistreated if it be inferred *prima facie* he is part of the cause" (Pet. App. 131-32).

But an assessment of the evidence to determine whether petitioner adheres to the cause of Communism is not a fair assessment to determine whether petitioner is under foreign control and operates to advance the seditious objectives described in section 2.

Respondent's "brief review of important parts of the evidence" (Mem. 9) likewise demonstrates the vacuity of the evidence against petitioner. The selected parts consist of a hotchpotch of obsolete and immaterial matters, such as that in 1934 a Communist wrote that the Soviet Communist Party had a leading role in the Comintern (Mem. 10); that before 1940 petitioner belonged to the Communist International, now long defunct (Mem. 11); that petitioner believes in the doctrines contained in Communist writings (Mem. 12); that the Daily Worker had a correspondent in Moscow (Mem. 13, ftn. 8); and that petitioner agrees with Soviet foreign policy (Mem. 13-14). Unable to cite any evidence of Soviet directions or supervision, respondent is compelled to dilute "control" into the meaningless concept that it "implies a prediction that the Party, the entity controlled, will act in the future in accordance with the leadership of the Soviet Union" (Mem. 11). Unable to cite evidence that respondent incites violence, respondent asserts (without documentation) that petitioner would do so "if deemed necessary" in some future hypothetical situation (Mem. 16, ftn. 11). Respondent also states that "the theory of the world Communist movement, as amply revealed by the record" is that each national Communist Party will lead the proletariat of its country "under the direction and control of the Soviet Union" (*ibid.*). But again it cites no evidence in support of its say-so, and there is no such finding in the Second Modified Report.

With regard to the criteria of section 13(c), respondent states that the "Board made specific findings of the extent to which petitioner met all of these criteria and the court below held that all subsidiary findings were supported by a preponderance of the evidence in all but one instance" (Mem. 13). This disingenuously omits reference to the nature of and support for the 13(c) findings which were sustained. The situation with regard to the seven findings left after the court below struck that on "secret practices" is explained in our petition and is not controverted by respondent. It is as follows: (1) the findings on "financial aid" and "instruction and training" are favorable to petitioner; (2) the partially unfavorable findings on "reporting" and "directives and policies" are negated by the Board's own evidentiary findings; (3) the adverse finding on "discipline" is contradicted by the Board's evidentiary findings; (4) the adverse finding on "non-deviation" is based on a welter of illogical theories; (5) the adverse finding on "allegiance" is based on a view of Marxist writings incompatible with *Schneiderman* v. *United States*, 320 U.S. 118. (Pet. 14-17, 55-57.)

That the court below did not fairly assess the record also appears from its handling of the concept of foreign "control." In its original opinion, the court held the evidence sufficient without giving any interpretation of the term "control." In its second opinion, after petitioner pointed out that there was no evidence of any means by which the Soviet Union could or did exert compulsion on petitioner, the court explained (we think wrongly) that "control" includes a *voluntary* following of Soviet directions (Pet. App. 94). On the third review, accordingly, petitioner empha-

sized that there was no evidence or Board findings of any Soviet directions after 1940 which petitioner could follow, even voluntarily. The answer supplied by the third opinion was that "control" is satisfied by nothing more than adherence to the "cause of Communism" out of "intellectual affiliation" (Pet. App. 131-32).[2]

It is likewise clear that the court below did not make a fair assessment of the evidence on the "objectives" component of the section 3(3) definition. In its first opinion, the only references to "objectives" were repeated statements that the ultimate objective of Communism is a "classless, stateless world" (Pet. App. 60, 66, 67). Obviously, that objective does not correspond to the seditious objectives which section 2 attributes to the world Communist movement and which section 3(3) incorporates into the definition of a Communist-action organization. The language of the second opinion, decided January 9, 1958, stated that the evidence and findings on the objective component were sufficient (Pet. App. 94-95). But the court itself later denied that it had made such a determination. For in its explanatory memorandum of April 11, 1958, the court stated that its second de-

[2] It is misleading for respondent to say (Mem. 8) that the court below "made a painstaking and exhaustive review of the evidence" on "the three occasions" the case was before it. The court below itself stated in its explanatory memorandum of April 11, 1958 that it did not intend on its second review to affirm the Board's findings (Pet. App. 123). The court's first review was based on a record which contained large quantities of evidence which was thereafter stricken or discredited by the Board (Pet. 12). On the final review, the court's discussion of the evidence consisted of one paragraph (Pet. App. 131, quoted Pet. 17-18), plus one sentence asserting that "we have examined the Modified Report [not the evidence] in the light of these averments and think the findings are amply sufficient" (Pet. App. 125).

cision "certainly did not intend to affirm" the Board's findings of fact. (Pet. App. 123). And the summary of the evidence in its final opinion, as we have seen, contains nothing to indicate that petitioner advances seditious objectives.

**II. The refusal to strike all of Budenz' testimony because of his unavailability for cross-examination (Question 4)**

As respondent recognizes (Mem. 19), the consequence of a deprivation of cross-examination because of the death or illness of a witness has never been determined by the Court. Both respondent and petitioner cite (Mem. 20; Pet. 65-66) the statement on the subject in 5 *Wigmore, Evidence* (3rd ed.) sec. 1390. Wigmore says that all of the testimony of the witness must be stricken (1) if the party who called him had "responsibility of any sort" for the deprivation or (2) if the loss of cross-examination is a material loss.

1. Respondent ignores petitioner's showing (Pet. 66) that the Attorney General was responsible for the deprivation because he failed to disclose the FBI's possession of the Budenz statements until it was too late to recall the witness for cross-examination. This failure is alone sufficient under the Wigmore rule to require striking all of the testimony of the witness.

Petitioner showed (Pet. 66) that the Attorney General and the Board were responsible for the deprivation of cross-examination for the further reason that the objections of the former and the rulings of the latter denied petitioner access to the Budenz statements until the witness became unavailable. Respondent argues (Mem. 21, ftn. 15) that neither the Attorney General nor the Board are responsible for the conse-

quence of their actions because the objections and the rulings "had at that time respectable, and perhaps majority, support in the reported cases." This statement is inaccurate.[3] But even if it were true, it would not absolve the Attorney General and the Board from responsibility for the error. It would be obviously unfair to prejudice one party because of the other party's mistake, even if the mistake were made in good faith. And where it is uncertain whether prejudice has resulted, fairness requires that the doubt be resolved against the party making the mistake. This is the whole point of the rule that where, in Wigmore's words, the tendering party has "responsibility of any sort" for the deprivation of cross-examination, all of the witness' testimony must be stricken without the need for showing that the deprivation was a material loss.

2. Respondent argues (Mem. 19-21) that the deprivation of cross-examination was not a material loss to petitioner because the witness had already been cross-examined at length. Obviously, however, lengthy cross-examination without the aid of relevant prior statements is no substitute for cross-examination once the statements have been supplied. Nor may the de-

[3] Prior to *Jencks* v. *United States*, 353 U. S. 657, the commonly held view was that the prior statements of a witness must be produced to the tribunal and made available to the cross-examiner if *in camera* inspection showed that they were inconsistent with the testimony. See e.g., *United States* v. *Krulewich*, 145 F. 2d 76; *United States* v. *Simonds*, 148 F. 2d 177; *United States* v. *De Normand*, 149 F. 2d 622; *Boehm* v. *United States*, 123 F. 2d 791; *Crosby* v. *Pacific S. S. Lines*, 133 F. 2d 470; *United States* v. *Schneiderman*, 106 F. Supp. 731; *United States* v. *Lebron*, 222 F. 2d 531. Yet the Attorney General objected to petitioner's motions for *in camera* inspection of the Budenz statements, and the Board sustained him (R. 2187-89, 2217, 2225).

trial of cross-examination with the aid of the prior statements be justified by respondent's speculation (Mem. 20-21) that such examination would not have resulted in impeaching the witness. *Jencks* v. *United States*, 353 U. S. 657, 688-89; *Gordon* v. *United States*, 344 U. S. 414, 420-21; *United States* v. *Zborowski*, 271 F. 2d 661, 667. Furthermore, Budenz' prior statements indicate a strong likelihood that his testimony on the Starobin and Weiner matters was concocted (Pet. 67-68).

Respondent argues (Mem. 20-21) that "there is no sufficient basis in the case for believing that further cross-examination of Budenz as to the Starobin and Childs-Weiner matters would reveal perjury as to the *non-stricken* testimony" (emphasis supplied). This misconceives petitioner's contention. Our complaint is that the deprivation of cross-examination on the Starobin and Weiner matters with the aid of Budenz' prior statements denied petitioner the opportunity of showing that his testimony on *those matters* was false. Such a showing would, at a minimum, have seriously impaired the credibility of his testimony on other matters and might well have required striking it as tainted: *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115. The loss of the opportunity to make such a showing was a material loss within the rule as stated by Wigmore.

The correctness of the principles stated by Wigmore and the application of those principles to the facts of this case present novel questions of general importance to the administration of justice which plainly require review.

**III. The refusal to order the production of relevant prior statements of witnesses for the Attorney General (Question 5)**

A. *The Gitlow memoranda*

1. Petitioner urged (Pet. 70) that the court below misapplied *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U. S. 197, in holding that the exclusive remedy for the Board's refusal to order production of the Gitlow memoranda was by a motion for leave to adduce them as additional evidence pursuant to section 14 of the Act. Respondent sees "no basis" for this contention (Mem. 22). But the court below thought otherwise. The majority stated that petitioner's argument "is not unreasonable" (Pet. App. 103); and Judge Bazelon held (Pet. App. 121) that the refusal to order production of the Gitlow memoranda was erroneous. Furthermore, the majority recognized (Pet. App. 102) that its ruling was contrary to a decision of the Eighth Circuit and imposed the cumbersome requirement of multiple interlocutory appeals to secure review of the exclusionary rulings of administrative agencies which operate under standard statutory review provisions. All of these considerations underscore the need for the Court to determine whether the court below rightly extended *Consolidated Edison* by applying it to a ruling denying production of documents for use in cross-examination (see Pet. 70). Moreover, the rule in *Consolidated Edison*, even if limited to the situation there involved, is sufficiently doubtful to warrant reconsideration.

2. Petitioner urged (Pet. 69-70) that even if the majority below correctly applied *Consolidated Edison*, there was no justification for denying the relief sought by petitioner when, in compliance with the court's

ruling, petitioner moved for leave to adduce the Gitlow memoranda as additional evidence. Respondent's only reply to our contention that the court's action violated accepted standards of fair play is the *ipse dixit* that the ruling was "amply justified" (Mem. 22).

3. Respondent contends (Mem. 24) that petitioner's demand for the Gitlow memoranda was over-broad because it was not limited to the portions relating to matters about which the witness had testified. But neither the Board nor the court below assigned this as a ground for refusing to order production of the memoranda. Petitioner, therefore, was not accorded a fair opportunity to make a more limited demand before the Board. Moreover, petitioner's motion for leave to adduce additional evidence was limited to those portions of the memoranda which related to the subject matters of Gitlow's testimony (R. 2797). Finally, even if petitioner's original demand was too broad, that would not justify the denial of production of those portions of the memoranda to which it was entitled.

B. *The Budenz statements*

The majority below, Judge Bazelon dissenting, ruled that petitioner was not entitled to statements of Budenz other than those relevant to the Starobin and Weiner matters because petitioner did not demand them at the hearing (R. 2831-32; Mem. 25). Respondent apparently concedes that such a demand was not required if the Board had, by prior rulings, established the principle that a witness' statements were producible only upon a showing of inconsistency. Respondent asserts, however, that the record does not support our

statement that the Board had established such a principle. (Mem. 24-25.)

This assertion is wrong. As respondent acknowledges (Mem. 25), the Board denied production of the memoranda of the first witness, Gitlow, on the ground that "the record fails to disclose any factual situation justifying the granting of the [motion]" (Tr. 2886). What respondent overlooks is that the "factual situation" referred to in this ruling was stated by the Board in an opinion denying another production motion made before Budenz' appearance on the stand. This opinion shows that in the Board's view the "factual situation" prerequisite to production was one in which the cross-examiner had established an inconsistency between the witness' testimony and his statement. The Board's opinion stated (Tr. 12659-60):

> "The [petitioner] heretofore has sought compulsory production of documents and memoranda from the witness Gitlow which had been turned over to the FBI, raising substantially the same contentions as here advanced, but the motion was denied on May 15, 1951. We see no reason for changing this ruli[illegible].
>
> "As stated in Gi[illegible]man v. United States, mentioned earlier, it is 'the better rule that where a witness does not use his notes or memoranda in court, a party has no absolute right to have them produced or to inspect them.' United States v. Krulewich, reported in 145 Fed. 2d at 76, Circuit Cou[illegible] Case Second Circuit 1944, is in no way contrary to the foregoing conclusion, since in that case the witness' cross-examination revealed that she had made an inconsistent prior statement to the FBI . . . .
>
> "Here there is no showing that anything contained in the documents sought would in any way

serve to contradict or impeach the witness Baldwin's testimony.

"Hence the [petitioner's] motion is denied. . . ."

Plainly, this ruling relieved petitioner of the obligation of making fruitless motions for the production of prior statements by Budenz which it could not show were inconsistent with his testimony. Accordingly, the failure to make such motions did not preclude petitioner from access to the Budenz statements when it moved for their production after this Court's decision in *Jencks*.

*C. The prior statements of other witnesses*

Respondent's only reply to petitioner's argument (Pet. 72-73) that it was entitled to production of the relevant FBI statements of all other witnesses for the Attorney General is that the argument rests on "the factually erroneous contention that, having been denied production of the Gitlow memoranda at the original hearing, petitioner did not make the demands in respect to subsequent witnesses because it considered that such demands would have been 'fruitless'" (Mem. 26). As we have just shown, however, petitioner is factually correct, and it is respondent which is in error.

**IV. The findings on "secret practices" (Question 6)**

Respondent urges that the striking of the secrecy finding did not require a remand because the finding was "of minor importance and separable," so that "it is clear that the Board's order would have been the same" if the finding had been omitted (Mem. 27). This impliedly concedes that if the finding was important the court below erred in refusing to remand.

It is clear that the Board did consider the secrecy finding to be of major importance. It insisted on retaining the finding after the court below had held on its first review that the finding was not supported by the evidence (Pet. 73-74). The Board did so although it knew from the preceding litigation that retention of the finding would create a substantial question as to the necessity for a remand.[4] Furthermore, the Board refrained from stating that this doubtful finding was not essential to the result. The assertion now made in respondent's Memorandum as a litigation tactic obviously is contrary to the action of the Board in its quasi-judicial capacity.

Respondent deprecates the secrecy finding on the ground that it "went only to . . . one of the eight standards or criteria found in Section 13(e)" (Mem. 27). The fact that "secret practices" was one of the criteria laid down in the Act indicates that it is of major importance, and one out of eight would not be an insignificant proportion even if all of the 13(e) findings had been adverse to petitioner. In fact, two of the 13(e) findings were favorable to petitioner, and the remaining are based on remote evidence and misinterpretations (see *supra*, p. 6, and Pet. 14-17, 55-57).

[4] One of the questions on which the Court granted certiorari at the 1954 Term was: "2. Whether the court below, having stricken two of the key findings [i.e. on "reporting" and "secret practices"] on which the Board based its order, erred in failing to remand the proceeding for administrative redetermination." (Petition in No. 718, Oct. Term, 1954, p. 3.) The Board's Modified Report acceded to the holding of the court below that its finding on "reporting" was not supported (cf. Pet. App. 72 with R. 2583). The contrast in its refusal to yield on the "secret practices" finding emphasizes the importance which the Board attached to the subject.

Under the circumstances, it would be thoroughly inconsistent with the *Chenery* doctrine (Pet. 74) for the Court to decide what the Board refuse to decide—that the "secret practices" finding was not important to the result.

As we have seen, the question under discussion was included in the questions which the Court accepted for review in the petition at the 1954 Term. The importance of the question and the probability of error below have not diminished.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

October Term, 196

No. 12

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,

*Petitioner,*

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

## BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,
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SUBVERSIVE ACTIVITIES CONTROL BOARD.

**On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

### Interest of *Amicus*

The American Civil Liberties Union, appearing herein with the consents of both parties filed with the Clerk of this Court, is a nationwide nonpartisan organization devoted solely to the protection and advancement of the individual liberties fundamental to the democratic way of life. *Amicus* is primarily concerned with the instant case because it believes the free exchange of political opinion and the cognate freedom to associate for the purpose of political expression, guaranteed from government interference by the Constitution, are drastically curtailed by the instant statute and order.

## Statement of the Case

The facts, proceedings, and statutes here involved are set forth in detail in the briefs of the parties. Here the statute will be summarized so far as relevant to the instant argument.

The Subversive Activities Control Board found, after a hearing, that petitioner is a "Communist-action organization" as defined in the Subversive Activities Control Act of 1950,[1] and issued the order here involved directing petitioner to register as a "Communist-action organization" under the Act. The Act defines a "Communist-action organization" as "any organization in the United States • • • which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title." (Section 3(3)(a).) Section 2 declares that the world Communist movement is "a world-wide revolutionary movement" aiming to establish Communist dictatorships throughout the world by treachery, espionage, or any other necessary means; that the movement is directed by the Communist dictatorship of an unnamed foreign country; and that action organizations in other countries, which are subject to the control of the dictatorship, "endeavor to carry out the objective of the world Communist movement by bringing about the overthrow of existing governments • • • and setting up Communist totalitarian dictatorships • • •."

In determining whether any organization is a "Communist-action organization," as defined in Section 3, with reference back to Section 2, the Board is directed to "take into consideration" among other things, and did in the

[1] 64 Stat. 987, 50 U. S. C. 781, ff.

instant case place major emphasis on, "the extent to which its views and policies do not deviate from those of such foreign government (Russia)" (Section 13(e)(2)).

An organization found to be a "Communist-action organization" by the Board must register, in registers "kept and maintained in such manner as to be open for public inspection" (Section 9(b)), the names and addresses of all officers and members during the preceding year, the sources of all money received and the purposes for which expended, and a list of printing presses and similar machines in which the organization has an interest (Section 7).

The Act further provides that any publication disseminated by the organization through the mails or in interstate or foreign commerce, must bear on its wrapper as well as its text the notation "Disseminated by ..... ....., a Communist organization", and all broadcasts are to be preceded by the announcement: "The following program is sponsored by ....., a Communist organization", with the name of the organization in place of the blank (Section 10).

Besides the public registration of members of an organization found to be a "Communist-action organization", the Act imposes specific disabilities on members with respect to employment in the Government, in defense facilities, and labor unions (Section 5); passports (Section 6); if they are aliens, exclusion, deportation, and naturalization; as well as denaturalization (Sections 22, 25).

## Question To Be Argued

This brief will be limited to the issue of whether the statute and order violate the First Amendment, and it will refrain from developing arguments that are being advanced on this point in petitioner's brief.

## Summary of Argument

The legislative history of the registration provision unequivocally demonstrates that its purpose is to interfere with petitioner and its members in their expression of ordinary non-revolutionary opinions on social and political issues. The exposure and stigmatization effected by the registration of petitioner as a "Communist-action organization" as defined in the Act, and of its officers and members, would accomplish the legislative purpose: it would impede their efforts to gain an audience for their views on current issues, to associate with non-Communists for the purpose of peaceful political expression, and to attract persons interested in their non-revolutionary political opinions to membership in petitioner. These restraints on First Amendment rights are unconstitutional because they interfere with expression of opinion that is far removed from incitement to violence or any other danger that Congress has the power to prevent.

## ARGUMENT

**The statutory provision for registration as here interpreted, and the registration order issued thereunder against petitioner, violate the First Amendment to the Constitution.**

### 1. Purpose of Registration Provision

Regardless of what may be its ultimate objectives, petitioner acts in its public appearances and contacts as a political organization expressing non-revolutionary opinions on the issues of the day. Its public expressions relate to such social and political topics as labor relations, race discrimination, and most continually, international affairs, such as relations with China or control of atomic weapons (see Court of Appeals' Opinion, Ops. 67-69).[2] It is clear

[2] "Ops." refers to the Appendices to the petition for certiorari, in which the opinions below and the statutes are printed.

from the legislative history of the Act that the registration provision is intended to obstruct petitioner and its members when they express themselves and seek to influence other people on these non-revolutionary issues, and to associate with non-Communists for this purpose, or when they seek to attract as members people who are sympathetic with their views on such current issues.

The Senate Report on the bill which became the instant Act pointed out: "The purpose of registration is—(a) to expose the Communist movement and protect the public against innocent and unwitting collaboration with it • • • ",[3] and "The proposed bill represents • • • a registration statute calculated to effect disclosure of the identity and propaganda of individual Communists and Communist organizations."[4] The Report makes clear that the propaganda the draftsmen had in mind was opinion on everyday political issues; it points out, in justification for the Act's purpose of exposure, that "the present line of the Party • • • is to avoid wherever possible the open advocacy of violence."[5] Illustrating the purpose of impeding communication of non-revolutionary political opinion and the association of Communists with non-Communists for the purpose of peaceful political expression, Senator Ferguson, submitting the Senate Report, pointed out that genuine liberals should appreciate the registration provision be-

[3] Senate Report No. 1358, 81st Cong., 2nd Sess., on S. 2311, p. 3. The other purpose of registration is stated as "(b) to expose, and protect the public against, certain acts which are declared unlawful." The Report then specifies the acts made unlawful by the statute, such as the communication of defense secrets.

[4] *Ibid*, p. 7.

[5] *Ibid.*

cause it would help them prevent Communist infiltration of their organizations.[6]

### 2. Effect on First Amendment Rights

The registration provision, together with Section 10's requirement of labeling and identifying propaganda, would undoubtedly have the effect intended by Congress: to deter anyone from giving an audience to petitioner or its members on any public issue, from responding to their views, or associating with them politically. In *Talley* v. *California*, 362 U. S. 60; *Bates* v. *Little Rock*, 361 U. S. 516; and *NAACP* v. *Alabama*, 357 U. S. 449, this Court recognized that the government exercises an effective deterrent to expression and association when it compels an individual's exposure as a supporter of an unpopular cause. The instant Act goes much further. It does not merely use the weapon of exposure, with the matter of popularity or unpopularity left to public opinion, but the government itself stigmatizes petitioner and its members with involvement in treachery, violence, and destruction of liberty (Secs. 3(3) and 2). On this basis alone it is far different from the statutes providing for a non-invidious registration, cited by the court below (Ops. 32-33). And, demonstrating the Act's purpose of obstructing political expression and association by petitioner's members, it stigmatizes all of them, as contrasted with an exposure of those in particular occupations or positions where they might be thought unfit or dangerous.

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[6] 96 Cong. Rec. 14535. See also Senator Ferguson's statement that the purpose of registration is "to protect the public at large against innocent collaboration with communism and against its treachery * * *. No longer can there be dupes"; and his repeated explanations that the purpose was disclosure to the public (*Ibid.*, and 96 Cong. Rec. 14439-14440). See statement of Senator Mundt, another draftsman of the Act (See 96 Cong. Rec. 14575), that the Act "will alert Americans to the fact that Communist propaganda is spewed out to them from Communist sources" (96 Cong. Rec. 14598).

The Government exposure and condemnation of petitioner and its members undoubtedly is an interference with the right of free speech "guaranteed every citizen that he may reach the minds of willing listeners" [7] and undoubtedly blocks their opportunities for communication and association. The question is whether this restraint is permissible under this Court's interpretations of the First Amendment, assuming *arguendo* there is support for the declarations in Section 2 of the Act as to Communism and for the Board's findings as to petitioner.

The obstruction imposed by the Act on communication of political views by petitioner and its members violates the principle that the government can restrain expression only on the basis of *what* is said, and not on the basis of *who* says it. *DeJonge* v. *Oregon*, 299 U. S. 353; *Herndon* v. *Lowry*, 301 U. S. 242. This principle is essential to the continuance of a truly "free debate of ideas" (see *Dennis* v. *United States*, 341 U. S. 494, 503). Under the First Amendment, reason and the free exchange of ideas in the marketplace are to be the citizen's protection against the false and misleading; by this Act, instead, the government assumes the function of directing the people in the field of ideas and political association by telling them what speakers must be shunned.[8] We do not mean to challenge the proposition that it may be helpful in evaluating a viewpoint to know whether its proponent is a member of petitioner; we mean only that the government must, under the First Amendment, allow the citizen to make his own determinations in the field of political opinion and association, and cannot take over, for him, the approval or condemnation of spokesmen on political issues.

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[7] See *Kovacs* v. *Cooper*, 336 U. S. 79, 87.

[8] Government condemnation of petitioner and its members is accompanied by the specific threat that communication with them may be treated as evidence of membership, in a prosecution under Section 15 of the Subversive Activities Control Act for failure to register or to obey the sanctions on members. (See Section 5 of the Communist Control Act. Ops. 179-180.)

This Act establishes the new principle that the Government can interfere with innocent expression because of an alleged hidden motive, and with the total right of expression because one phase of a person's or organization's activity is found to be dangerous. *Contra*: *Donaldson* v. *Read*, 333 U. S. 278.

### 3. Lack of Justification

The justifications for this Government interference and direction of expression and association, according to the Act and the opinion of the court below, are the dangers of espionage, sabotage, and overthrow of the Government.[9] But the question is, what is the connection between these dangers and the peaceful political expression on everyday issues which the registration provision was intended to and would affect. The relation apparently consists of the possibility that through the attraction of its views on these issues the Communist Party may gain influence over people so that it may eventually persuade them to engage in dangerous acts. The registration provision thus impedes and interferes with expression and association that merely may lead to a person's heeding speech concerning violence.

This Act is not restraining incitement nor advocacy nor even discussion of violence, but expression much further removed from the possibility of dangerouts acts. Compare *Yates* v. *United States*, 354 U. S. 298, 318-326. There has been no demonstration that narrower and more direct means, operating nearer the point of danger, are inadequate to prevent any danger of overthrow of the government, espionage or sabotage; and in fact more direct means, less injurious to First Amendment principles, are in use and have been approved by this Court. (See e.g. *Dennis* v.

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[9] While the opinion below also discusses the evil of foreign control of our Government, the danger in the contemplation of Congress and the court below is foreign influence leading to overthrow of our Government, rather than foreign influence as such (Ops. 10).

*United States*, 341 U. S. 494.) The instant interference with the communication of permissible political opinion and with association for this purpose therefore violates the First Amendment.

* * *

We have assumed, as the draftsmen of the Act assumed, that petitioner would continue in existence and that stigmatization of petitioner and its members would impede their political communication and association with persons outside the Communist Party. Petitioner contends that the effect of the stigma and the sanctions imposed on its officers and members would be to destroy it completely. At the least there is no question that many persons would be deterred from officership or membership. The Act thus interferes with the right to associate in the Party and use it as an organ of expression of peaceable political opinion. The interference with the First Amendment rights of expression and association is again overly broad from the standpoint of the alleged dangers of sabotage, espionage, and overthrow, and the Act thus again violates the First Amendment.

### 4. Especial Restraint on Expression of Opinion on International Issues

The particular effect of the statute and order on free expression of views on international questions must be noted. "One of the chief items of evidence" establishing that petitioner is a "Communist-action organization" was, according to the Court of Appeals (Ops. 71), the coincidence of its views with Russia's on various international issues, such as the Truman Doctrine, representation of China in the United Nations, or the Korean War (Ops. 68). The Court held that the Board correctly treated coincidence as signifiant, regardless of its causation or even of whether Russia had preceded petitioner in espousing the view. Considering the importance attached to mere coincidence of opinion, the Act as here applied necessarily deters or-

ganizations, and individuals,[10] from expressing views similar to Russia's on current issues. Obviously many of these views may be regarded as meritorious by non-Communists on non-Communist premises. The restraint on expression imposed by the registration provision impedes the ascertainment of truth on the crucial international issues of our time.

## Conclusion

The Act's provision for registration of "Communist-action organizations", together with all provisions dependent thereon and the registration order issued thereunder against petitioners, should be held unconstitutional. The judgment of the Court below should be reversed with directions to vacate the Board's order.

Respectfully submitted,

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[10] A person's support of any of petitioner's "purposes" is in turn evidence of his membership in petitioner, in a prosecution under Section 15 of the Subversive Activities Control Act for failure to register or obey the sanctions on members. See Section 5(11), (12), and (13) of the Communist Control Act of 1954 (Ops. 180).

IN THE

# Supreme Court of the United States

October Term, 1960

No. 12

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,

*Petitioner,*

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

## BRIEF FOR PETITIONER

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IN THE

# Supreme Court of the United States

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**No. 12**

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COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,
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v.

SUBVERSIVE ACTIVITIES CONTROL BOARD.

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**On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF FOR PETITIONER

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### Opinions Below

The opinions below (R. 2078, Ops. 1; R. 2652, Ops. 91, modified at R. 2694, Ops. 122; R. 2699, Ops. 124)[1] are reported in 223 F. 2d 531; 254 F. 2d 314 (modified by an unreported memorandum of April 11, 1958, R. 2694); and 277 F. 2d 78.

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[1] By leave of the Court, the printed record includes the five volume record filed when this case was here before (No. 48, Oct. Term, 1955). The record now has a sixth printed volume, paginated to follow the first five volumes. As the parties have stipulated, volume V is obsolete. The entire record before the Board has also been filed pursuant to the Court's Rule 21(3).

We use "R." to refer to the printed record, and "Tr." to refer to the original record of the Board's proceedings. "Ops." refers to the volume of Appendices to our petition for certiorari, in which all the opinions below are collected. Citations to the opinions in the body of this brief will be exclusively to that volume.

## Jurisdiction

The judgment below was entered on July 30, 1959 (R. 2708). A timely petition for rehearing was denied on August 27, 1959 (R. 2709). The petition for certiorari was filed on November 23, 1959, and was granted on February 5, 1960 (R. 2723). The Court's jurisdiction derives from section 14(a) of the Subversive Activities Control Act of 1950,[2] 64 Stat. 1001, 50 U. S. C. 793(a), and 28 U. S. C. 1254.

## Statutes Involved

The pertinent provisions of the Subversive Activities Control Act of 1950, as amended, the Immigration and Nationality Act, the Communist Control Act of 1954, and the Social Security Act, are set forth in the Appendix to this Brief.

## Questions Presented

1. Whether the provisions of the Subversive Activities Control Act of 1950, as amended, and as supplemented by section 5 of the Communist Control Act of 1954, relating to Communist-action organizations and their members, are unconstitutional on their face or as applied in this case.

2. Whether the order of the Board and the decision below rest on an erroneous construction of the Act's definitions of a Communist-action organization and the world Communist movement and on an erroneous construction and application of the Act's standards of proof.

3. Whether the order of the Board is unsupported by the preponderance of the evidence.

4. Whether all testimony of the Attorney General's witness Budenz should have been stricken because prior statements relating to his testimony, demanded by petitioner while he was on the stand, were not produced until he was no longer available for cross-examination.

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[2] The Subversive Activities Control Act of 1950, as amended, is Title I of the Internal Security Act of 1950, 64 Stat. 987, and is hereafter referred to as the Act.

5. Whether the Board and the court below erred in refusing to require production to petitioner of prior statements made by witnesses for the Attorney General on subjects concerning which they testified.

6. Whether the court below, having stricken one of the key findings on which the Board based its order, erred in refusing to remand the proceeding for administrative redetermination.

## Statement of the Case

This case presents for review a decision of the court below (Judge Bazelon dissenting) affirming an order of the Board that petitioner register as a Communist-action organization under section 7 of the Act. The litigation is before the Court for the second time. *See Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115.

### The Act

The Act was passed on September 23, 1950, over the President's veto,[3] shortly after the outbreak of the Korean War. It authorizes the Board to determine on petitions of the Attorney General whether accused organizations shall be required to register as "Communist-action" or "Communist-front" organizations (sec. 13) or shall be declared

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[3] The legislation had also been opposed by the A. F. of L., C.I.O., Brotherhood of Railroad Trainmen, National Farmers Union, Society of Friends, American Unitarian Association, National Fraternal Council of Negro Churches, American Civil Liberties Union, Americans for Democratic Action, American Association of University Professors, National Association for the Advancement of Colored People, Council for Social Action of Congregational Christian Churches, United Council of Church Women, American Jewish Congress, Women's International League for Peace and Freedom, National Council of Jewish Women, American Veterans Committee, National Community Relations Advisory Council, many distinguished individuals, more than twenty major newspapers, and numerous local groups. Hearings before Committee on Un-American Activities, H.R., 81st Cong., 2d Sess., on H.R. 3903 and 7595 (March 1950); Hearings before the Committee on the Judiciary, Sen., 80th Cong., 2d Sess., on H.R. 5852 (May 1948); 96 Cong. Rec. A6135, A6620-22, A6724-26, A7397, A7275-80; see R. 185.

"Communist-infiltrated" organizations (sec. 13A, added by sec. 10 of the Communist Control Act of 1954). The latter, although not required to register, are deprived of the benefits of the National Labor Relations Act (sec. 13A(g)).

A Communist-action organization is defined by section 3(3) as an organization which

> "(i) is substantially directed, dominated or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 * * *, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 * * *"

The "world Communist movement" is found by section 2(4) to be under the control of the Communist dictatorship of an unnamed foreign country. Sections 2(1), (5) and (6) find that this movement seeks by any means deemed necessary, including force, sabotage, terrorism, etc., to overthrow capitalist governments and replace them by totalitarian dictatorships subservient to the controlling foreign dictatorship; and that it establishes and utilizes for this purpose Communist-action organizations in various countries. Section 2(15) recites that the "Communist organization in the United States" presents a clear and present danger to the security of the United States.

Section 13(e) of the Act establishes eight criteria for the Board to consider in determining whether an organization is a Communist-action organization.[4]

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[4] A Communist-front organization is defined, in substance, as one which is controlled by a Communist-action organization and is primarily operated to aid a Communist-action organization, a Communist foreign government, or the world Communist movement (sec. 3(4)). A Communist-infiltrated organization is defined, in substance, as one which is controlled by individuals who are, or have been within three years, engaged in giving support to a Communist-action organization, a Communist foreign government or the world Communist movement, and is serving, or within three years has served, as a means for giving support to any such organization, government or movement, or for the impairment of the military or industrial strength of the United States (sec. 3(4A)).

A Communist-action organization is required to register as such with the Attorney General. The registration statement must show the names and addresses of the organization's officers and members, give a detailed accounting of all moneys received and expended, and list all printing and duplicating facilities. Annual reports must be filed to keep the registration up to date. The registration statement is open for public inspection. (Sec. 7.)

When a registration order becomes final, as it does on exhaustion of judicial review (sec. 14(b)), the officers of the organization have a duty to register the organization and to list its members (sec. 7(h)). Members not so listed are under a duty to register themselves after an administrative determination of their membership (secs. 8, 13(a)). Failure to comply with these duties is punishable by imprisonment up to five years and fine up to $10,000, for each day of default. Each falsity in a registration statement is punishable by a similar penalty. (Sec. 15.)

The listing or self-listing of members of petitioner in compliance with a registration order is affected by section 5 of the Communist Control Act, 68 Stat. 777, 50 U. S. C. 844, which enumerates thirteen criteria for determining "membership" in the Communist Party.

Any person whose name is listed on a registration statement as an officer or member of, or a contributor to, the organization is in jeopardy of prosecution under section 4(a) of the Act [5] as well as under the Smith Act.

In addition, the entry of a final registration order automatically makes operative crippling sanctions against the organization and its members. These sanctions apply whether or not the organization registers.

[5] Section 4(a) makes it criminal to conspire "to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship" under foreign control.

The sanctions are the following:

(1) The organization must label publications and literature which it distributes by mail or in interstate or foreign commerce as being disseminated by a Communist organization, which according to section 2 is a participant in a foreign-controlled seditious conspiracy. Its radio and television broadcasts must be announced as sponsored by a Communist organization. These requirements apply without regard to the nature and content of the publications and broadcasts. (Sec. 10.)

(2) Members of the organization may not hold nonelective federal employment, employment in any privately owned "defense facility," or office or employment in labor unions; nor may they represent employers in matters arising under the National Labor Relations Act (sec. 5). A "defense facility" is any establishment listed by the Secretary of Defense on his *ex parte* determination that the security of the United States requires such listing (secs. 3(7), 5(b)). Accordingly, what employment is open to members of the organization rests in the unreviewable discretion of the Secretary of Defense.

(3) Government employees and employees of "defense facilities" are prohibited from contributing funds or services to the organization (sec. 5(a)(2)), and even from subscribing to its publications (sec. 3(6)). Accordingly, the *ex parte* determination of the Secretary of Defense limits the sources from which the organization can obtain funds or services or find readers of its material.

(4) Members of the organization may not hold or apply for passports (sec. 6).

(5) Naturalized citizens who join or affiliate with the organization within five years after naturalization are subject to revocation of citizenship. Alien members of the organization are excluded from admission into the United States; if already in the country, they must be deported.

An alien may not be naturalized if he was a member of the organization within ten years preceding the filing of his naturalization petition.[6]

(6) Contributions to the organization are not tax deductible, and the organization itself is denied tax exemptions (sec. 11).

(7) Service in the employ of the organization after the order becomes final is not considered employment for social security purposes (42 U. S. C. 410(a)(17)).

The prohibitions described in the first four paragraphs above are enforceable by criminal penalties of up to five years imprisonment and $10,000 fine (sec. 15).

The sanctions on the members described in paragraphs (2), (4), (5) and (7) above, apply regardless of their personal innocence and lack of knowledge of alleged illegal or conspiratorial actions or purposes, and though their activities are confined to constitutionally protected areas.[7]

**History of the Proceeding**

On November 22, 1950, the Attorney General petitioned the Board to order the petitioner herein to register as a Communist-action organization (R. 143).

On April 20, 1953, following an administrative hearing, the Board issued a registration order against petitioner (R. 138) and a Report containing its findings (R. 1-137). The Report made findings adverse to petitioner under each of the eight criteria of section 13(e). On the totality of these findings the Board concluded that the petitioner is a Communist-action organization.

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[6] Originally contained in secs. 22 and 25 of the Act, these sanctions have been carried forward by secs. 212(a)(28)(E), 241(a)(6)(E), 313(a)(2)(G), and 340(c) of the Immigration and Nationality Act, 66 Stat. 163, 8 U. S. C. 1182, 1251, 1424, 1451.

[7] The sanctions against Communist-front organizations and their members differ from the foregoing only in a few ameliorating details.

On review, the court below struck the findings under the fifth and seventh criteria of section 13(e) as not supported by the evidence (Ops. 71, 74). These were (1) that petitioner reports to the Soviet government and (2) that petitioner engages in secret practices for the purpose of concealing foreign control and promoting its objectives. Nevertheless, the court proceeded to hold the Act constitutional and to affirm the order of the Board. Judge Bazelon dissented on the ground that the Act violates the fifth Amendment privilege against self-incrimination (Ops. 76).

This Court reversed, without reaching the other questions presented, because of the denial below of petitioner's motion for leave to adduce evidence that three of the Attorney General's witnesses were perjurers. *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115.

Upon remand, the Attorney General did not controvert petitioner's allegations of perjury by the three witnesses, and the Board therefore expunged their testimony (R. 2174-75). On December 18, 1956, the Board issued a Modified Report (R. 2406) and a recommendation (R. 2644) that the court below affirm the registration order.

On January 9, 1958, the court below ordered the case again remanded to the Board (Ops. 91), and on April 11, 1958, it enlarged the scope of the remand (Ops. 122). This decision ruled that the principles of the "Jencks" statute (18 U. S. C. 3500) were applicable to administrative proceedings. It held that the Board had erred in refusing to require the production of certain documents involving the Attorney General's witness Markward and statements made by the witness Budenz to the FBI on two matters ("the Starobin letter" and "the Weiner conversation") concerning which he had testified. The court, however, refused to require the production of Budenz' FBI statements on other matters concerning which he had testified. It also refused to require production of memoranda which the Attorney General's witness Gitlow had furnished the FBI concerning the subject of his testimony. Judge Bazelon dissented from the latter two rulings (Ops. 121, 123).

In the ensuing administrative proceeding, the Board furnished petitioner with excerpts from Budenz' FBI statements which it considered relevant to the Starobin and Weiner matters. The recall of Budenz for cross-examination with the aid of these statements proved impossible because of his ill health. Petitioner moved to strike all of his testimony because of his unavailability. The Board denied the motion, but struck Budenz' testimony on the Starobin and Weiner matters. (R. 2387-93.) Petitioner also moved for production of statements made to the FBI by all the Attorney General's witnesses on matters relating to their testimony. The motion was denied. (R. 2338, 2344-46.)

On February 9, 1959, the Board issued its Modified Report on Second Remand (R. 2375), in which it readopted the first Modified Report with certain amendments,[8] and again recommended affirmance of the registration order (R. 2402).

Both the first and second Modified Reports found under section 13(e)(7) that petitioner engages in secret practices for the purpose of promoting its objectives (R. 2631), notwithstanding that this finding had been stricken by the court below in its initial decision.

The court below adhered to its previous view that the Board's finding on secret practices was unsupported by the evidence. Nevertheless, it again affirmed the order of the Board (Ops. 126). Judge Bazelon dissented on the grounds (1) that the invalidity of the Board's finding on secret practices required a remand of the proceedings for administrative redetermination and (2) that all of Budenz' testimony should have been stricken (Ops. 132).

[8] These are listed in an appendix to the second Modified Report (R. 2403-05), and indicated in an appended text of the first Modified Report (R. 2377, 2406).

**The Documents and Witnesses**

The Modified Report states that "the really vital part of [the Attorney General's] case is documentary evidence, which to a considerable extent needs relatively little oral illumination" (R. 2411, ftn. 5). The documents referred to fall into three categories.

The first consists of historical and theoretical Communist writings which long antedated the Act, such as the *Communist Manifesto* of 1848, writings of Lenin and Stalin in the 1920's or earlier, and resolutions and reports of the Communist International (dissolved in 1943, R. 2485), of which the most recent is dated 1935 (R. 2414-16).

The second category consists of petitioner's constitution and writings of American Communists showing that petitioner, as it has always acknowledged (R. 182), adheres to Marxist-Leninist principles (e.g., R. 2414, 2546-47). Most of the documents in these two categories were before the Court in *Schneiderman* v. *United States*, 320 U. S. 118, and *Yates* v. *United States*, 354 U. S. 298.

The third category of documents comprises exhibits introduced to show that petitioner and the Soviet Union had similar views on a series of international questions. These documents were supplemented by the testimony of a university professor that they showed such a similarity. (R. 2580-81.)

The remainder of the Attorney General's evidence consists of the testimony of sixteen former members of petitioner,[9] relating almost exclusively to periods antedating the Act. None of these witnesses gave significant testimony concerning post-Act matters. (See *infra*, pp. 106-08.)

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[9] The Attorney General called 22 witnesses. As already stated, all the testimony of three (Crouch, Matusow and Johnson) was stricken following the first remand to the Board. Two other witnesses merely translated or identified documents. (R. 2646-50.)

The case for petitioner was presented through three witnesses. Two had for many years been members of the petitioner's national committee. The third testified as an expert on Communist doctrine. (R. 2650-51.) The testimony of these witnesses and the documentary evidence introduced through them portrayed petitioner's purposes, policies and activities from the time of its reconstitution as a political party in 1945. This evidence shows petitioner as a self-governing, independent American political party which is an adherent of Communism and seeks by peaceful means to persuade the American people that they should adopt a socialist system. (Ops. 51-54; R. 1199-1241, 1257-97.)

**Organizational History of Petitioner**

Petitioner was organized in 1919 (R. 2413), and until 1940 was an affiliate of the Communist International, a world-wide organization of Communist Parties (R. 2459). In 1940, petitioner disaffiliated from the Communist International in order to avoid registration under the then newly-enacted Voorhis Act (R. 2512; Ops. 64-65), which required registration of organizations affiliated with international political bodies. 54 Stat. 1201; 18 U. S. C. 2386. In 1943, the Communist International dissolved (R. 2485; Ops. 60). Petitioner has had no foreign affiliation since 1940.[10]

In 1944, petitioner dissolved and formed the Communist Political Association. In 1945, petitioner reconstituted itself as the Communist Party. The reconstitution followed

[10] The only international organization of Communist Parties which existed at any time after 1943 was the Communist Information Bureau, organized in 1947 by certain European Communist Parties (Ops. 60; R. 2487). The Bureau dissolved subsequent to the administrative hearing in this case. As the court below and the Board found (Ops. 65; R. 2492), petitioner was not affiliated with the Bureau, and the uncontradicted evidence is that it had no dealings or relations with it (R. 1209-10, 1286-89).

the appearance in a French Communist journal of an article by Jacques Duclos, a leading French Communist, which criticized the dissolution of the Party and the policies of Browder, then chairman of the Association. (R. 2517-18.)

**Evidence and Findings Concerning the Relations Between Petitioner and the Soviet Union**

Much of the Attorney General's evidence was designed to establish that petitioner had been controlled by the Soviet Union through the Communist International during petitioner's affiliation with the latter organization. There is no evidence that at any time after its 1940 disaffiliation from the Communist International petitioner received any directives or orders from abroad, and the Board found none. The record discloses only a few insignificant and innocuous contacts and communications of any kind between petitioner and the Soviet Union or its citizens since 1940—as, for example, that in 1949 petitioner wired Stalin congratulations on his 70th birthday (see *infra*, pp. 99-100).

The evidence on which the court below sustained the Board's order was summarized by the court as follows (R. 2842):

> "But the facts beyond dispute are that there is a Communist Party in Europe, based upon Marxism-Leninism, and in power in Soviet Russia; that our present petitioner was for years a member of the Communist International, and its separation from that organization was not accompanied by a repudiation, either of objectives or of methods; that it is by its own choice named the Communist Party of the United States of America, a self-imposed description not to be ignored without reason; that it once forsook the line laid down by the Communist Party abroad but, upon being severely brought to task by a leading European Communist in an open letter to Communists, reorganized itself, even to the extent of expelling its erring leader, and went back to the

line[11]; and that, save for that period of waywardness, it has never differed from the program and policy of the Communist Party abroad and has always adhered to that program and policy even in sharp changes."

## Summary of Argument

### ONE

The Act is unconstitutional on its face and as applied.

### I.

The Act and the Board's order violate the First Amendment.

A. If the registration order becomes final, it will outlaw petitioner. Petitioner and its members will be governmentally branded and quarantined. The sources from which petitioner can obtain funds, services and readers will be curtailed. Petitioner's members will be denied employment, prohibited from travel abroad, subjected to loss of naturalized citizenship, and, if aliens, deported. These consequences will occur whether or not petitioner registers.

If petitioner registers, its officers will expose themselves to prosecution and become informers on its members. If the officers do not register petitioner, they and petitioner will be liable to astronomical criminal penalties. Peti-

[11] The reference is to the article by Duclos and the 1945 reconstitution of the Communist Party (*supra*, pp. 11-12). Contrary to the court's statement, the evidence is uncontradicted that the Duclos article was not written to bring petitioner "to task," but was directed to French Communists in answer to questions raised by many of them regarding developments in America, and that petitioner's reconstitution, though undoubtedly influenced by Duclos' analysis, was the product of its own independent decision (R. 1280, 1291-96; A. G. Ex. 208, p. 656).

tioner's members will then be faced with a choice between the catastrophic consequences of self-registration and criminal penalties for non-registration.

The Act, therefore, does not contemplate disclosure by registration. The function of the order is to lay a foundation for mass prosecutions for non-registration and to subject petitioner and its members to intolerable sanctions.

By outlawing petitioner, the Act suppresses all advocacy by and association with petitioner, and thus abridges First Amendment rights.

B. This suppression cannot be justified, along the lines asserted by the Act, as a protection against danger to the national security, because issuance of a registration order is not contingent on the organization's engaging in acts or advocacy dangerous to the national security.

A registration order requires proof of two components, foreign control and advancement of the objectives of the world Communist movement referred to in section 2. The existence of foreign control obviously does not of itself establish that the organization's activities are inimical to the national security.

If the objectives component merely refers to the establishment of "Communist totalitarian dictatorships" without regard to the means employed, it is satisfied by peaceable advocacy and activity. If the component includes the means referred to in section 2, it is satisfied merely by a showing of willingness to use illegal means in some undefined future contingency. In neither case is there a clear and present danger for First Amendment purposes. If the objectives component is construed to require the present use or incitement of illegal means, the construction would condemn the application of the Act in this case, since no finding of such use or incitement was or could have been made.

C. The Act also violates the principle that even when the legislature may constitutionally restrict speech, press or assembly to prevent a substantive evil, the restriction must not be broader than necessary for prevention of the evil. The Act's restraints are not limited to speech, press and assembly used to incite to unlawful conduct. Instead, by outlawing petitioner the Act suppresses all of petitioner's activities, including its admittedly extensive peaceable advocacy and assembly.

The First Amendment requirement of economy is violated not only by the Act as a whole, but by each of its major sanctions considered individually. The requirement to label the organization's mail and broadcasts cannot be justified as a safeguard against incitement since it applies regardless of content. Similarly, the sanctions on petitioner's members are not limited to control of unlawful or seditious conduct.

D. The Act imposes a prior restraint on First Amendment rights by requiring registration as a condition to the exercise of those rights, contrary to *Thomas* v. *Collins*. This restraint is made even more onerous by the requirement that the registration statement list the names of the organization's members. The validity of these prior restraints is not supported by *New York ex rel. Bryant* v. *Zimmerman*, which in any event is unsound when tested by First Amendment principles.

## II.

The Act violates the privilege against self-incrimination since the registration order against petitioner compels admissions of membership or office-holding in the Communist Party and of participation in the conspiracy described in section 2 of the Act.

Section 4(f) does not grant immunity from prosecution for all matters to which the compelled admissions relate. Hence the immunity is not coextensive with the constitutional privilege and cannot save the Act.

The rule of *United States* v. *White* is inapplicable because the officer incriminates himself not by the contents of the organization's records, but by signing and filing the registration statement, and thus identifying himself as a member and officer of petitioner. Furthermore, the Act does not call for production of the organization's records, but requires the officers to prepare and file original statements. And these must contain information which may not appear in the organization's records.

Adjudication of the question of privilege is not premature. Petitioner's officers will have no opportunity to assert the privilege if petitioner cannot claim it for them now. If the officers claim the privilege as a reason for not filing a registration statement they thereby identify themselves as petitioner's officers and thus incriminate themselves. The privilege has not been waived by the officers and the immunity statute, 18 U. S. C. 3486, is inapplicable. Because petitioner and its members are for this purpose identical, petitioner may assert their privilege as an objection to listing, and thus incriminating, them.

## III.

The sanctions on the members violate due process because (1) they apply regardless of the member's personal innocence and lack of knowledge of the claimed character of the organization; (2) they establish conclusive disqualifications and do not permit a member to prove that he is a fit person to enjoy the privileges of which he is deprived; (3) they have no real or substantial relation to any legitimate federal objective, since they exclude members from non-sensitive employment and from travel abroad for innocent purposes and denaturalize them for reasons unconnected with fraud or lack of allegiance.

## IV.

The Act violates due process because it predetermines facts essential to the determination that petitioner is a Communist-action organization.

Under section 3(3), there can be a Communist-action organization only if there is a world Communist movement of the character described in section 2. However, neither the Board nor the reviewing courts are authorized to determine the existence and nature of such a movement. Instead, these "facts" are found legislatively in section 2 and are then incorporated into section 3(3) as assumptions of fact which the Board and the courts must accept and which petitioner may not contest. Moreover, these essential "facts" are also presupposed by the criteria of section 13(c), which the Board is obliged to apply in making its decision. Even if the Act were construed to leave these issues open to Board determination, the Board would not be able to determine them impartially, since realistically it could not decide that the Congressional findings are untrue.

Section 2 also finds that there is a Communist-action organization in the United States. The Board could not make a contrary determination without overruling Congress and the findings which justify the Board's creation.

Congress even predetermined the specific identification of petitioner as the domestic Communist-action organization. This appears from the debates and the reports, from the fact that the section 2 description of the Communist-action organization in the United States contains verbatim excerpts from Judge Hand's description of petitioner in the *Dennis* case, and from section 4 of the Communist Control Act.

## V.

The Act is a bill of attainder and violates Art. I, Sec. 9, cl. 3; Art. III, Sec. 2, cl. 3, and the Fifth and Sixth Amendments, because it imposes punishment without a judicial trial.

Registration under the Act is punishment because it entails self-defamation, self-ostracism, self-incrimination, and identification of the registrant and his associates as objects of onerous statutory sanctions and public invidium.

The registration *order is penal* because it outlaws the organization and all its activities, and is not confined to the prevention of deleterious conduct.

The sanctions have no rational relation to, and are unnecessary for, protection of the national security. Their purpose, therefore, is to punish. A member can escape the sanctions by leaving the organization. But this forced disassociation is itself punishment, and destroys and thus punishes the organization.

The Act establishes a mechanism to prosecute accused persons for their failure to register themselves as criminals. Its only purpose, therefore, is to punish Communists as criminals without proof of crime.

The legislative history confirms that the Act was designed to punish petitioner and its members.

## VI.

The Board's determination that petitioner is a Communist-action organization will be conclusive in prosecutions of petitioner and its officers for failure to register petitioner and in prosecutions of members for failure to register themselves, holding forbidden employment, or applying for passports. As to this element of the crimes, therefore, the accused is denied a judicial trial, indictment by grand jury, and trial by petit jury, in violation of the Fifth and Sixth Amendments and Art. III. Sec. 2, cl. 3.

## VII.

The Act violates due process because the Board is necessarily biased and has an interest in deciding adversely to petitioner.

At the time the registration order was issued, the Board's sole function was to identify Communist-action organizations, their members, and Communist-front organizations. By definition, there can be no front organization

in the absence of an action organization. The only Communist-action organization envisaged by the Act is petitioner, as both the Attorney General and the Board have recognized. The Board, therefore, could not have decided for petitioner without rendering itself and the Act *functus officio*. Irresistible pressure was thus generated by the Act upon the agency to decide in the only way which would preserve the Act and the agency—*i.e.*, against petitioner.

Moreover, the members of the Board had a personal interest in ruling against petitioner so as to preserve further business for themselves. By ruling otherwise they would have lost their jobs, salaries, and appointment patronage. The Board's staff had a similar job interest in seeing that the order was adverse to petitioner.

## VIII.

The Act violates due process because the standards it establishes for the administrative adjudication are vague and irrational.

The objectives component of the definition of a Communist-action organization is vague because the objectives of the world Communist movement cannot be ascertained from section 2.

An examination of each of the eight criteria of section 13(e) discloses that they have no reasonable relation to the ultimate facts to be established under the 3(3) definition. Section 3(3) is also vague because the Act does not indicate whether a registration order must be supported by adverse findings under all or only some of the eight criteria and because of the ambiguous prefatory term "the extent to which."

## IX.

The Act violates due process because of the impact of section 5 of the Communist Control Act. Section 5 establishes criteria for determining membership in petitioner.

These must be applied by petitioner and its officers in preparing a registration statement, by persons desiring to know whether they may lawfully hold certain jobs or apply for passports, and by the Board in proceedings to compel alleged members to register themselves.

The criteria of section 5, however, are vague and irrational, and their application requires a knowledge of facts which petitioner, its officers and other persons cannot have or obtain.

## TWO

The Board and the court below misconstrued and misapplied the Act.

### I.

The Board and the court misconstrued and misapplied the foreign control component of section 3(3).

A. This component, properly construed, requires proof that the Soviet Union (1) issues orders to the accused organization and (2) has some means for enforcing compliance with these orders. Furthermore, control will normally be accompanied by supervision and reporting to insure compliance with the orders. The component is not satisfied by an organization's voluntary adherence to Soviet policies or objectives.

B. The decision below and the Modified Report show on their face that the order is not supported by proof of foreign control as correctly defined. There is no finding or evidence that the Soviet Union gives orders to petitioner or that it has any means by which it could exact compliance with such orders if given. Nor does the Modified Report cite any evidence that petitioner reports to or is supervised by the Soviet Union. In fact, the Modified Report cites no significant contacts between petitioner and the Soviet Union after petitioner's disaffiliation from the Communist International in 1940.

The court below misconstrued the foreign control component, holding that it is satisfied by voluntary compliance with Soviet directives, without a means for exacting compliance. Even this erroneous construction is not satisfied because neither the Board nor the court found, or could have found, any Soviet directives to petitioner after petitioner's 1940 disaffiliation from the Communist International.

II.

The Board and the court below misapplied the objectives component of section 3(3).

The objectives referred to in this component are obscure, but presumably are (1) overthrow of capitalist governments by force or other illegal means, and (2) establishment of a "Communist totalitarian dictatorship," which (3) will be subservient to the Soviet Union.

Because of First Amendment considerations, an organization cannot be found to be advancing the first objective by peaceable advocacy. It must actually engage in or incite illegal action. The Board did not, and could not, make such a finding against petitioner.

The Board found that the objective of Communism is to establish a dictatorship of the proletariat. Such a dictatorship does not correspond to the Act's definition of "Communist totalitarian dictatorship." Hence the second objective was not, and could not be, found.

The Modified Report does not, and could not, find that petitioner seeks to advance the third objective of establishing in this country a government subservient to the Soviet Union.

III.

The Board and the court below erroneously relied on evidence of conduct discontinued before enactment of the Act.

The issue under the Act is whether petitioner was a Communist-action organization at the time of the administrative proceeding or, in any event, after enactment of the Act. Evidence of prior conduct was relevant only so far as it illuminated relevant post-Act conduct.

The overwhelming mass of the evidence and evidentiary findings relate to the period before the Act, mostly before 1940. The meagre post-Act evidence is a mixture of irrelevant matters and petitioner's ideological adherence to Communism.

The Board and the court below held that petitioner was under Soviet control when affiliated with the Communist International, and that neither petitioner's 1940 disaffiliation nor the International's 1943 dissolution were of consequence because both petitioner and the Soviet Union continued to adhere to Communist principles. This theory was erroneous. Petitioner's separation from the International and the dissolution of the latter terminated all means and manifestations of Soviet control. It is irrelevant that petitioner thereafter adhered to its previous views and agreed with the Soviet Union. For the adherence and agreement were voluntary, not products of control.

## IV.

A detailed examination of the Board's application of each of the standards of section 13(e) shows that the Board violated the Act by employing irrational interpretations of the section and by relying on irrelevant matters.

## V.

The court below misconstrued and misapplied the Act's definition of "world Communist movement."

The court below found that there is a world Communist movement in the sense that there are Communist parties in various countries which have a common outlook and work

for the revolutionary attainment of a classless, stateless society. This is not the movement described by section 2, the key characteristics of which are a highly-centralized world-wide organization, rigid Soviet control, and use of violent and criminal means, if necessary. Neither the Board nor the court found, nor does the evidence show, that a movement with these characteristics exists.

VI.

The order of the Board is not supported by a preponderance of the evidence, as required by the Act. The Modified Report and the opinions below show on their face that the evidence does not satisfy the section 3(3) definition, any of the criteria of section 13(e), or the section 2 description of the world Communist movement.

## THREE

I.

The Board and the court below erred in refusing to strike all the testimony of the Attorney General's witness Budenz.

At the original Board hearing, petitioner moved for the production of statements made by Budenz to the FBI on two matters concerning which he had testified, the Starobin letter and the Weiner conversation. The motion was denied.

The court below eventually ordered the production of the statements. But by the time they were produced, Budenz could not be further cross-examined because of his ill health. The Board thereupon struck Budenz' testimony on the Starobin and Weiner matters, but refused to strike the rest of his testimony. The court below sustained this action.

The refusal to strike all of Budenz' testimony was erroneous if the deprivation of petitioner's right to cross-

examine him was due to the fault of the Board or the Attorney General or if it represented a material loss to petitioner. The deprivation was the fault of the Board, which made the original erroneous ruling, and of the Attorney General, who had objected to the production of the statements and who had withheld the fact that the statements existed. Moreover, deprivation was a material loss because it prevented petitioner from being able to discredit all of Budenz' testimony by showing that he had testified falsely on the Weiner and Starobin matters.

Examination of Budenz' FBI statements and his testimony indicates that Budenz had concocted his testimony on the Weiner and Starobin matters and that this could have been established on cross-examination.

## II.

A. The Board and the court below erred in refusing to require production of statements of the Attorney General's witness Gitlow.

In his testimony, Gitlow identified and explained the contents and significance of various documents. He had previously prepared for the FBI memoranda interpreting the documents. The Board denied petitioner's motion for production of the memoranda.

The court below held that the Board's action was erroneous, but refused to remand the case on the ground that petitioner's only remedy, which it had not utilized, was to file with the court an independent motion for leave to adduce the memoranda as additional evidence. Petitioner thereupon filed such a motion, but the court denied it on the ground that it was too late to cure the procedural defect.

The court erred in both rulings. A denial of the right of cross-examination is remediable on the petition for review of the agency's order and does not require an inde-

pendent motion for production of evidence. But if the motion procedure was required, it was error to deny relief when the motion was filed.

3. The court erred in denying petitioner's motion for production of all statements made by Budenz to the FBI relating to subjects on which he testified. The court held that petitioner was not entitled to the production of the statements because it had not demanded them at the original hearing. But petitioner was not required to make such a demand at the original hearing because it would have been futile under already announced Board rulings that a witness' prior statements were producible only if it were first shown that the statements were inconsistent with his testimony.

The court also ruled that petitioner's motion was a "fishing expedition" and came too late. But the demand conformed to the procedure specified in 18 U. S. C. 3500 and contemplated in *Jencks* v. *United States*. And it came when it did because the government had previously misled petitioner into believing the statements did not exist.

C. For the reasons stated in the preceding section, the court below also erred in denying petitioner's motion for the productions of all statements, as defined in 18 U. S. C. 3500, which had been made by witnesses for the Attorney General and which related to the subject matter of their testimony.

## III.

The court below, having stricken a key finding of the Board, erred in not remanding the case for administrative redetermination.

The court below struck, as unsupported by the evidence, the Board's finding under section 13(e)(7) of the Act that petitioner engages in secret practices for the purpose of promoting its objectives. Since this was a key finding, the court was obliged to return the case for administrative re-

determination. The court's refusal to do so is contrary to section 14 of the Act and the principle that administrative orders must be judged on the grounds on which they are based.

## ARGUMENT

### PART ONE: THE UNCONSTITUTIONALITY OF THE ACT AND THE ORDER

#### I. The Act and the order violate the First Amendment.

##### A. The Act and the Order Outlaw Petitioner and Thus Suppress Advocacy by and Association With It.

If the registration order becomes final, it will outlaw petitioner. For the order will have the following consequences *whether or not petitioner registers*:

(1) Petitioner, its members and supporters, will be governmentally branded as participants in the foreign-controlled, seditious conspiracy described in section 2 of the Act. Petitioner will also be required to defame itself by invidiously labelling its publications and broadcasts (see *supra*, p. 6). The order will thus subject petitioner and its members to public opprobrium and ensuing social and economic reprisals, and make it impossible for them to obtain public consideration of their views on the merits.

(2) The sources from which petitioner can obtain funds, services, and readers of its publications will be drastically curtailed by the provisions of sections 5(a)(2) and 3(6) (see *supra*, p. 6).

(3) Any person who remains or becomes a member of petitioner will be denied private and public employment, deprived of the right to travel abroad, subjected to loss of naturalized citizenship, and, if an alien, deported. He will incur these disabilities regardless of his personal innocence

and lack of knowledge of any illicit activities by petitioner. (See *supra*, pp. 6-7.)

(4) Any other organization which associates with, or supports the views of, petitioner or its members will risk condemnation as a front or infiltrated organization under the evidentiary standards of sections 13(f) and 13(A)(e) of the Act. Any individual who has dealings with petitioner or its members will risk incurring the disabilities of membership in petitioner by virtue of the expansive criteria of section 5 of the Communist Control Act for determining petitioner's "members" (*infra*, pp. 89-93). The order will, therefore, quarantine petitioner and its members, denying them access to the public and the public access to their ideas.

Registration by petitioner in compliance with the Board's order will have additional consequences. The officers who execute the registration statement will expose themselves to prosecution under the extravagantly vague provisions of section 4(a) of the Act and under the Smith Act.[12] They will become informers on the members by listing their names in the registration statement, thereby exposing the members to public opprobrium, possible prosecution, loss of employment, and application of the Act's sanctions.

On the other hand, if the officers do not register, they and the organization will be liable to the astronomical, cumulative penalties of section 15. Furthermore, petitioner's members will then be faced with a choice between the catastrophic consequences of self-registration and the criminal penalties for non-registration.

Accordingly, the Act offers petitioner and its members the illusory alternative of suicide by registration or execution for non-registration.

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[12] Furthermore, the organization and its officers incur astronomical criminal penalties for the inevitable "false statements" and "omissions" in the list of members, which are induced by section 5 of the Communist Control Act. See *infra*, pp. 88-94.

The Act cannot be justified as a disclosure statute. No legitimate disclosure statute defames and imposes destructive penalties on those who comply with it by registering. Nor does it make registration an act of self-exposure to criminal and civil penalties created by the legislation itself.

The Act does not contemplate, therefore, that a registration order will be complied with. The true function of the order is to lay a foundation for the mass prosecution of petitioner's officers and members for non-registration, to subject them and petitioner to the other sanctions of the Act, and thus to outlaw petitioner.

The Court has recognized that a defamatory listing by the Attorney General, even without public disclosure of the names of the members and the numerous sanctions of the Act, has the effect of virtually destroying the listed organization. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 139, 142, 161, 175. And the Court has on First Amendment grounds invalidated requirements for the public identification of dissenters for the reason that "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." *Talley* v. *California*, 362 U. S. 60; *Bates* v. *Little Rock*, 361 U. S. 516; *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449.

The Act goes far beyond the measures invalidated in the three cases last cited. By outlawing petitioner it proscribes, and does not merely deter, all advocacy by and association with petitioner. In what follows we will show that this abridgment of First Amendment rights does not have a constitutional justification and is therefore invalid

**B. The Act's Suppression of Advocacy and Association Is Not Constitutionally Justified Because the Registration Order Need Not Be and Was Not Based on Conduct Which Endangers the National Security.**

The First Amendment prohibits legislative restrictions of speech, press and assembly which do not create a clear and present danger of substantive evils that Congress has

a right to prevent. *Schenck* v. *United States*, 249 U. S. 47, 52. Congress sought to bring the Act under this principle by finding in section 2(15) that its enactment was necessary to guard against "a clear and present danger to the security of the United States and to the existence of free American institutions."

The Act, however, cannot be justified on this ground. For it authorizes the issuance of a registration order against an organization which does not engage in conduct endangering the national security even remotely, much less clearly and presently. Moreover, the order against petitioner was issued and affirmed without evidence or findings that petitioner engages in conduct that threatens the national security. Accordingly, the Act violates the First Amendment both on its face and as applied.[13]

Section 3(3) of the Act defines Communist-action organizations in terms of two characteristics which we call the "foreign control component" and the "objectives component". Neither of these involves activities which endanger the national security or are unlawful.

The foreign control component requires that an accused organization be "substantially directed, dominated or controlled" by the Soviet Union. Proof that a domestic organization is under Soviet control does not *ipso facto*

[13] The Congressional finding of a clear and present danger has no constitutional significance. Since the First Amendment is a limitation on the legislative power, it must be applied by the courts. Otherwise Congress could escape the limitation merely by a self-serving declaration that the legislation is valid. Accordingly, "The doctrine that there must be a clear and present danger of a substantive evil that Congress has a right to prevent is a judicial rule to be applied as a matter of law by the courts." *Dennis* v. *United States*, 341 U. S. 494, 513. Moreover, the existence of a clear and present danger depends on the content of a particular expression and the circumstances of its dissemination. It must therefore be determined on the facts presented by each case as it arises and cannot be legislatively found in advance.

establish that the activities of the organization are inimical to the national security. If the activities are peaceable and innocent, they cannot be dangerous, regardless of the nature and control of the organization which performs them. This is true under the correct construction of the foreign control component, which, as we later show, requires that the Soviet Union have and exercise some means for compelling the organization to comply with Soviet directives. *A fortiori* it is true under the loose conception adopted below, that the foreign control component is satisfied by voluntary ideological adherence to Soviet policies. (See *infra*, pp. 96-98, 100-01.)

The objectives component is satisfied if an accused organization "operates primarily to advance the objectives of such world Communist movement as referred to in section 2." Section 2 contains lengthy Congressional findings concerning the existence and character of "a world Communist movement." But neither this section nor any other provision of the Act defines the "objectives" of the movement. These can only be inferred from sections 2(2) and 2(6). The former recites that it is the "purpose" of the movement "by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, terrorism and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world." Section 2(6) states that Communist-action organizations in various countries "endeavor to carry out the objective of the world Communist movement by bringing about the overthrow of existing governments by any available means, including force if necessary, and setting up Communist totalitarian dictatorships which will be subservient to the most powerful existing totalitarian dictatorship."

It may be that the "objectives" referred to in section 3(3) are the "purpose" or "objective," stated in sections 2(2) and 2(6), of establishing a "Communist totalitarian dictatorship," without regard to the means employed to

that end. But Congress has no power to suppress a peaceful change in our form of government, no matter how obnoxious it believes the change would be. Hence Congress may not curtail the advocacy and association of those who promote such a change. "If, in the long run, the beliefs established in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way." Holmes, J., dissenting, *Gitlow* v. *New York*, 268 U. S. 652, 673.

The situation is not remedied by the other possible interpretation of the objectives component—namely, that the objectives referred to include not merely the ultimate aim of establishing a Communist totalitarian dictatorship, but also the means for achieving that aim described in section 2. For sections 2(2) and 2(6) do not find that the world Communist movement presently advocates or employs force or other unlawful means. They merely find that the movement will resort to such means if necessary in an unstated eventuality. Hence the objectives component of section 3(3) is satisfied by nothing more than willingness to use illegal means in some undefined future contingency. Such willingness, unaccompanied by incitement to or preparation for violence, is neither a clear nor a present danger to the national security. In fact, *Yates* v. *United States*, 354 U. S. 298, 324, doubted whether an actual conspiracy "to engage at some future time in seditious advocacy" could constitutionally be punished.

If the objectives component could be construed to require the present use of or incitement to illegal means, then the clear and present danger test might be satisfied. Such a construction would be an imaginative rendition unsupported by the statutory text. But if adopted, it would condemn the application of the Act by the Board and the court below. Neither the Board nor the court found, or could have found on the evidence, that petitioner engages

in or incites to violence or other unlawful methods. The Board did find that petitioner "advocates the overthrow of the government of the United States by force and violence *if necessary*" (R. 2633, emphasis supplied, and see R. 2632). On its face this is a finding not of incitement but of advocacy of abstract doctrine, which cannot constitutionally be suppressed. Cf. *Yates* v. *United States, supra.* Furthermore, as appears from the Modified Report (R. 2632-33), the finding was based on Marxist texts and the conclusory testimony of government witnesses. *Yates* held (at 329) that the same texts and similar testimony did not establish "Party advocacy or teaching in the sense of a call to forcible action at some future time."

Section 13(e) of the Act further demonstrates that a registration order may be issued without a finding of acts or advocacy prejudicial to the national security. None of the criteria which the section directs the Board to consider includes the use or advocacy of violence or other unlawful means. The section focuses on the promotion of or agreement with any Soviet views, no matter how valid or innocuous. The court below acknowledged (Ops. 44) that the "directives and policies" criterion of section 13(e)(1) does not require a showing that petitioner's objectives are evil or morally wrong, much less that they are criminal or violent. It further acknowledged (Ops. 45) that the "nondeviation" criterion of section 13(e)(2) may be satisfied by evidence of adherence to policies calculated to promote the peace and welfare of our nation. And in fact the Board and the court below so applied these criteria, as when they placed heavy reliance on the fact that petitioner and the Soviet Union held similar views on a variety of international issues (see *infra*, pp. 111-17).

Accordingly, if the judgment below is sustained, petitioner will be outlawed not for endangering the national security, but for peaceable advocacy of Marxism-Leninism and agreement with Soviet views on international affairs.

If the registration order against petitioner is upheld, there will remain no effective limitations on Congress' control over political expression and association. If Congress can impose sanctions for "non-deviation" from Soviet views, it can do the same for "non-deviation" from other views. In fact, the provisions of the Act relating to front and infiltrated organizations already penalize agreement with petitioner's views. See secs. 13(f)(4) and 13A(e)(3).[14]

### C. The Act Is Not Limited to the Control of Conduct Endangering the National Security But Suppresses Peaceable Advocacy and Assembly.

The Act violates the First Amendment even if construed to authorize the issuance of a registration order only against organizations found to be engaged in acts or advocacy creating a clear and present danger to the national security. For in those instances where the legislature may constitutionally restrict speech, press, or assembly to prevent a substantive evil, the restriction is nevertheless invalid if it

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[14] The first petition filed under the Act by the Attorney General against a trade union alleges that it is Communist-infiltrated on the grounds, among others, that it has promoted the objectives of the Communist Party by: opposing the Smith Act, the Foreign Agents Registration Act, the Taft-Hartley Act, the Communist Control Act, the Selective Service Act, the Draft Extension Act, and the Defense Production Act; denouncing Congressional Committees and other government bodies for investigating un-American and subversive activities; denouncing government law-enforcement agencies, including the Federal Bureau of Investigation and the Immigration and Naturalization Service; opposing the registration and deportation of aliens and the federal employee loyalty program; supporting and urging its members to support the Progressive Party; advocating clemency for Julius and Ethel Rosenberg, the "Trenton Six," Willie McGee and the "Martinsville Seven"; charging the United States government with the practice of genocide; and denouncing American statesmen and industrialists as "warmongers." Petition in *Rogers v. International Union of Mine, Mill and Smelter Workers*, Docket No. 116-56, Subversive Activities Control Board.

is broader than necessary for prevention of the evil. *De Jonge* v. *Oregon*, 299 U. S. 353; *Stromberg* v. *California*, 283 U. S. 359; *Cantwell* v. *Connecticut*, 310 U. S. 296, 308; *Winters* v. *New York*, 333 U. S. 507. As stated in *De Jonge*, at 364-65:

> "These [First Amendment] rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed."

Contrary to this principle, the Act's restraints are not limited to speech, press and assembly when used to incite to terrorism, sabotage, violence and the other unlawful conduct which section 2 attributes to the world Communist movement. Instead, by outlawing petitioner, the Act and the registration order proscribe all of petitioner's activities, including its admittedly extensive peaceable advocacy and assembly.

Although always numerically small, petitioner has run numerous candidates for public office, some of whom were elected, and has participated in coalitions supporting non-Communist candidates. Even its worst enemies admit that it has frequently played a seminal role in bringing about needed changes in our social and economic life. Many of the reforms advanced by petitioner and originally the object of vilification, have been adopted by the people of the United States, when they were convinced, with the aid of petitioner's agitation, that these were to their best interest. These include social security, minimum wage legislation, the organization of labor unions on industrial lines and measures against racial discrimination. Like other political parties it seeks to help organize "the expression of bloc sentiment" which "is and always has been an integral part of our democratic and electoral process." *United States* v. *C. I. O.*, 335 U. S. 106, 143.

Indeed, it is precisely peaceable advocacy and innocent association which the Act is designed to reach, since there is a plethora of other laws which punish seditious acts and advocacy and provide for the registration of foreign agents. E.g., 18 U. S. C. 793-798, 951, 957, 2151-2157, 2381-2391; 22 U. S. C. 611-621. Because the Act suppresses all the advocacy and political activity of petitioner and is not limited to, and is unnecessary for, suppressing illegitimate and dangerous conduct, it is invalid.

At the heart of the First Amendment is the principle that government may not intervene in the political process by imposing special disabilities on any political group. Otherwise the party in power could perpetuate itself in office by denying its rivals free and equal access to the electorate. The Act clearly infringes this principle. For it discriminatorily prevents petitioner from engaging in political activities of a kind employed by other political parties and groups in their effort to attract adherents. As the President said in a special message to Congress, the bill which became the Act "would, in effect, impose severe penalties for normal political activities on the part of certain groups, including Communists and Communist Party-line followers," and attempts to "proscribe for groups such as the Communists, certain activities that are perfectly proper for everyone else." H.R. Doc. 679, 81st Cong., 2d Sess., p. 6.

The constitutional principles discussed above have been applied by the Court specifically to the Communist Party and its members. *De Jonge* v. *Oregon*, 299 U. S. 353, and *Herndon* v. *Lowry*, 301 U. S. 242, held that peaceable assembly and advocacy of the Communist Party and its members could not be abridged even if it were assumed that the Party engaged in illicit advocacy and activity.

Similarly, *American Communications Association* v. *Douds*, 339 U. S. 382, sustained section 9(h) of the Taft-Hartley Act only because it "did not restrain the activities

of the Communist Party as a political organization" (at 404), or proscribe or severely burden Party membership (at 404, 434). The Act does the very things condemned by *Douds*.

*Douds* justified section 9(h) on the ground that it was narrowly limited to the prevention of what Congress found to be a substantive injury to interstate commerce. The Court's approval of what it considered an incidental infringement of the rights of a few Communists rested on the view that Congress had acted economically to attain a constitutionally permitted objective.

In sharp contrast, the Act suppresses all advocacy of and association with petitioner and its members. The Act's abridgment of the First Amendment rights of Communists is not incidental to some other and legitimate legislative objective. It is an end in itself, its only other purpose being to lay a foundation for the abridgment of the constitutional liberties of non-Communists.

In *Australian Communist Party* v. *The Commonwealth*, 83 C. L. R. 1 (1951), the High Court of Australia applied the same principle of legislative economy in a different constitutional setting. It invalidated a statute which dissolved the Communist Party, authorized the executive to dissolve other organizations found to be under Communist influence or control, and imposed civil disabilities on Communist Party members. The statute contained a recital of parliamentary findings concerning Communism similar to those of section 2 of the Act. The Commonwealth urged that the law was authorized under the defense power vested in the federal government by the Australian constitution. The High Court rejected this contention on the grounds that the statutory sanctions exceeded measures reasonably necessary for defense purposes and unnecessarily suppressed civil liberties. As one of the prevailing opinions stated (at 225-27):

> "Any conduct which is reasonably capable of delaying or otherwise being prejudicial to the Commonwealth preparing for war would be conduct which could be prevented or prohibited or regulated under the defense power. Amongst such conduct there could be included, I should think, most if not all, of the serious misdoings with which communist bodies and communists are charged in the recitals. But the legislation would have to define the nature of the conduct and the means adopted to combat it, so that the court would be in a position to judge whether it was reasonably necessary to legislate with respect to such conduct in the interests of defense and whether such means were reasonably appropriate to the purpose * * *. But none of this conduct is prevented or prohibited or made an offense by the operative provisions of the Act * * * In my opinion legislation to wind up bodies corporate or unincorporate and to dispose of their assets or to deprive individuals of their civil rights or liberties on the mere assertion of Parliament or the Executive that they are conducting themselves in a manner prejudicial to security and defense, is not authorized by the defense power or the incidental power in peace time."

And as another one of the Justices put it (at 187-88):

> "In point of constitutional theory the power to legislate for the protection of an existing form of government ought not to be based upon a conception, if otherwise adequate, adequate only to assist those holding power to resist or suppress obstruction or opposition or attempts to displace them or the forms of government they defend."

The First Amendment requirement of narrowly drawn legislation is violated not only by the Act as a whole, but by each of its major sanctions when considered individually.

Under section 10, an organization ordered to register must label its publications and broadcasts as emanating from a Communist organization and hence as the product

of a group that has been officially condemned as a seditious foreign agent. Obviously these requirements effectively restrain freedom of press and expression. Cf. *Talley* v. *California, supra.* They cannot be justified as safeguards against incitement since they apply regardless of the content of the publications and broadcasts.

The court below analogized section 10 to mail fraud statutes (Ops. 35-36). The analogy is faulty because the restraints of the latter are based on the content of the mail, not on the character of the sender or recipient. The power to prevent fraudulent communications cannot be employed to bar innocent publications. *Donaldson* v. *Read Magazine*, 333 U. S. 178, 191-92, sustained a postoffice fraud order against a First Amendment attack only because the order was limited to communications relating to the particular fraudulent scheme, leaving other communications of the offending publication untouched. Similarly, the Postmaster General may not ban future issues of a magazine from the mails because past issues contained obscene matter. *Summerfield* v. *Sunshine Book Company*, 221 F. 2d 42, cert. den. 349 U. S. 921. Section 10, however, restrains all the literature and broadcasts of the organization even without regard to the content of prior expressions.

The section cannot be analogized to the Congressional power to exclude fraudulent matter from the mails for the additional reason that the power does not and cannot constitutionally apply to matters of opinion. *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; *Reilly* v. *Pinkus*, 338 U. S. 269. The present case presents an even stronger claim to First Amendment protection since it involves opinion on political questions.

The court below also defended section 10 by citing the labelling provisions of the Foreign Agents Registration Act (Ops. 36). The controls of that statute, as construed in *Viereck* v. *United States*, 318 U. S. 236, are limited to activities conducted by the agent on behalf of his foreign

principal. Furthermore, the label required by that statute is not an invidious one. Section 10 of the Act, however, requires communications to be labelled as emanating from a seditious foreign agent even though they are made in the organization's own behalf and are innocent of seditious content.

The court below also compared section 10 to statutes requiring that paid broadcasts be identified by the name of the purchaser and that literature in behalf of candidates for federal office bear the name of the issuer (Ops. 36). These provisions, however, are non-invidious and non-discriminatory, and hence do not discourage the exercise of First Amendment rights. The failure of the court below to appreciate the difference between such requirements and the provisions of section 10 is indicated by its statement (Ops. 35-36) that petitioner has little to choose between identifying itself as "the Communist Party" and as "a Communist organization." Of course petitioner does not object to identifying itself by name, which it does voluntarily in the conduct of its activities as well as pursuant to statutes of the kind referred to by the Court. This is entirely different, however, from the discriminatory requirement of section 10 that it identify itself with a label or armband signifying that it has been governmentally condemned as a seditious foreign agent. The function of section 10 is not to identify petitioner, but to deprive it of an audience and to deny others access to its ideas.

Similarly, the Act's sanctions on petitioner's members are not designed to control unlawful or seditious conduct but flagrantly abridge the First Amendment's guaranty of freedom of association. This appears from our subsequent demonstration that the sanctions likewise violate the less stringent guaranty of due process (see *infra*, pp. 50-56).

**D. The Act Imposes a Prior Restraint on the Exercise of First Amendment Rights.**

As we have already shown (*supra*, pp. 26-28), the registration requirement is an integral part of an invalid statutory scheme to outlaw organizations. But even if the registration provision is considered by itself, divorced from the sanctions of the Act, it is unconstitutional as a prior restraint on the exercise of First Amendment rights.

The Act and the order require petitioner to register as a participant in the international conspiracy described in section 2 before it can have a lawful existence, and thus before it can lawfully exercise any First Amendment rights. *Thomas* v. *Collins*, 323 U. S. 516, establishes, however, that the exercise of speech and assembly may not be conditioned on prior registration with governmental authorities. There the Court stated (at 539):

> "If the exercise of the rights of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition for exercising them and making such a condition the foundation for restraining in advance their exercise and for imposing a penalty for violating such a restraining order."

The prior restraint invalidated by *Thomas* v. *Collins* was far less onerous than that imposed by the Act. The statute in that case merely required registration of the name and union affiliation of labor organizers desiring to solicit union membership. The registration did not, as here, involve an opprobrious characterization, or require identification of the union's members for subjection to intolerable statutory sanctions.

*United States* v. *Harriss*, 347 U. S. 612, upheld the statute requiring registration of lobbyists, only after limiting it to persons who collect or receive contributions for the purpose of influencing, and whose main purpose it is to in-

fluence, legislation by direct communication with members of Congress. As so limited, the Court held the statute valid because:

> "It has merely provided for a modicum of information from those who *for hire* attempt to influence legislation or who *collect or spend funds* for that purpose. It only wants to know who is being hired, who is putting up the money, and how much." (At 625, emphasis added.)

The statute thus construed is within the principle recognized in *Thomas* v. *Collins* (at 538) that a reasonable identification or registration requirement may be imposed on one who solicits funds. See also *N. A. A. C. P.* v. *Alabama, supra,* at 464. Furthermore, as *Harriss* plainly indicates, a registration requirement even under these circumstances would be of doubtful validity if it applied to persons who seek to influence legislation by propagandizing the general public. Cf. *United States* v. *Rumely,* 345 U. S. 41. The Act has neither of the saving graces of the Lobbying Act. Registration of Communist organizations is not made dependent on the collection of funds and is a precondition to every form of speech, writing and assembly, irrespective of purpose and without regard to the class of persons sought to be influenced.

This Court has never passed upon the constitutionality of the Foreign Agents Registration Act, 22 U. S. C. 611-621, which, in at least some of its applications, is a regulation of commercial or professional relations between foreign agents and their principals. Moreover, it is significant that the one decision of the Court under that act reversed a conviction on the ground that the statute had not been narrowly construed and applied by the trial court. *Viereck* v. *United States,* 318 U. S. 236, discussed *supra,* pp. 38-39).

Finally, the registrations under the Lobbying and Foreign Agents Registration Acts require only "a modicum of information," involve no self-defamation by the regis-

trants, and do not result in any significant inhibition of First Amendment rights.

The prior restraint imposed by the Act's requirement of registration is made more onerous by the provision that the registrant list the names of all its members (sec. 7(d)(4)). This public identification obviously is a major inhibition on the members' freedom of association. "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *N. A. A. C. P.* v. *Alabama, supra,* at 462; *Bates* v. *Little Rock,* 361 U. S. 516.[15] Anonymity of membership in minority parties is indispensable to freedom of political action. Almost every minority party which advocated substantial change has been the object of bitter attack and public vituperation. See *Talley* v. *California, supra,* at 64-65. Most of them would have been strangled in infancy if they had been required to reveal the names of their members. To permit this handicap to be imposed on a minority party by a legislature composed of its political opponents is to destroy the electoral process.

Accordingly, the Act's requirement that petitioner register and publicly list the names of its members is invalid as a prior restraint on First Amendment freedoms even without regard to the fact that the listing also identifies the members as the objects of the onerous sanctions imposed by the Act.

This conclusion is not vitiated by *New York ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63, which upheld, as applied to a member of the Ku Klux Klan, a New York statute requiring oath-bound organizations to file their

[15] It would seem superfluous to insist on evidence that known or suspected Communists are targets for discrimination and invidium. The record, however, contains such evidence. E.g., R. 1217-23. See also the discussion by the court below of the purpose of "secret practices" (Ops. 73-74).

membership rosters with state officials. "The decision was based on the particular character of the Klan's activities, involving acts of unlawful intimidation and violence, which the Court assumed was before the state legislature when it enacted the statute, and of which the Court itself took judicial notice." *N. A. A. C. P.* v. *Alabama, supra,* at 465.

Here the registration order was issued, pursuant to the Act, without a finding or evidence that petitioner engages in or incites to violence or other unlawful conduct. Judicial notice cannot substitute for such evidence. The Court held in *Yates* v. *United States, supra,* at 329-30, that the government had been unable to prove in a protracted trial that petitioner engages in incitement to violence.

Furthermore, the statute in *Bryant* v. *Zimmerman* was not challenged as a restraint on speech, press or assembly and the Court did not consider that question. The Court took judicial notice of the Klan's nature and activities only to support its holding that the statute did not arbitrarily classify organizations contrary to the equal protection clause of the Fourteenth Amendment.

If tested by First Amendment principles, *Bryant* v. *Zimmerman* is wrong. Since the statute there involved was not limited to the control of acts of violence and intimidation, it restrained membership in the Klan for peaceable purposes and thus offended the First Amendment requirement of legislative economy. See *supra;* pp. 33-34. Since the statute did not require proof that the Klan engaged in violence or intimidation, it violated the principle that association may be restrained only to guard against the danger of a substantive evil. Neither legislative findings nor judicial notice can substitute for proof of a fact whose existence is a constitutional prerequisite for legislation. See *supra,* p. 29, ftn. 13. Finally, *Bryant* has the fundamental vice that it places freedom of association at the mercy of findings which the persons affected have had no opportunity to contest. See Robison, *Protection of As-*

*sociations From Compulsory Disclosure of Membership*, 58 Col. L. Rev. 614, 642-47.

The Act also requires that the registration statement list all printing presses, mimeograph machines and the like in the possession of the registrant, its officers or members, or other groups in which if "has an interest" (sec. 7 (d) (6), added by 68 Stat. 586). This restraint adopts the odious premise that printing presses may be regulated like guns, and patently violates the First Amendment.

## II. The Act violates the privilege against self-incrimination.

The registration of a Communist-action organization must, of course, be accomplished by individuals. Under the Act and the Attorney General's regulations, the persons required to sign and file the registration forms for the organization are its principal officers and all the members of its governing board. Act, secs. 7(d) and (h); 28 C. F. R. 11.200, 11.205; Dept. of Justice Form ISA-1. If the organization does not register, or if its registration statement omits the names of any members, the members must register themselves (sec. 8). Failure of the officers to register the organization or of individual members to register themselves when and as required is punishable by penalties which accumulate at the rate of five years imprisonment and $10,000 for each day that the failure continues (sec. 15).

It is obvious that any person who signed petitioner's registration statement as an officer of the organization and gave the information required by section 7 would thereby admit his membership in the Communist Party and an "intimate knowledge of its workings." *Blau v. United States*, 340 U. S. 159, 161. He would necessarily, therefore, furnish "a link in the chain of evidence needed

in a prosecution" (*ibid.*) of himself under section 4(a) of the Act, as well as under the Smith Act.[16] The same thing is true of an individual member who registers himself.

The Court has held, however, that a compelled admission of membership in the Communist Party, without more, violates the privilege against self-incrimination. *Blau* v. *United States, supra; Quinn* v. *United States*, 349 U. S. 155. The Act and the registration order, therefore, invade the Fifth Amendment privilege of petitioner's officers and members. Petitioner has standing to raise this issue as the representative of its officers and members. *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449.

In an effort to avoid the unconstitutionality of compelling self-incrimination by the device of registration, the Act contains a so-called "immunity" provision. Section 4(f) provides that the holding of office or membership in a Communist organization shall not, per se, constitute a violation of section 4(a) or any other criminal law, and that the fact of registration of any person under sections 7 and 8 shall not be admissible in a prosecution under section 4(a) or for any other crime.

This provision tacitly recognizes the vulnerability of the Act, but does not save it because the immunity conferred is not coextensive with the constitutional privilege. Section 4(f) merely immunizes membership per se and makes the fact of registration inadmissible as evidence. This does not prevent prosecution of a registrant for an offense in which his membership in the Communist Party is one of several ingredients. Nor does it bar the prosecution from proving the membership of an accused by evidence other than the registration statement, even if the registration statement supplied the lead to such other evidence. Accordingly, the provision does not afford a regis-

[16] Registration also serves to identify the registrants for apprehension under the concentration camp provisions of Title II of the Internal Security Act, 50 U. S. C. 811-26.

trant "complete immunity from prosecution for any act concerning which he testifies;" and therefore it is "not a sufficient substitute for the constitutional privilege of refusing to answer self-incriminating questions." *United States* v. *Bryan*, 339 U. S. 323, 336; *Counselman* v. *Hitchcock*, 142 U. S. 547.

The majority below held (1) that the Act and the registration order did not violate the privilege of petitioner's officers against self-incrimination, and (2) that in any event it was premature to raise the issue in this proceeding. The majority was wrong, and Judge Bazelon's dissent holding the Act unconstitutional was correct.

1. The majority below held that under *United States* v. *White*, 322 U. S. 694, petitioner's officers are not privileged to refuse to register the organization. This holding is unsound in three respects.

First, *White* held that the privilege does not excuse an officer from producing records of the organization on the grounds that the *contents* of the records will incriminate him. Here the officer incriminates himself not by the contents of the records, but by his acts in signing and filing the registration statement. Thereby he identifies himself as a member and officer of petitioner and as one familiar with its records and affairs. These admissions are precisely those which *Blau* v. *United States*, *supra*, held cannot be compelled.

Second, the Act does not call for production of the organization's records. Instead it requires the officers to prepare and file original statements. Hence, the *White* doctrine does not apply. *White* itself pointed out (at 701) that its rule was not meant to infringe the individual's privilege against "compulsory incrimination through his own testimony." The same distinction was made in *Shapiro* v. *United States*, 335 U. S. 1, 27, and *Wilson* v. *United States*, 221 U. S. 361, 377, 385. Most recently *Curcio* v. *United States*, 354 U. S. 118, made it clear that the privilege

protects the officer from compulsion to do more than to produce and identify the records. He may not otherwise be compelled to testify about them. In *Curcio* an officer was held privileged not to reveal the whereabouts of records; *a fortiori* he may not be compelled to give information as to their contents. *Curcio* stated (at 128):

> "The compulsory production of corporate or association records by their custodian is readily justifiable, even though the custodian protests against it for personal reasons, because he does not own the records and has no legally cognizable interest in them. However, forcing the custodian to testify orally as to the whereabouts of nonproduced records requires him to disclose the contents of his own mind. He might be compelled to convict himself out of his own mouth. That is contrary to the spirit and letter of the Fifth Amendment."

Third, the *White* rule is inapplicable because section 7(d) compels the officers to furnish information about the organization which may not appear in its records.

> "The execution of a registration statement by an individual would at least require him to confirm and transpose selected material from the organization's records to the registration statement. Since an organization need not keep complete records prior to registration, in many cases the officer would be forced to execute the registration statement by relying on his own knowledge. It is clear that in both instances the officer is doing more than producing records and identifying them. He is disclosing other matters of his personal knowledge." (Note, *The Internal Security Act of 1950*, 51 Col. L. Rev. 606, 621, quoted in Judge Bazelon's dissent, Ops. 83.)

2. The majority below also held (Ops. 20-23) that adjudication of the officers' privilege is premature in this proceeding and must await a criminal prosecution for the failure of the officers to file a registration statement. The grounds for this conclusion were that the officers (a) may

never assert the privilege, (b) may have done something to waive the privilege, or (c) may be granted immunity under 18 U. S. C. 3486.

(a) The principle that the privilege is lost if not asserted is applicable where the person from whom incriminating information is demanded has an opportunity to claim the privilege before he is prosecuted for refusing to answer. If there is no opportunity to assert the privilege, it cannot be lost for non-assertion. Petitioner's officers have no such opportunity. If they submit a claim of privilege to the Attorney General as a reason for non-compliance with the registration requirement, they will thereby identify themselves as officers of petitioner and make the same incriminating admission that registration entails. If they do not claim the privilege they will be prosecuted for failure to file the registration statement. It follows that this proceeding provides the only opportunity to secure to the officers the benefit of the privilege. Hence the issue is not prematurely raised.

The situation is the same as in *N. A. A. C. P. v. Alabama, supra,* which held that an organization may assert the constitutional right of its members against compulsory disclosure of their membership. As the Court pointed out (at 459), "To require that it [the right] be claimed by the members themselves would result in nullification of the right at the very moment of its assertion."

The effect of the holding below is that legislation or administrative orders which compel incriminating testimony can never be declared unconstitutional but merely unenforceable in individual cases against persons who assert the privilege. This is contrary to *Boyd* v. *United States,* 116 U. S. 616. That case involved a statute which, like the Act, afforded the accused no meaningful opportunity to assert the privilege. Accordingly, the Court (at 638) held the statute "unconstitutional and void" without refer-

ence to the doctrine that the privilege must be asserted to be availed of.[17]

(b) The majority below also suggested (Ops. 22) that petitioner's officers may not be entitled to the privilege because some of them were convicted of conspiring to violate the Smith Act, some have publicly asserted their membership, and two identified themselves as officers in testifying before the Board. This suggestion is based on the unwarranted assumption that the persons referred to by the Court will be petitioner's officers at the time registration is required. Even if they are, it is obvious that none of the factors alluded to by the court will strip them of their privilege. The conviction of some under the Smith Act is no bar to other indictments for subsequent or different offenses under the same statute,[18] or under section 4(a) of the Act, or other criminal statutes. The facts that some of the officers have made extra-judicial admissions and that two of them testified about their offices before the Board do not constitute waivers of the privilege with respect to the registration statement. For it is settled that admissions made extra-judicially, in another proceeding, or even at different stages of the same proceeding, do not waive the privilege. *Re Neff*, 206 F. 2d 149, and cases cited therein at 152; *United States* v. *Field*, 193 F. 2d 109; 8 Wigmore, *Evidence* (3rd Ed.), sec. 2276(4). In any event the suggestion that some

[17] Similarly, state courts have invalidated state statutes compelling self-incrimination on their face. *In re DeWar*, 148 Atl. 489 (Vt.); *People* v. *Reardon*, 90 N. E. 829 (N. Y.); *State* v. *Simmons Hardware Co.*, 18 S. W. 1125 (Mo.); *People* v. *McCormick*, 228 P. 2d 349 (Calif.); *Maryland* v. *Perdew*, 19 U. S. L. Week 2357 (Md. C. C., Alleghany Cty.). The last two cases involved statutes requiring Communist Party members to register.

[18] In fact, defendants convicted in *Dennis* v. *United States*, 341 U. S. 494, are also under pending indictments for violating the membership provision of the Smith Act, 18 U. S. C. 2385.

of the officers may have waived the privilege obviously cannot apply to other officers as to whom no waiver is claimed.

(c) Finally, the majority below suggested (Ops. 22-23) the possibility that the Attorney General might meet the officers' claim of privilege by granting them immunity under 18 U. S. C. 3486. The proposition is untenable. The immunity statute has no application to the filing of registration statements under the Act. It applies only in proceedings before Congressional committees, federal grand juries, and federal courts.

For these reasons, the court below erred in holding that the privilege of the officers against self-incrimination could not be asserted by petitioner in this proceeding. The court also erred in holding that petitioner could not assert the privilege of its members. It reasoned (Ops. 24-25) that the problem of the members' privilege was not posed in this case and would arise only when a member was ordered to register following failure of petitioner to list his name in its registration statement. This overlooks the fact that if petitioner lists its members, it thereby incriminates them. Yet petitioner "and its members are in every practical sense identical" (*N.A.A.C.P.* v. *Alabama, supra,* at 459). Therefore, when the members are incriminated by petitioner, they are being incriminated by themselves. Accordingly, as held in *N.A.A.C.P.* v. *Alabama,* an organization may raise its members' constitutional objections to a demand to disclose their identity when the demand is made on it.

## III. The Act deprives petitioner's members of liberty and property without due process of law.

As we have seen (*supra,* pp. 5-7, 26-27), a final regsitration order will result in intolerable sanctions on petitioner's members. Their names must be publicly listed on an

opprobrious registration statement, either by the organization or themselves. They are barred from extensive areas of employment, public and private. They are denied the right to travel abroad. Naturalized members may lose their citizenship. Alien members must be deported.

The rights, privileges, and interest in reputation of which the members are deprived clearly constitute "liberty and property," protected by the due process clause.[19] Petitioner has standing to challenge the deprivation of these rights both because it is the appropriate representative of its members and because the disabilities imposed on its members directly affect and injure petitioner by tending to reduce its membership and revenue. *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 152-154, 187.

The members suffer the onerous sanctions of the Act even though they are never determined to be under foreign control or engaged in advancing the objectives attributed to the world Communist movement by section 2. It does not matter that they have no knowledge of the alleged character of petitioner. Nor are they afforded an opportunity to demonstrate that despite their membership they are fit persons to enjoy the privileges denied them. The Act thus goes far beyond the much-criticized government loyalty-security program. Under the latter, organizational membership is not a conclusive disqualification, but "is simply one piece of evidence which may or may not be helpful in arriving at a conclusion as to the action which is to be taken in a particular case." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, *supra*, at 205; see *Kutcher* v. *Gray*, 199

[19] *Williams* v. *Fears*, 179 U. S. 270, 274; *Truax* v. *Raich*, 239 U. S. 33, 41; *Wieman* v. *Updegraff*, 344 U. S. 183; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123; *Kent* v. *Dulles*, 357 U. S. 116, 125; *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 238-239.

F. 2d 783. The Act, therefore, represents an extreme case of defaming individuals and subjecting them to disabilities solely and conclusively because of their association. In these respects it violates the due process principles established by *Wieman* v. *Updegraff*, 344 U. S. 183, and *Adler* v. *Board of Education*, 342 U. S. 485.[20]

*Wieman* held that exclusion even from public employment cannot be constitutionally imposed for organizational membership in the absence of knowledge by the member of the organization's illicit character. The Court stated (at 191), "Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power." *Adler* ruled that an individual could not be barred from teaching in the public schools even for knowing membership in a seditious organization unless he had an opportunity to prove that notwithstanding his membership he was fit to be a school teacher. The Court stated (at 495) that the statute involved was valid because the presumption of ineligibility arising from knowing membership "is not conclusive but arises only in a hearing where the person against whom it may arise has the full opportunity to rebut it." The Court added (at 496, emphasis supplied):

> "Where, as here, the relation between the fact found and the presumption is clear and direct *and is not conclusive*, the requirements of due process are satisfied."

Clearly, the protections accorded by *Weiman* and *Adler* to the individual's interest in government employment also apply to his interest in private employment and in the opportunity for foreign travel. *Schware* v. *Board of Bar Examiners*, *supra*, at 246; cf. *Greene* v. *McElroy*, 360 U. S. 474; *Kent* v. *Dulles*, *supra*.

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[20] It also violates the First Amendment in this regard. See *Smith* v. *California*, 361 U. S. 147, 151-52.

Since the Act does not require scienter for the application of its sanctions against members, it is condemned by *Wieman*. Since it makes conclusive a presumption of unfitness arising from membership, it is condemned by *Adler*.

The court below held that the scienter requirement of *Wieman* was satisfied on the grounds that (1) a member has knowledge of his membership; and (2), "The statute before us requires that before these sanctions apply a member must have 'knowledge or notice' that the organization has registered or been finally ordered to register" (Ops. 26). These grounds are both irrelevant and inaccurate.

As *Wieman* makes abundantly clear, the scienter required by due process is personal knowledge that the organization has deleterious purposes. The requirement is not satisfied by knowledge of membership. Nor is it satisfied by knowledge or notice that the organization has been governmentally condemned. This is so if only for the reason that the member was not a party to, and hence cannot be bound by, the proceeding against the organization. Moreover, knowledge that an organization has been found to have seditious or other evil purposes cannot be inferred from knowledge that it has been ordered to register. For the Act permits a registration order to be issued without proof of such purposes (see *supra*, pp. 28-32).

Furthermore, the court misread the statute in stating that knowledge or notice of a registration order is a prerequisite to the imposition of the sanctions. Under the Act, notice by publication [21] is necessary to support criminal prosecutions for applying for a forbidden job or a passport or for a member's failure to register himself if the

[21] Under section 14(k), notice of a registration order is given to members by publication in the Federal Register of the fact that the order has become final.

organization failed to list him (secs. 5(a), 6(a), 8(b), 15(a)(2)). But this limited "scienter" is not necessary to the imposition of the civil sanctions and disabilities of the Act. For employers must deny a member employment, the government must withhold a passport from him, and, if he is an alien, the government must deport him and may not naturalize him, all without reference to any kind of knowledge or notice on his part. (See secs. 6(b) and 5(a)(2) of the Act, and sections 241(a)(6)(E) and 313(a)(2) of the Immigration and Nationality Act.)

Finally, in view of the vague criteria of membership established by section 5 of the Communist Control Act, it is not true that "members" have knowledge of their membership. (See *infra*, pp. 89-93.)

The sanctions on the members are invalid not only under the rules laid down in *Wieman* and *Adler*, but because in still other respects they violate the due process principle that "the means selected shall have a real and substantial relation to the object sought to be obtained." *Nebbia* v. *New York*, 291 U. S. 502, 525.

The restrictions on employment in government and industry apply to all positions, including the most insentitive, and thus exceed any measures reasonably required for the protection of the national security. Cf. *Cole* v. *Young*, 351 U. S. 536. Nor can there be any foundation in reason for allowing the Secretary of Defense unfettered and unreviewable authority to designate any private enterprise as a "defense facility," and thereby to declare non-sensitive enterprises off-limits for petitioner's members.

The prohibition of trade-union employment is also too embracing. It would subject a member of petitioner to a five-year prison term and a $10,000 fine for the "crime" of holding a job as a janitor for a local of the Musicians Union. Yet *American Communications Association* v. *Douds*, 339 U. S. 382, 404, held section 9(h) of the Taft-

Hartley Act valid on the ground that it excluded Communists only from "position[s] of great power over the economy of the country."

Similarly, the passport sanction prohibits all foreign travel by petitioner's members, even if for the most innocuous of purposes.

Section 25 of the Act (carried forward in section 340(c) of the Immigration and Nationality Act) makes membership by a naturalized citizen, within five years after naturalization, in an organization ordered to register under the Act, prima facie evidence sufficient to authorize the revocation of his citizenship in a denaturalization proceeding. The Constitution, however, prohibits revocation of citizenship for mere association. Cf. *Schneiderman* v. *United States*, 320 U. S. 118; *Knauer* v. *United States*, 328 U. S. 654, 669; *Baumgartner* v. *United States*, 322 U. S. 665. These cases involved association at the time of naturalization. The Act presents an aggravated case, since it presumes fraudulent procurement of naturalization on the basis of association *after* naturalization.

The court below avoided a decision on the validity of the denaturalization sanction on the ground that the issue must await determination in a denaturalization proceeding under the section. However, the presence of this sanction in the Act causes immediate harm to petitioner by making membership in it prohibitive for naturalized citizens. The issue is therefore ripe for adjudication, and petitioner has standing in this proceeding to challenge the validity of the section on its face (see *supra*, p. 51).

Analysis of the individual sanctions thus confirms our demonstration that the purpose and effect of the Act as a whole is to outlaw petitioner by illegalizing membership in it. The function of the sanctions is not to protect the national security. Such protection, if needed, could have been provided by narrowly drawn legislation addressed to

that purpose. The Act's sanctions serve a different purpose—to make registration impossible, destroy petitioner, and deny its members their livelihood and liberties merely because of their membership.

## IV. The Act violates due process because it predetermines facts essential to a finding that petitioner is a Communist-action organization.

Since the order of the Board deprives petitioner and its members of liberty and property, it may not constitutionally be entered without a hearing. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123; *Morgan* v. *United States*, 304 U. S. 1. If any of the elements requisite to a determination of liability are found legislatively, rather than by an independent adjudication of the facts, the due process requirement of a hearing has been denied. *Manley* v. *Georgia*, 279 U. S. 1; *Western and Atlantic Railroad* v. *Henderson*, 279 U. S. 639; *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79; *Tot* v. *United States*, 319 U. S. 463.

The Act violates this requirement in three respects.

1. Under the Act, certain facts essential to guilt have been found legislatively and as a matter of law are removed from administrative adjudication by the Board. These are the "facts" as to the existence, nature and objectives of the world Communist movement.

Section 3(3) defines a Communist-action organization as an organization which (a) is substantially controlled by the foreign power or organization "controlling the world Communist movement referred to in section 2" and (b) operates primarily to advance the objectives of the "world Communist movement as referred to in section 2." Accordingly, there can be a Communist-action organization in the United States only if there is a world Communist movement of the

character and with the objectives described in section 2. However, the existence, nature and objectives of the world Communist movement are not issues left to adjudication by the Board. Instead, these "facts" are found by Congress in section 2. The findings are then incorporated into section 3(3) in the form of assumptions of fact which the Board is not authorized to re-examine, but is required to accept as the foundation for its decision.

The correctness of these legislative findings regarding the world Communist movement is also assumed by the eight criteria which section 13(e) requires the Board to apply in deciding whether an accused organization is a Communist-action organization.[22]

Accordingly, the Act does not permit the Board to decide that there is no world Communist movement, or that if there is one it is not controlled by a foreign government or does not have the objectives and characteristics attributed to it by section 2. Moreover, even if the Act contemplated Board determination of these issues, the Board could not decide them in the negative without overruling the Congressional findings which are part of the definition and violating the standards which the Act requires it to apply.

The court below held that the section 2 "findings upon the existence and nature of a world Communist movement" are binding on the Board and the courts and that these

[22] Thus the first of the evidentiary standards of 13(e) is "the extent to which" an accused organization's "policies are formulated and its activities performed pursuant to directives or to effectuate the policies of the foreign government or foreign organization in which is vested, or under the domination or control of which is exercised, the direction and control of the world Communist movement, referred to in section 2.". All the remaining standards, except 13(e)(7), refer back to "such foreign government or foreign organization" or "such world Communist movement."

matters are not subject to adjudication (Ops. 55-56). It held, however, that this legislative predetermination was not a violation of due process for the reason that (Ops. 55):

> "The rule, as we understand it, is that, if it appears Congress has power over the subject matter of a statute, and if the findings of fact are not baseless but are based on extensive investigation, the courts are to adopt these findings."

The rule on which the court relied is inapplicable. The rule applies only to findings of "legislative" as distinguished from "adjudicative" facts. Legislative facts are found by Congress for the purpose of showing the necessity and policy of a particular law. Such findings can be attacked for purposes of judicial review of the validity of the law only by showing that they have no reasonable basis. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152-154. Adjudicative facts, on the other hand, are those which bring a specific organization or person within the terms of the legislation enacted. As previously stated, due process requires that the organization or person have an opportunity to litigate those facts.

Clearly, the existence, objectives and nature of the world Communist movement are adjudicative facts, since they are prerequisites to bringing an organization under the coverage of the Act.[23]

Petitioner has been ordered to register as a "Communist-action organization." The first component of the definition of such an organization is that it is the agent of the foreign government or foreign organization which controls "the world Communist movement referred to in

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[23] The findings of section 2 are legislative facts for the purpose of aiding determination of the reasonableness and policy of the Act. But under the 3(3) definition, they are adjudicative facts for the purpose of determining whether an accused organization is a Communist-action organization.

section 2." The fact of such agency is obviously an adjudicative or operative fact as the court below itself recognized (Ops. 41). Hence due process requires that petitioner be allowed to litigate the existence of this fact. But agency cannot exist without a principal. Therefore, due process requires that the petitioner be allowed to prove that there is no agency by showing that there is no principal—i.e., that there is no world Communist movement as described in section 2, and that consequently there is no foreign government or organization which controls that movement and can be the alleged principal.

The second half of the definition of a Communist-action organization is that it "operates primarily to advance the objectives of such world Communist movement as referred to in section 2". Due process requires that petitioner be allowed to litigate the adjudicative or operative fact of whether it operates to advance the described objectives. This means that petitioner must be allowed to prove that it does not so operate because (a) there is no such world Communist movement, and hence there can be no such objectives; or (b) if there is a world Communist movement, it does not have the objectives ascribed to it, and hence petitioner can not operate to advance them.

Section 2, however, precludes petitioner from litigating any of the foregoing adjudicative facts. In short, petitioner has been ordered to register and label its publications and broadcasts as the agent of a described foreign principal, without being allowed to prove the non-existence of this principal. It has been ordered to register and label as an organization which advances specified seditious objectives of a foreign movement, without being allowed to prove that the movement does not exist or does not have those objectives. Petitioner has, therefore, been foreclosed by legislative fiat from litigating adjudicative facts. This is a palpable violation of due process.

Nor can this result be obviated by construing the statute, contrary to its terms, as authorizing the Board to determine whether there is a world Communist movement of the nature found by section 2. For the Board could not adjudicate these issues fairly and impartially. An administrative agency cannot realistically be expected to decide that Congressional findings are untrue. This is particularly so when, as here, the findings furnish the justification for the enactment of the legislation and the establishment of the agency, and are prefaced by Congress' assertion that they were made "As a result of evidence adduced before various committees of the Senate and House of Representatives." Indeed, it would be fatuous to ascribe to Congress the intention that the Board should reexamine and redetermine the identical issues on which Congress made its findings.

2. Section 2 also predetermines the issue as to the existence of a Communist-action organization in the United States. Sections 2(5) and 2(6) find that the foreign Communist dictatorship establishes and utilizes Communist-action organizations in various countries. Section 2(12) finds that there is a foreign-controlled "Communist network in the United States." Section 2(15) finds that "the Communist movement in the United States" is an organization, and that "*the* Communist organization in the United States" (emphasis added) endangers the nation's security. Section 2(9) refers to individuals in the United States who participate in the world Communist movement (which, by hypothesis, operates through Communist-action organizations). Collectively, these findings constitute a finding that there is a Communist-action organization in the United States.

Unlike the predetermination with regard to a world Communist movement, the legislative finding of a domestic Communist-action organization is not expressly incorporated into the section 3(3) definition and the standards of

section 13(c). Hence the latter issue is ostensibly open for administrative determination. But as already shown, the difference is not significant, since the Board is not free to make findings of fact contrary to those made by Congress.

3. Congress, then, found that there *is* a Communist organization in the United States, that it *is* the agent and operates to carry out the seditious objectives of a destructive world Communist movement, which *is* controlled by a foreign power. Obviously, therefore, Congress left only one function for the Board—to supply the name of the particular organization which Congress had in mind when it referred in section 2(15) to "the Communist organization in the United States."

As to this there can be no earthly doubt. Petitioner denies the truth of the findings of section 2. But it is beyond question that by these findings Congress referred to, and meant, the Communist Party of the United States, the petitioner here. Indeed, as we later show, only qualms as to constitutionality kept Congress from identifying the petitioner by name. The evidence adduced before various committees of Congress, on which the findings purport to rest, dealt with petitioner by name; the legislation was recommended as a weapon against petitioner by name; and the reports and debates dealt with petitioner by name (*infra*, (pp. 67-71). Moreover, section 2(15) of the Act refers to a *single* "Communist organization in the United States," and if the petitioner is not the organization meant by Congress, it is obvious that there is none which can possibly be identified as such.

If after all this there could remain any lingering doubt that Congress intended to and did identify the petitioner as the Communist-action organization in the United States, two further circumstances would dispel it. Section 2(15), in describing "the Communist organization in the United States," contains verbatim excerpts from Judge Hand's

description of petitioner in *United States* v. *Dennis*, 183 F. 2d 201, 212, 213. And the House and Senate reports accompanying the legislation advised Congress, in identical language, that petitioner is a Communist-action organization within the meaning of the section 3(3) definition. The reports stated:

> "There is incontrovertible evidence of the fact that the Communist Party of the United States is dominated by such totalitarian dictatorship and that it is one of the principal instrumentalities used by the world Communist movement in its ruthless and timeless endeavor to advance the world march of Communism." [24]

This Court flatly ruled in *Carlson* v. *Landon*, 342 U. S. 524, 535, 544, that section 2(15) of the Act in mentioning "the Communist movement in the United States" refers to the Communist Party of the United States.

Finally, while this case was pending in the court below on the first review and thus before the Board's final decision, Congress enacted the Communist Control Act, section 4 of which identifies petitioner by name as a Communist-action organization.

Accordingly, even the particularized identification of petitioner as the Communist-action organization in the United States was legislatively predetermined. The Board's only function was to rubber-stamp the Act's built-in verdict against petitioner, and the elaborate administrative hearing was a sham.

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[24] H. Rep. 2980, 81st Cong., 2d Sess., on H.R. 9490, pp. 1-2; S. Rep. 1358, 81st Cong., 1st Sess., on S. 2311, p. 5. The same passage appears in the House Committee Report on the Mundt-Nixon bill, the forerunner of the Act. H. Rep. 1844, 80th Cong., 2d Sess., on H.R. 5852, p. 3.

## V. The Act is a bill of attainder and otherwise invalid because it imposes punishment without a judicial trial.

"A bill of attainder is a legislative Act which inflicts punishment without judicial trial." *Cummings* v. *Missouri*, 4 Wall. (71 U. S.) 277, 323. As stated in *United States* v. *Lovett*, 328 U. S. 303, 315, and repeated in *Garner* v. *Board of Public Works*, 341 U. S. 716, 722:

> "* * * legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution."

The Act, as we have seen, determines petitioner's guilt by legislative fiat and identifies petitioner and its members as the objects of statutory sanctions. But even if it is assumed, arguendo, that the Board was free to make an independent determination, the Act denies petitioner a judicial trial and imposes sanctions on "easily ascertainable members of a group." For petitioner is accorded only an administrative hearing, not a judicial trial, and the Act imposes various sanctions on the organization identified by the registration order and on its members. Accordingly, if the registration order and the sanctions "inflict punishment", the Act meets the definition of a bill of attainder and is invalid under Art. I, sec. 9, cl. 3 of the Constitution. It also, in that event, violates Art. III, sec. 2, cl. 3 and the Fifth and Sixth Amendments.[25] Cf. *Flemming* v. *Nestor*, 363 U. S. 603; *Wong Wing* v. *United States*, 163 U. S. 228; *Lipke* v. *Lederer*, 259 U. S. 557.

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[25] Art. III, sec. 2, cl. 3 requires that the "trial of all crimes * * * shall be by jury," and shall be held in the State where committed. The Fifth Amendment requires a grand jury presentment or indictment "for a capital or otherwise infamous crime." The Sixth Amendment applies to "all criminal prosecutions." These provisions are relevant because a crime is, by definition, conduct which the state punishes.

Since *Cummings*, it has been clear that the imposition of civil disabilities may constitute punishment. Cummings stated (at 320): "The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of deprivation determining this fact." See also *Garner* v. *Board of Public Works, supra*, at 722; *Ex Parte Garland*, 4 Wall. (71 U. S.) 333; *Dent* v. *West Virginia*, 129 U. S. 114; *United States* v. *Lovett, supra*. As stated in *Trop* v. *Dulles*, 356 U. S. 86, 95-96:

> "Each time a statute has been challenged as being in conflict with the constitutional prohibitions against bills of attainder and ex post facto laws, it has been necessary to determine whether a penal law was involved, because these provisions apply only to statutes imposing penalties. In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose. The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a non-penal effect. The controlling nature of such statutes normally depends on the evident purpose of the legislature."

The "evident purpose" and effect of the Act are the imposition of punishment, not the accomplishment of "some other legitimate government purpose." This appears in several respects.

1. As we have seen (*supra*, pp. 26-27), registration by the organization, or by the member if he is not listed by the organization, entails self-defamation, self-ostracism, self-incrimination, and identification of the registrant and his associates as objects of onerous statutory sanctions and

public invidium. Thus registration is as punitive as the pillory or the arm-band.

As a realistic matter, registration is impossible since it is incompatible with self-preservation. Yet the Act provides astronomically cumulative fines and prison sentences for non-compliance with the registration order which the Act has made it impossible to obey. This is simply a roundabout way of fining and imprisoning those to whom the registration order is addressed.

2. A statute designed to control deleterious conduct rather than to punish would be confined to prevention of such conduct in the future. A registration order, however, outlaws the organization and thus prohibits it from engaging in any future activity, however innocent and beneficial. It is therefore as obviously penal as execution of an individual.

3. The Act's self-justification, stated in section 2(15), is to preserve the national security. The labelling requirements and the sanctions on the members have no rational relationship to, and are unnecessary for that objective. Their purpose is to injure the organization and its members even in the most innocuous of pursuits and regardless of personal innocence. (See *supra*, pp. 37-39, 54-56). Accordingly, the labelling provisions and the sanctions "[bear] no rational connection to the purposes of the legislation of which [they are] a part, and must without more therefore be taken as evidencing a Congressional desire to punish." *Flemming* v. *Nestor*, *supra*, at 617. Cf. *Garner* v. *Board of Public Works*, *supra*, at 722-23.

The number, quality and destructive impact of the Act's sanctions demonstrate their punitive nature. The members suffer much more than a single, limited "loss of position" imposed in order "to forestall future dangerous acts." *American Communications Association* v. *Douds*, 339 U. S. 382, 413, 414. The sanctions, moreover, are imposed solely because of association, without reference to the fitness

of the individuals to enjoy the denied privileges if judged on their own merits as individuals, and without regard to their lack of guilty knowledge.

A member of the organization can escape the disabilities by leaving it. But a forced deprivation of the privilege of association is itself punishment. As *Cummings* held (at 324): "These bills may inflict punishment absolutely, or may inflict it conditionally." If Congress were to place special disabilities on members of a particular religion the legislation would be invalid as a bill of attainder even though the members could avoid the disabilities by abandoning their church.

Moreover, if the members of the organization escape the Act's sanctions by leaving it, the organization thereby is destroyed. Hence the organization has no escape from the registration death sentence which the Act visits against it.

4. The Act purports to require the registration of Communist-action organizations and their members as participants in a foreign-controlled conspiracy to commit espionage, sabotage, treason, violent revolution, and other crimes on behalf of a foreign power. The Act thus establishes a mechanism to prosecute accused persons not for their alleged crimes, but for their failure to register themselves as criminals. The only rational explanation for this shift of the locus of punishment from the crime itself to failure to register as a criminal is that the Act seeks to punish Communists as criminal conspirators even though they are not and cannot be proved to be such. Thus the Act "is evidently aimed at the person or class of persons" and is punitive. *Flemming* v. *Nestor, supra,* at 614.

5. The legislative history [26] confirms our analysis.[27] It shows that the Act was designed to punish petitioner and its members for alleged conduct which was already criminal but which could not be proved against them in judicial proceedings.

The Act originated in the Mundt bill (H. R. 4422, 80th Cong., 1st Sess.), which would have required "any person who is a member of the Communist Party" to register as a foreign agent under criminal penalties for non-compliance.[28] However, the Congress was informed by Attorney

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[26] The bill enacted was the Senate rewrite, sponsored by Senator McCarran, of H.R. 9490, 81st Cong., 2d Sess. (Wood bill). The antecedent bills were: H.R. 4422, 80th Cong., 1st Sess. (Mundt bill); H.R. 5852, 80th Cong., 2d Sess. (Mundt-Nixon bill); H.R. 3342, 81st Cong., 1st Sess. (Nixon bill); S. 1194 and S. 1196, reported out as S. 2311, 81st Cong., 1st Sess. (Mundt-Ferguson-Johnson bill); S. 4037, 81st Cong., 2d Sess. (McCarran bill); H.R. 7595, 81st Cong., 2d Sess. (Nixon bill). Applicable committee reports are: H. Rep. 3112, 81st Cong., 1st Sess. (Conference Report on H.R. 9490); H. Rep. 1844, 80th Cong., 2d Sess. (on H.R. 5852); Sen. Rep. 1358, 81st Cong., 1st Sess. (on S. 2311); H. Rep. 2980, 81st Cong., 2d Sess. (on H.R. 9490); Sen. Rep. 2369, 81st Cong., 2d Sess. (on S. 4037). Applicable hearings are: Before Subcommittee on Legislation of Committee on Un-American Activities, H.R. 80th Cong., 2d Sess., on H.R. 4422 and H.R. 4581 (Feb. 1948), hereafter cited as *House Hearings;* Before Committee on Judiciary, Sen., 80th Cong., 2d Sess., on H.R. 5852 (May 1948), hereafter cited as *Senate Hearings;* Before Committee on Judiciary, Sen., 81st Cong., 1st Sess., on S. 1196 (April-June 1949); Before Committee on Un-American Activities, H.R., 81st Cong., 2d Sess., on H.R. 3903 and H.R. 7595 (March 1950).

[27] Legislative history is relevant, and may be crucial, in determining whether disabilities are penal or regulatory. *United States v. Lovett, supra.*

[28] Section 1 of the Mundt bill provided: "That notwithstanding the provisions of any other law any person who is a member of the Communist Party or of any organization, association, or other combination of individuals which is dominated, directed or controlled by the Communist Party, shall be required to register with the Department of Justice, Washington, District of Columbia, as an agent of a foreign principal." Mr. Mundt later proposed that his bill be amended, for purposes of administrative convenience, to require registration by the Party itself, rather than by the individual members. *House Hearings*, p. 4. The bill is quoted in these hearings at p. 2.

General Clark and others testifying before the legislative sub-committee of the House Committee on Un-American Activities, that this singling out of the Communist Party by name was probably unconstitutional as fiat legislation violating the due process and bill of attainder clauses. (*House Hearings*, pp. 19-20, 113, 115, 117, 209-11, 256, 432, 493-95.)

Because of these warnings, the Committee on Un-American Activities rejected the approach of the Mundt Bill and reported the Mundt-Nixon bill (H. R. 5852, 80th Cong., 2d Sess.), which first proposed the scheme of an administrative proceeding to determine registerable organizations. Representative Nixon, chairman of the legislative sub-committee of the Committee on Un-American Activities and co-author of the bill, explained to the Senate Judiciary Committee the reason for the change (emphasis added):

> "We felt also that the Mundt bill, in its original form, was not the proper approach to the problem for two reasons. In the first place, the bill specifically named the Communist Party of the United States and attempted to build its definitions around the name of the party. From having heard the witnesses before our committee, we came to the conclusion that naming the Communist Party by name and attempting to build the entire registration provisions around such a definition was an unconstitutional approach and *consequently the committee attempted to find a legislative device for meeting the problem in a constitutional manner* * * *" (*Senate Hearings*, p. 40.)
>
> "Our committee realizes that it would be a very dangerous thing to bring to the Congress and to the Senate a measure which went too far and which ran a great risk of being held unconstitutional by the Supreme Court because we realize that the Communists would make great capital of such a holding. For that reason alone our committee was particularly careful to attempt to find a constitutional answer to this problem. That is the reason that we do not name the Communist Party." (*Senate Hearings*, pp. 45-46.)

The House and Senate Committees also informed the Congress in their reports on the bill which became the Act:

> "To make membership in a specifically designated existing organization illegal *per se* would run the risk of being held unconstitutional on the ground that such an action was legislative fiat." (H. Rep. No. 2980, 81st Cong., 2d Sess., on H. R. 9490, p. 5; Sen. Rep. No. 1358, 81st Cong., 1st Sess., on S. 2311, p. 9.)

Accordingly, constitutional doubts alone prevented the authors of the Act from actually naming petitioner in the text of the Act. As we have shown, however (*supra*, pp. 61-62), they otherwise unmistakably identified petitioner as the intended victim.

The legislative history further shows that the Act was thought necessary because the Department of Justice was unable to prove that petitioner or its members were violating the criminal statutes against sedition and failure to register as foreign agents. Justifying the failure to use such existing legislation against the petitioner or its members, Attorney General Clark explained to the House Committee:

(a) As to the failure to prosecute under the Smith Act, 18 U. S. C. 2385:

> "By means of this statute, we are able to prosecute, provided we are able to obtain proof of force or violence * * *. Adequate proof against the individual in this regard is most difficult to adduce. In fact, the dignitaries of the American Communist Party have each denied that they have any aim or purpose to overthrow the Government by force or violence. Because of the shifting program and the character of the Party line, which can adjust itself to suit almost any limitation, we have found it more practical, effective, and much more speedy to proceed under other Federal statutes." (*House Hearings*, p. 21.)

(b) As to the failure to prosecute the Communist Party for not registering under the Voorhis Act, 18 U. S. C. 2386:

> "In order to force a registration or to prosecute any organization for failing to register under the act, we must prove in one or more of the combinations described in the act that the purpose or aim or one of the purposes or aims of the organization is to overthrow by force or violence the Government of the United States, or that the organization is engaged in civilian military activity prohibited by the statute or is subject to foreign control.
>
> "The fact is that the description of activities which make it obligatory for an organization to register is enough to brand the organization as subversive. As soon as the Voorhis Act was passed, * * * the Communist Party changed its constitution for the purpose of disaffiliating, as the announcement put it at the time, from the Communist International in order to avoid registering under what the party called the Voorhis Blacklist act. * * *
>
> "You have asked me what, in my opinion, is the true character and aim of the Communist Party in the United States, Mr. Chairman. The ultimate question, however, is not what my opinion may be, but what proof exists to successfully prosecute an individual or organization under the above statutes. Although the Voorhis Act has been on the books since 1940, no Attorney General has directed a prosecution under it." (*Ibid.*)

(c) As to failure to prosecute the Communist Party or its members for not registering under the Foreign Agents Registration Act, as amended:

> "By the provisions of this act, agents of foreign principals are required to file a registration statement with the Attorney General and to label political propaganda disseminated by them. The terms of the act are sufficiently broad to require registration by members of the Communist Party; provided, of course, that proof is available that they are operating in this country as agents of a foreign principal. This is a difficult task. * * * " (*Id.*, pp. 21-22.)

The sponsors of the legislation, accepting the Attorney General's testimony, informed Congress that the Act was necessary because the Communist Party could not be proved, by accepted legal standards, to be a seditious foreign agent. The Senate Committee stated that the Act was required by the "inadequacy" of existing legislation. It explained:

> "Congress has passed several laws which were directed specifically at curbing the subversive activities of communism in the United States, but they have proved largely ineffectual in accomplishing their purpose. As has been cited above, the Attorney General on February 5, 1948, testified before a committee of Congress that present laws were inadequate to deal with the subversive activities of the Communist threat in the United States.[29] There have been no significant additions to statutory law in this field since that date." (Sen. Rep. No. 1358, *supra*, p. 7.)[30]

The House Committee Reports contain passages to the same effect as to the "inadequacy of existing legislation" (H. Rep. No. 2980, *supra*, p. 2; H. Rep. No. 1844, *supra*, p. 5), and Representative Nixon made a similar explanation when testifying before the Senate Committee (*Senate Hearings*, pp. 41-43).

The Act has all the earmarks which historically characterize bills of attainder. They are the product of periods of savage political intolerance and hysteria. See Story's *Commentaries*, sec. 1344. They commonly represent a charge made by an angry and vindictive legislature of subverting the government or engaging in acts claimed to be prejudicial to the national security. See, *e.g.*, bills attainting the Earl of Strafford, 3 How. St. Tr. 1382, 1518; Earl of Clarendon, 3 How. St. Tr. 318, 392; Bishop of Rochester, 16 How. St. Tr. 323; Archbishop Laud, 4 How.

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[29] The reference is to the testimony of Attorney General Clark which we have just reviewed.

[30] The Report goes on to explain the "inadequacy" of each of the "present laws" along the lines of Attorney General Clark's testimony.

St. Tr. 598, 599. They are used where the evidence is insufficient to prove guilt or where the government is not satisfied with the severity of the punishment conventionally imposed for an offense. Woodeson, *Law Lectures* (1792) 653 ff.; Miller, *Lectures on Constitution of the United States* (1893) 584. As we have seen, these are precisely the considerations which inspired the Act and determined its form.

## VI. The Act is invalid because it denies a judicial trial by making the Board's determinations of fact conclusive in subsequent criminal prosecutions.

Once the Board's determination that an organization is a Communist-action organization becomes final, it supplies a predicate for criminal prosecutions of petitioner and its officers for failure to register petitioner, and for criminal prosecutions of petitioner's members for failure to register themselves, for holding employment forbidden to members, or for applying for passports. It is a necessary element of each of these offenses that petitioner be a Communist-action organization, since the various penalties apply only to such organizations, their officers, and members. Yet this element has been conclusively determined by the Board in an administrative proceeding and cannot be relitigated in the criminal trials.

Accordingly, as to this element of the crime, the Act denies a judicial trial, indictment by grand jury, as required by the Fifth Amendment, and trial by petit jury, as required by the Sixth Amendment and Art. III, sec. 2, cl. 3.

The invalidity of the Act in these respects is established by *Wong Wing* v. *United States*, 163 U. S. 228. The statute involved there authorized imprisonment at hard labor upon a non-jury finding that a Chinese alien was illegally present in the United States. The Court recognized that an alien's illegal presence could be determined without a jury and

even non-judicially for the purpose of excluding or expelling him. But it held that criminal penalties could be attached to the alien's illegal presence only if that fact were found according to procedures which satisfied the Constitution's provisions as to criminal trials.

The issue whether a criminal prosecution may be based on administrative determination of one or more elements of the offense arose, but was not reached by the Court, in *United States* v. *Spector*, 343 U. S. 169. The statute there provided criminal punishment for an alien's failure to comply with an administrative order of deportation. Mr. Justice Jackson's dissenting opinion, in which Mr. Justice Frankfurter joined, condemned the statute. The observations of the dissent (at 177-179) are applicable to the present Act:

> "This Act creates a crime also based on unlawful residence in the United States. The crime consists of two elements: one, an outstanding order for deportation of an alien; the other, the alien's willful failure to leave the country or take specified steps toward departure. The Act does not permit the court which tries him for this crime to pass on the illegality of his presence. Production of an outstanding administrative order for his deportation becomes conclusive evidence of his unlawful presence and a consequent duty to take himself out of the country, and no inquiry into the correctness or validity of the order is permitted.
>
> "The subtlety of the present Act consists of severing the issue of unlawful presence for administrative determination which then becomes conclusive upon the criminal trial court. • • • And if vital elements of a crime can be established in the manner here attempted, the way would be open to effective subversion of what we have thought to be one of the most effective constitutional safeguards of all men's freedom."

The Act is even more vulnerable than the statutes involved in *Wong Wing* and *Spector*. In those cases the ac-

cused had been a party to the administrative or non-jury proceeding. But under the Act, the member prosecuted for not registering, applying for a passport, or holding a forbidden job, is not a party to the administrative proceeding which determines that the organization is a Communist-action organization. Nevertheless, this determination, made without benefit of judge or jury, is conclusive in a prosecution against him.[30a]

Criminal penalties may be imposed for violations of administrative rules and regulations. And in such cases the accused may be limited to challenging the validity of the administrative regulation in a proceeding other than the criminal trial. *Yakus* v. *United States*, 321 U. S. 414. But those principles apply only to administrative rule-making, not to administrative adjudications as to the conduct or guilt of specific respondents. Justice Jackson pointed out this key distinction in *Spector* at 179.

## VII. The Act violates due process by establishing a Board which is necessarily biased and has an interest in the event.

"When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality." *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 50. "Trial must be held before a tribunal not biased by interest in the event." *Fay* v. *New York*, 332 U. S. 261, 288. "Fairness of course requires an absence of bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U. S. 133, 136.

In violation of these principles of due process, the Act exerts compelling pressure on the Board to decide against petitioner and gives the Board members a personal stake, financial and otherwise, in so deciding.

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[30a] Petitioner has standing to litigate this denial of the constitutional rights of its members. See *supra*, p. 50.

The Board is set up as a permanent agency, which originally had the sole function of identifying Communist-action organizations, their members and Communist-front organizations. Since Communist-action organizations are by definition tools of a Communist-action organization, they can exist only if the Board finds that there is an action organization.[31]

The Act and its legislative history contemplate the existence in the United States of only one Communist-action organization, the petitioner (see *supra*, pp. 60-62). And even if Congress had considered that there might be more than one, it is certain that it believed petitioner to be the principal organization of that character.

It is clear, therefore, that if the Board had decided that the petitioner was not a Communist-action organization, it would have prevented the Act from being applied to any organization.

This fact has been recognized by the Attorney General and the Board itself. Although the case against the petitioner was pending before the Board for over two years, the Attorney General instituted no proceeding during that time against any other organization. Yet only two days after the Board issued its registration order against petitioner, the Attorney General filed twelve petitions with the Board, all charging that the organizations named were Communist-front organizations controlled by the petitioner as a Communist-action organization. All subsequent petitions filed by the Attorney General have charged the accused organizations with being "fronts" of or "infiltrated" by petitioner. In the ten years that the Act has been in existence, only one organization, the petitioner, has been

[31] After the registration order was issued, the Communist Control Act gave the Board the additional function of identifying Communist-infiltrated organizations. The definition of the latter also presupposes the existence of a Communist-action organization (sec. 3(4A)).

charged before the Board with being a Communist-action organization.

The first two chairmen of the Board both advised Congressional appropriation committees that the continued functioning of the Board depended entirely upon the entry of a registration order against petitioner. The first chairman of the Board advised the appropriations committee:

> "Now, of course, the fundamental agency that covers all of these 130 organizations [on the Attorney General's list of 'subversive organizations'] is the Communist Party because they are all splinter groups from the Communist Party, and if the Communist Party is not found to be subversive then this splinter group cannot be so found." [32]

The second chairman of the Board informed the committee (emphasis supplied):

> "The Attorney General advises that some 25 petitions will be filed with the Board during the balance of this fiscal year *in the event the Board's final decision orders the Communist Party so to register.*" [33]

Thus it appears that the Board was told, in *ex parte* conversation with the only litigant empowered to initiate proceedings before it, that it would get additional business only if it decided for that litigant in the pending case against petitioner.

The following colloquy regarding the case against petitioner also occurred between a member of the appropriations sub-committee and the second chairman of the Board:

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[32] Hearings before Subcommittee of Committee on Appropriations, H. R., 81st Cong., 2d Sess., on Second Supplemental Appropriations Bill for 1951, p. 263.

[33] Hearings on Independent Offices Appropriations for 1954 before Subcommittee of Committee on Appropriations, H. R., 83rd Cong., 1st Sess., p. 188 (Feb. 23, 1953), and see also at pp. 190, 196-98.

"Mr. Cotton: The case is of paramount importance, upon which the whole structure rests, and without which there can be no structure.

"Mr. Brown: Yes."[34]

The "structure," of course, was the Board and the Act.

As its chairmen recognized, the Board, therefore, could not have decided in favor of the petitioner without rendering itself *functus officio* and, in effect, repealing the Act. It is inconceivable that an administrative agency would have the temerity to frustrate the will of Congress by repealing the Act which created it. Accordingly, irresistible pressure was exerted on the agency to decide in the only way which would preserve the Act and the agency—that is, against the petitioner.

The pressure on the Board to preserve itself and the Act by deciding against petitioner was intensified by considerations of personal interest. The members of the Board had to rule against petitioner if they were to have any further business and thus keep their jobs, salaries and the appointment patronage available to them as heads of an agency. Yet *Tumey* v. *Ohio*, 273 U. S. 510, flatly holds that it is a violation of due process to commit adjudication to one who has either a financial or official stake in the outcome of the case. The Court stated (at 532):

> "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law."

The jobs of the members of the Board staff, including those who assisted the Board in preparing the decision.

[34] Id., pp. 198-99. For testimony to the same effect given by Mr. Brown a year earlier, see Hearings on Independent Offices Appropriations for 1953 before Subcommittee of Committee on Appropriations, H. R., 82d Cong., 2d Sess., pp. 245, 248 (Jan. 16, 1952).

were also staked on a decision adverse to the petitioner. The Board's reliance on such interested staff members in reaching its decision was at least as unfair as if it had utilized findings prepared by the active prosecutors for the government after an *ex parte* discussion which the petitioner had no opportunity to meet. Yet the latter procedure was held in *Morgan* v. *United States*, 304 U. S. 1, 22, to vitiate adjudication as "a vital defect."

Under the circumstances, it is not surprising that the bias of two members of the Board manifested itself in indecorous conduct during the proceedings. After issuance of the hearing panel's recommended decision, and while the proceeding was pending before the full Board, Peter Campbell Brown, chairman of the Board and the hearing panel, appeared with the Board's general counsel on a radio and television program, commented on the evidence, expressed delight with the recommended decision, and stated the conviction that petitioner is a Communist-action organization (R. 197-98, 206-08).

During the course of the administrative hearing, likewise, Board and hearing-panel member McHale made a speech before the Women's National Democratic Club in which she discussed the proceeding and expressed prejudgment on issues in the case (R. 187-90, 193-96).

In the *Fay* case *supra*, at 288, the Court recognized that a system of jury selection "could be so manipulated as to call a jury before which defendants would have so little chance of a decision on the evidence that it would constitute a denial of due process." The statute here so manipulates the character of the Board that petitioner had no chance at all of a decision on the evidence.

## VIII. The Act violates due process because of its vague and irrational standards.

Under section 3(3), a Communist-action organization is distinguished by two characteristics: (a) foreign control and (b) advancement of the objectives of the world Communist movement "as referred to in section 2." We have already seen (*supra*, pp. 30-31) that section 2 is thoroughly ambiguous and vague as to the nature of these objectives. This fact in itself unsettles the ultimate determination to be made by the Board.

The defect is compounded by section 13(e), which directs the Board to take eight criteria into consideration in determining whether an organization meets the section 3(3) definition. As to foreign control, the criteria are nebulous, circumstantial and largely irrelevant. As to objectives, only three of the eight criteria ("directives and policies," "nondeviation" and "secret practices") relate to objectives of any kind, and none of these is pertinent to any of the various meanings of objectives which can be extracted from section 2. We will examine each of the criteria.

*"Directives and policies."* Section 13(e)(1) directs the Board to consider "the extent to which" the accused organization formulates and carries out its policies or performs its activities "pursuant to directives or to effectuate the policies" of the foreign government which directs and controls the world Communist movement described in section 2.

This section does not require the Board to consider whether the organization seeks to establish a "Communist totalitarian dictatorship" as described in section 2, much less to use the unlawful means to which section 2 refers. Thus the section is not relevant to either of the two possible definitions of the objectives component. On the contrary, the section authorizes the Board to consider the fact that an organization seeks to effectuate Soviet policies on *any* subjects as evidence that the organization operates to advance the particular objectives, whatever they are, referred to in section 3(3).

*"Non-deviation."* Section 13(e)(2) directs the Board to consider "the extent to which" the accused organization's views and policies "do not deviate from those of" the Soviet Union. The section does not confine the inquiry to Soviet views and policies on particular matters. Accordingly, non-deviation from any of the countless views expressed by the Soviet Union becomes evidence of foreign control and of a purpose to advance the objectives ascribed to the world Communist movement by section 2.

This test is irrational in several respects.

(1) It permits the advancement of the seditious objectives described in section 2 to be established by proof of "non-deviation" from views and policies which are either unrelated to the national interest or are in fact calculated to promote the welfare of the United States and its people. The court below acknowledged that this standard has no relevancy to the objectives component of the section 3(3) definition, asserting that "the point" of the test is "foreign domination" (Ops. 45).

(2) Identity of views cannot be a rational criterion of Soviet control if the views involved are not peculiarly characteristic of the Soviet Union, if they are widely held by non-Communists, if they are demonstrably true, or if they are arrived at independently by the accused organization. Yet the standard ignores these factors. Under this obscurantist test, the stigma of foreign control and sedition can be avoided only by adopting views which are demonstrably false if the Soviet Union has adopted views which are demonstrably true. In the area where views may reasonably differ, the stigma can be avoided only by mechanically opposing any position taken by the Soviet Union, regardless of its merits, thus subjecting oneself to Soviet control in reverse.[35]

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[35] As we later point out (*infra*, pp. 111-17), the Board applied all the irrational features of the non-deviation test, predicating guilt on views which concededly may be in the national interest, demonstrably true, widely held, and independently arrived at.

*"Financial Aid."* Section 13(e)(3) directs the Board to consider "the extent to which" an accused organization "receives financial or other aid, directly or indirectly, from or at the direction of the foreign government or organization that directs, dominates and controls the world Communist movement described in section 2."

It is obvious that a contribution to a cause which the contributor deems worthy of support does not thereby subject the recipient to the "direction, domination or control" of the contributor. Nor does it make the recipient the agent of the contributor "to advance the objectives" of the latter, let alone to advance specific objectives. History and experience provide many examples of aid by governmental and non-governmental bodies to organizations which they do not "dominate or control" and which operate to promote their own objectives, not those of the donor. Similarly, it is well known that bad people contribute to good causes, and vice versa.

Of course, the giving or withholding of financial assistance may be a lever by which the contributor secures and exercises control of the recipient. In that case, the relevant consideration is not the bare fact of aid, but the terms and conditions, if any, on which it is given. But, as the court below acknowledged (Ops. 46), section 13(e)(3) does not direct the Board to consider the relevant factor of terms and conditions, but focuses exclusively on the irrelevant factor of aid.

*"Instruction and Training."* Section 13(e)(4) directs the Board to consider "the extent to which" an accused organization "sends members or representatives to any foreign country for instruction or training in the principles, policies, strategy or tactics" of the world Communist movement.

This test is irrational because it does not require a showing that the accused organization is obliged to or does conform to what is taught.

*"Reporting."* Section 13(e)(5) directs the Board to consider "the extent to which" an accused organization "reports to" the Soviet Union or the foreign organization which assertedly controls the world Communist movement. This test is irrational because it makes "reporting" proof of foreign control without regard to the nature and content of the "report," the purpose for which it was given, or its use, if any, by the recipient. Labor, business, religious, scientific, cultural and political organizations customarily receive reports at their gatherings as a means of exchanging and sharing knowledge, experiences, and ideas. Under the preposterous theory of this subsection, those who report at such gatherings furnish evidence that they are "dominated and controlled" by the sponsoring organization.

*"Discipline."* Section 13(e)(6) directs the Board to consider "the extent to which" the organization's "principal leaders or a substantial number of its members are subject to or recognize the disciplinary power" of the alleged foreign principal. This standard permits the condemnation of the organization upon proof of the disciplinary status or subjective attitude of some of its leaders or members, notwithstanding that they may be an unrepresentative or dissenting minority and that the organization itself is completely independent.[36]

*"Secret Practices."* Section 13(e)(7) directs the Board to consider "the extent to which" the accused organization

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[36] In condemning a similar clause in the Mundt-Nixon bill, the antecedent of the act, Mr. John W. Davis wrote the Senate Judiciary Committee in response to its request for his comments: "But assume, if you will that the organization contains some members or even some 'leaders' who * * * recognize the disciplinary power of such foreign government. * * * how many or what proportion of such individuals are to be held sufficient to color the entire organization? What is to be the status of a dissenting member, a minority of members or even a majority who do not hold such views? Are they and the organization to be condemned on the principle of *noscitur a sociis*, i.e., guilt by association?" *Senate Hearings*, p. 421.

conceals the identity of its members and the contents of its records and otherwise operates on a secret basis "for the purpose of concealing foreign direction, domination or control, or of expediting or promoting its objectives."

This test is incapable of rational application. It makes "secret practices" relevant only if employed for the purpose of concealing foreign control or promoting the organization's objectives. The first of these purpose limitations involves circular reasoning, since foreign control is one of the ultimate facts to be established under section 3(3). Obviously, a standard whose application requires proof of an ultimate fact cannot be used to determine the existence of the ultimate fact. As to the second purpose limitation, if the reference is to promotion of the objectives attributed to the world Communist movement by section 2, then the same circuity exists. If on the other hand, "objectives" embraces all possible organizational purposes, then the secrecy test has no rational relation to the ultimate fact to be proved—*i.e.*, advancement of the particular objectives referred to in section 2.

"*Allegiance.*" Section 13(e)(8) directs the Board to consider "the extent to which" the accused organization's "principal leaders or a substantial number of its members consider the allegiance they owe to the United States as subordinate to their obligations" to the Soviet Union or the foreign organization which allegedly controls the world Communist movement.

The "allegiance" test is completely subjective. It directs an inquiry into a pure state of mind. Moreover this mental state may be entirely the product of a voluntary ideological conviction. Accordingly, the mental state does not tend to show the existence of foreign control.

The section also assumes the facts prerequisite to the state of mind into which the Board is to inquire. It does not direct the Board to determine whether any of the organization's leaders or members owe obligations to the

Soviet Union or a foreign organization. It assumes that they do owe such obligations and confines the Board's inquiry to whether they "consider" these obligations subordinate to their allegiance to the United States. Furthermore, this section, like that on "discipline," imputes to the organization the state of mind of its "principal leaders or a substantial number of its members" although they may be an unrepresentative or dissenting minority and though the organization itself is completely loyal.

The standards of section 13(c) are vague, as well as irrational. The Act nowhere indicates whether a registration order must be supported by adverse findings under all eight standards, or whether something less is sufficient. In this connection it is significant that the Mundt-Nixon bill, which was the antecedent of the Act, directed the Board to consider "some or all" of the evidentiary standards which it contained. The vagueness of this language was criticized as unconstitutional by Charles Evans Hughes, Jr., who was invited by the Senate Judiciary Committee to comment on the pending measure (*Senate Hearings*, p. 417). Seth Richardson, who later served as the first Chairman of the Board, commented in response to the Committee's invitation that this language "leaves the measure of the envelopment of the particular organization in any of the activities noted, to depend largely on the particular cast of mind of whatever person the bill proposes shall reach the conclusion" (*id.*, p. 445). It was apparently to avoid these criticisms that the words "some or all" were omitted from the bill as enacted. Clearly, however, this omission does not cure the defect, but only adds ambiguity to uncertainty.

The obscurity which thus envelops section 13(c) is made even more impenetrable by the phrase "the extent to which," which prefaces each of the eight standards. In commenting on this phrase, which appeared in the original Mundt-Nixon bill, John W. Davis stated: "Or take the introductory phrase itself as used throughout—'the

extent to which, etc.'—what are the limits which these words envisage? To how great an extent, how customary a practice, how definite, pervasive, or continuous a policy? There would seem to be no room here for the application of any doctrine of *de minimis*." Mr. Davis concluded that the vagueness and uncertainty of the standards of the Mundt-Nixon bill vitiated the entire bill. (*Id.*, pp. 420-22.)

The foregoing examination of section 13(c) shows that it perverts the function of the orthodox legislative enumeration of factors to be taken into account by an administrative agency in reaching its determination. The legitimate role of such an enumeration is to give definite content to a generalized ultimate standard."[37] Section 13(c), however, does nothing to cure the vagueness of the ultimate standard set forth in the objectives component of section 3(3). Moreover, it unsettles the reasonably definite and meaningful standard contained in the control component. Indeed, the court below relied on section 13(c) to support its construction of the control component as being satisfied with nothing more than voluntary adherence to Soviet views (Ops. 93). Of course, if this is the intended meaning of the control component, then it too is hopelessly vague, as well as completely at odds with the First Amendment. On the other hand, if the control component refers to control in its meaningful and orthodox sense, then the irrational and vague standards of 13(c) authorize petitioner's conviction of one thing on proof of another. In any event, the latter holds true for the objectives component.

Congress has the power to prescribe rules of evidence, including presumptions, in judicial or administrative pro-

[37] For examples of legislation in which legislative guides were employed to give more definite content to generalized ultimate standards, see the statutes involved in *Yakus* v. *United States*, 321 U. S. 414; *Opp Cotton Mills, Inc.* v. *Administrator*, 312 U. S. 126; *Hampton, Jr. & Co.* v. *United States*, 276 U. S. 394; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381.

ceedings. But the due process clause limits that power by forbidding the substitution of legislative fiat for proof. As stated in *Tot* v. *United States*, 319 U. S. 463, 467:

> "But the due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress or that of a state legislature to make the *proof* of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated * * *. Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience."

And as stated in *Manley* v. *Georgia*, 279 U. S. 1, 6:

> "A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause."

Accordingly, the legislature may validly establish a presumption of fact only if there is a rational connection between the fact to be proved and the ultimate fact to be presumed. *Manley* v. *Georgia*, *supra*; *Adler* v. *Board of Education*, 342 U. S. 485, 496; *Tot* v. *United States*, *supra*; *Western & Atlantic Railroad* v. *Henderson*, 279 U. S. 639; *McFarland* v. *American Sugar Co.*, 241 U. S. 79; *Bailey* v. *Alabama*, 219 U. S. 219. As we have shown, section 13(e) does not meet this requirement.

The court below held that any defect in the section 13(e) standards is not fatal because the "catalog in Section 13(e) is not exclusive" (Ops. 42). That circumstance, if true, does not save the Act. The fact that the Act authorizes the Board to decide on the basis of irrational standards is enough to invalidate it. As stated in *Bailey* v. *Alabama*, 219 U. S. 219, 235 (emphasis in original):

> "It is not sufficient to declare that the statute does not make it the *duty* of the jury to convict, where there is no other evidence but the breach of the contract and the failure to pay the debt. The point is that, in such case, the statute *authorizes* the jury to convict. It is not enough that the jury may not accept that evidence as alone sufficient; for the jury may accept it, and they have the express warrant of the statute to accept as a basis for their verdict. And it is in this light that the validity of the statute must be determined."

The fact is that the Act is invalid if any one of the standards of 13(c) is irrelevant to the ultimate issue. This appears not only from *Bailey* v. *Alabama*, but from the elementary logic that if any one of the propositions from which a conclusion is drawn is not valid, then the conclusion itself has not been demonstrated valid.

Section 13(c) and the objectives component of section 3(3) also violate due process because the vagueness which we have described strips them of any ascertainable standard for judgment. Such an unfettered delegation of power violates due process and Article I, section 1 of the Constitution. *Burstyn* v. *Wilson*, 343 U. S. 495; *Winters* v. *New York*, 333 U. S. 507; *Niemotko* v. *Maryland*, 340 U. S. 268; *Stromberg* v. *California*, 283 U. S. 359; *Herndon* v. *Lowry*, 301 U. S. 242; *Connally* v. *General Construction Company*, 269 U. S. 385; *Lanzetta* v. *New Jersey*, 306 U. S. 451; *Panama Refining Co.* v. *Ryan*, 293 U. S. 188.

In those cases, criminal and regulatory statutes containing far more definite and ascertainable standards than section 13(c) were invalidated for their failure to measure up to this essential requirement of due process. As the cited cases also show, narrowly drawn and definite standards are of special importance where, as here, the conduct subject to regulation lies in the area guarded by the First Amendment.

In *Winters*, the Court stated (at 518):

> "The present case as to a vague statute abridging free speech involves the circulation of only vulgar magazines. The next may call for decision as to free expression of political views in the light of a statute intended to punish subversive activities."

This is the "next case" anticipated in *Winters*. If political expression is to be protected by the same due process standard that safeguards vulgar magazines, the Act must be condemned for failure to meet that standard.

## IX. The Act violates due process because it is impossible under Section 5 of the Communist Control Act to determine who are members of the petitioner.

The Act makes it necessary for petitioner and its officers to determine who are members of petitioner. If the order of the Board becomes final, petitioner and its officers will be required to list the names of all the members in petitioner's registration statement (sec. 7(d)(4)). Other persons must determine whether they are members of petitioner in order to know whether they may lawfully hold certain jobs or apply for passports. The Board must make the same determination in proceedings to compel alleged members to register themselves upon failure of the organization to file a registration statement listing their names.

Section 5 of the Communist Control Act (50 U. S. C. 844) sets forth criteria for determining membership in the Communist Party. In preparing a registration statement, petitioner and its officers must apply these criteria if they are to avoid the criminal penalties of section 15 of the Act

for failure to list a member or for making a false listing.[38] Other persons must similarly apply the section 5 criteria if they are not to incur the penalties of section 15 for engaging in conduct forbidden to members of Communist-action organizations. And the Board must apply the criteria in administrative proceedings against alleged members.

Section 5, however, prescribes such vague and irrational criteria that it is impossible for petitioner, its officers or others to determine the identity of petitioner's members. Moreover, the application of these criteria requires a knowledge of facts which petitioner, its officers, and possible "members" cannot have or obtain. Section 5 thus unsettles and invalidates the Act as a whole, including the registration requirements.

Section 5 provides that "in determining membership or participation in the Communist Party or any other organization defined in this Act, or knowledge of the purpose or objective of such party or organization, the jury, under instructions from the court, shall consider evidence, if presented" as to thirteen enumerated criteria. Even before examining these criteria, the introductory provision which we have quoted demonstrates that the entire section is invalid for two reasons.

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[38] It cannot logically be argued that the criteria of section 5 should be construed to apply only to cases where the membership of the accused is in issue, and hence would not apply in a prosecution of petitioner's officers for failure to list all of the members. Such a reading would anomalously establish a dual test of membership, under which an individual could be found to be a member for the purposes of self-registration and the sanctions on members, but not a member for the purposes of registration by the organization. In any event, the criteria of the section are plainly applicable in prosecutions of alleged members. Hence petitioner is presently injured by the fact that the criteria make it dangerous for any person to associate or have business dealings with petitioner or to express views similar to those held by it. This circumstance alone gives petitioner standing to litigate the validity of the section. See *supra*, p. 51.

In the first place, the quoted provision does not make the rule of evidence enunciated in section 5 applicable to prove membership in all organizations, but only in the Communist Party and in organizations which seek to effectuate the violent overthrow of the government. Obviously, there can be no rational basis for this classification.

Secondly, it appears from the introductory provision of section 5 that evidence as to one or more of the thirteen criteria of that section is admissible to prove indiscriminately (1) membership in petitioner, (2) "participation" in the petitioner, and (3) knowledge of the purpose or objective of the petitioner. Surely the identical criteria cannot rationally prove all three of these relationships, which involve entirely different concepts. Participation may exist without membership; knowledge of purpose may exist without either membership or participation; and membership or participation may exist without knowledge of purpose. *A priori*, before examining the individual criteria, it is apparent that a system of proof which equates membership, participation and knowledge of purpose must either be wholly irrational or based on vague and indefinite evidentiary standards or both.

Turning to the thirteen criteria themselves, it should first be noted that none of them is limited as to time. Any conduct within one of the criteria serves as evidence of *present* membership irrespective of the fact that it occurred in the remote past. Such a rule of evidence is patently irrational.

Under paragraphs (5) and (7) of section 5, a court and jury may infer membership in petitioner from the fact that the individual in question has acted in *any* capacity "in behalf of" petitioner or "has been accepted to his knowledge • • • as one to be called upon for services" by petitioner's officers or members. Under these paragraphs the fact that a person supplies professional or business services to the petitioner or that his services are recommended by the peti-

tioner or its members furnishes evidence that he is a "member" of petitioner. Under paragraph (2), a person who lends money to petitioner, regardless of the purpose and terms of the loan (including, for example, a mortgagee, or seller of goods on a running account) likewise furnishes such evidence.

Under paragraphs (6) and (11) membership may be inferred from the fact that the individual in question has "conferred with" officers or members of petitioner "in behalf of any plan or enterprise" of petitioner or "has advised, counseled or in any way imparted information, suggestions [or] recommendations" to any of petitioner's officers or members "in behalf of the objectives" of petitioner. As every one knows, petitioner's "plans," "enterprises" and "objectives" include various social reforms, such as the promotion of the trade union movement, the enactment of improved social security and welfare legislation, the elimination of discrimination against the Negro people, etc. Yet under paragraphs (6) and (11) any person who consults or advises with any officer or member of petitioner with reference to these "plans," "enterprises" or "objectives" thereby furnishes evidence that he is a member of petitioner.

Paragraphs (4), (9), (10), (11), (12), and (13) eliminate contact or communication between the individual in question and officers or members of the petitioner as a requisite to evidence of membership. Under these paragraphs, the holding of views similar to those expressed by Communists or even an attitude of receptivity to the views of Communists is made evidence of membership. These paragraphs permit a finding of membership from the fact that the individual in question:

1. Has executed plans of any kind of the petitioner (paragraph (4)).

2. Has prepared or circulated any written material "in behalf of the objectives and purposes" of petitioner (paragraphs (9) and (10)).

3. Has imparted information, suggestions, or recommendations to anyone "in behalf of the objectives" of the petitioner (paragraph (11)).

4. Has indicated in any way "a willingness to carry out in any manner and to any degree the plans, designs, objectives, or purposes" of the petitioner (paragraph (12)).

5. Has "in any other way participated in the activities, planning, actions, objectives, or purposes of the organization" (paragraph (13)).

Under these paragraphs, anyone who has ever expressed a view or taken a position on any public question which is similar to the view or position taken by petitioner, thereby furnishes evidence of his membership in petitioner. If he so much as attends a public meeting called by petitioner or purchases a piece of its literature, he may be found, by that fact, to have indicated a willingness to carry out its plans, and hence to have supplied evidence of "membership." Indeed, since petitioner holds meetings for the purpose of attracting the public and publishes literature for the purpose of securing readers, attendance at a meeting or the purchase of literature ipso facto executes petitioner's "plan" to gain an audience.[39]

Under paragraph (8), a court and jury may consider as evidence of membership the fact that an individual has communicated in any way or form "orders, directives or plans" of the petitioner. A newspaper reporter who writes a story from one of petitioner's press releases, reports a

[39] Commenting on section 5, the *Newark Star Ledger* stated, "Such a law might be used to herd into prison thousands of persons who have never been Communists and who have no basic sympathy with the Communist conspiracy." 100 Cong. Rec. 15110. The *Wall Street Journal* said, "One of these provisions is that it would be evidence of cooperation with the Communist groups if any person has indicated a willingness to carry out aims and purposes of the party. For all we know the Communist Party may be against juvenile delinquency. So is this newspaper." *Id.*, 15111.

speech by one of its officers, or purports to expose its plans thereby furnishes evidence of his "membership" in petitioner.

In short, under the criteria of section 5, almost anyone may be found to be a member of petitioner.[40] For this reason alone the officers of petitioner cannot possibly comply with the membership listing requirement. Moreover, they cannot even attempt to apply the criteria of section 5 because these involve considerations of the past and present

[40] Counsel for petitioner apparently satisfy almost all of the thirteen criteria of membership merely by fulfilling their professional responsibilities in this case. In preparing our briefs and making our arguments, we have "executed * * * plans of any kind" of the petitioner, namely its plan to have the respondent's order set aside and thereby to survive (4th test). We have by our appearance before the Board and the courts "acted * * * in any * * * capacity in behalf of" petitioner (5th test). Naturally, we have "conferred with officers or other members" of our client, again "in behalf of" the "plan or enterprise" of having the respondent's order set aside (6th test). By preparing our briefs, including this one, we have "prepared documents" in behalf of the petitioner's "objectives and purposes" (9th test). By delivering our briefs to the courts as well as by giving copies to other lawyers, we have "delivered to others material * * * of any kind in behalf of" the petitioner (10th test). We have "counseled" and otherwise "imparted information, suggestions, recommendations" about this case to officers of the petitioner and to the Court ("anyone else") in behalf of petitioner's objective to have the respondent's order set aside (11th test). We have, by accepting this case, "indicated by word, action, conduct, writing or in any other way a willingness to carry out in any manner and to any degree the plans, designs, objectives or purposes of the" petitioner (12th test). By our participation in this case we have "in any * * * way participated in the activities, planning, actions, objectives, or purposes of the" petitioner (13th test). If our fee is too modest, it may be that we have made a "financial contribution * * * in any * * * form" (2d test). And because lawyers are obliged to accept instructions from clients, perhaps we have, by representing petitioner, made ourselves "subject to the discipline of the organization in any form whatsoever" (3d test). If our client is sufficiently impressed by our legal abilities to recommend our professional services to those of its members who need lawyers, we meet the seventh test.

conduct and state of mind of others which petitioner and its officers cannot conceivably know or ascertain. How, for example, is an officer to know all the individuals who ever "indicated * * * in any * * * way a willingness to carry out in any manner and to any degree the plans, designs, objectives or purposes" of petitioner (paragraph (12))?

If the order of the Board becomes final, petitioner and its officers can be punished by a $10,000 fine and five years' imprisonment for each member omitted from the registration statement (section 15 (b) of the Act). But since they have no way of knowing whom to register, they are hopelessly caught between the criminal penalties for each omission of a member and the penalties for a false listing.

Any person whom the petitioner might register as a member would immediately incur public infamy and the ruinous sanctions of the Act. True, he could request the Attorney General to remove his name from the registration list on the ground that he was not a member, and institute a proceeding before the Board for that purpose if the Attorney General failed for five months to act favorably (secs. 7(g) and 9(b)). However, it is difficult to conceive that the individual so listed could prove that he was not a member in the light of the criteria of section 5, and particularly in view of paragraph (1) of that section which makes the appearance of his name on petitioner's registration statement evidence of his membership.

The situation of such an individual is scarcely less difficult even if he convinces the Attorney General or the Board that he is not a member and therefore should have his name stricken from the list. For in view of the repeal of 5(c) and 6(c) of the original Act by 7(c) of the Communist Control Act (50 U. S. C. 784(c), 785(c); 68 Stat. 778), he will have incurred the employment and passport sanctions of the Act from the moment that the registration statement was filed until the time when his name is stricken from the list. The patient dies before the doctor arrives.

A person whose name is not registered by petitioner is in a dilemma. He cannot possibly determine from section 5 whether he will be found to be a member or not. He must therefore choose between the risk of prosecution for not registering, and the certainty of losing his livelihood and becoming a pariah by registering.

If such an individual decides not to register, he must of course take every precaution to avoid doing anything that can be used as evidence of membership. He must not express a view on any question until he has first ascertained petitioner's position (a task which he undertakes at the risk of thereby supplying evidence that he is a member). Thereafter, he must either give voice to the contrary opinion or remain silent. He must abstain from association or communication with any person who is a member of petitioner. And since he has no way of determining who may be found to be a member, he must shun association or communication with all men. Prudence therefore dictates that he live the life of a hermit. But there is no safety for him even in that course. Since the criteria of section 5 are unlimited as to time, he may be dragged from his hermitage to be tried and convicted on the basis of some incident in his remote past.

Our description of the consequences of the membership criteria of section 5 is not the product of a lawyer's imagination run riot. Congressional committees and loyalty boards have blasted the reputations and ruined the careers of hundreds of individuals and frightened thousands of others into silence by using precisely the same criteria to identify and expose "Communists." The authors of the Communist Control Act merely copied this technique of McCarthyism, wrote it into law, and implemented it with the intolerable sanctions of the Act.

## PART TWO: THE MISCONSTRUCTION AND MISAPPLICATION OF THE ACT

### I. The Board and the court below misconstrued and misapplied the "foreign control" component of section 3(3).

#### A. The Meaning of Foreign Control.

The section 3(3) definition of a Communist-action organization requires the presence of two components, the first of which is that the organization be "substantially directed, dominated, or controlled" by the Soviet Union.

This postulates a relationship in which the Soviet Union exercises a power to exact compliance with its demands from a domestic organization. It is not satisfied by an organization's voluntary adherence to Soviet policies or objectives. "The requirement of control, in the absence of legal title or beneficial ownership, is not satisfied by acquiescence or by business considerations without binding force." *Atlantic City Electric Co.* v. *Commissioner*, 288 U. S. 152, 153-54. "Control" means "power or authority to manage, direct, superintend, restrict, regulate, direct, govern, administer, or oversee." Black's Law Dict. (4th ed.) 399; *Pacific Employer Ins. Co.* v. *Hartford Accident & Indemnity Co.*, 228 F. 2d 365, 368; *American Auto Trimming Co.* v. *Lucas*, 37 F. 2d 801; *Mid-Continent Petroleum Corp.* v. *Vicars*, 221 Ind. 387, 396, 47 N. E. 2d 972, 975; *Re Tyler*, 135 Neb. 667, 669, 283 N. W. 512, 514.

Control, therefore, presupposes the existence of some significant means whereby the superior can compel compliance with its requirements or at least impose sanctions for non-compliance. Absent any such means, control is not present. If conformity nevertheless exists, it is voluntary, not the product of control.

Control exists in the relationships of superior officer and soldier, employer and employee, principal and agent, controlling stockholder and corporation, because in each instance there is a mechanism for exacting conformity. But

control does not exist in the cases of the parishioner who attempts to live in accordance with the principles preached by his minister, the economist who is a disciple of Keynes, the man who out of friendship mows the lawn of his vacationing neighbor, or the boy who imitates the batting stance of a baseball star. These involve no control because there is no significant mechanism to enforce compliance, even though there is adherence to another's precepts, the serving of another's interests, or the copying of another's actions.

The Act requires not merely a latent power to control, but its exercise. This necessarily means that the subordinate must act on orders from the superior. Ordinarily, too, a control situation involves features designed to insure satisfactory compliance with the orders, such as the supervision of an employee by an employer or the reporting by a soldier to his commander.

This principle, that the first component of section 3(3) involves compliance which can be exacted rather than voluntary conformity, derives not only from the natural meaning of the terms "direction, domination or control," but also from their context in the Act. An organization will meet the second component of section 3(3) of the Act, *i.e.*, will operate primarily for the purpose of advancing Soviet objectives, either because it has to or because it wishes to. That is, the second component involves voluntary conformity at a minimum. Accordingly, if the first component requires no more, it is redundant.[41]

That section 3(3) refers to an enforceable control also appears from section 2(5), which describes Communist-

[41] On the other hand, the second component cannot be considered redundant on the theory that a controlled organization will necessarily promote the objectives of the controller. For the second component is satisfied only if the organization promotes *certain* objectives of the controller, i.e., the particular objectives described in section 2, as distinguished from other possible objectives.

action organizations as "organizations which are not free and independent organizations, but are sections of a world-wide Communist organization and are controlled, directed, and subject to the discipline of the Communist dictatorship of such foreign country." Finally, imposition of the Act's severe sanctions for a conformity which stems from nothing more than ideological agreement would magnify the First Amendment objections to the Act.

In sum, the foreign control component requires proof that the Soviet Union (1) issues orders to the domestic organization and (2) has some means for enforcing compliance with these orders. Furthermore, control will normally be accompanied by supervision and reporting to insure compliance with the orders. The Modified Report shows on its face that there is no evidence of any of these factors, at least subsequent to petitioner's disaffiliation from the Communist International in 1940.

### B. The Absence of Foreign Control As Correctly Defined Appears From the Decision Below and the Modified Report.

First, the Modified Report cites no evidence that petitioner receives any orders from the Soviet Union. Abandoning the erroneous finding of the original Report (R. 146-47), it makes no finding that petitioner receives directives from abroad. In fact, the Modified Report cites no instance of a claimed Soviet directive to petitioner after petitioner's 1940 disaffiliation from the Communist International. The Modified Report does find (R. 2580) that petitioner "is still pursuing policies enunciated by the Soviet Union through the Communist International," which has been defunct since 1943. This, however, is nothing more than a finding of voluntary agreement, which, as we have seen, does not constitute control.

Second, there is no evidence of, and the Modified Report does not find, any means by which the Soviet Union could exact compliance with directives to petitioner, were it to give any. There is, of course, no showing or finding that

the Soviet Union can exercise physical or police power over petitioner. Neither is there a showing or finding of any other means by which the Soviet Union can or attempts to enforce conformity by petitioner to Soviet desires. If there were any evidence that the Soviet Union subsidizes petitioner, the withdrawal or threatened withdrawal of financial aid might supply a lever of control. The Modified Report itself acknowledges, however, "The record contains no evidence of substantial financial aid subsequent to 1940 and none after 1944" (R. 2596).[42] The court below likewise made no finding that the Soviet Union has any means of coercing petitioner, and it seems to have recognized that there is no evidence of any such means (Ops. 93-94).

Finally, the record contains no evidence that petitioner is supervised by or reports to the Soviet Union. The Modified Report cites no instance of reporting or supervision after 1945 at the latest. In fact, there is no competent evidence of either after petitioner's disaffiliation from the Communist International. (See *infra*, p. 119.)

Indeed, the Modified Report cites no significant contacts between petitioner and the Soviet Union after petitioner's disaffiliation from the Communist International in 1940. The only contacts after the disaffiliation were these: (1) In 1945, while on a trip to France, Elizabeth Gurley Flynn, a member of petitioner's National Committee, met some Russian women at an international women's conference and conversed with them about child care, post-war reconstruction, and the rights of women (R. 2605-06, 1298).[43] (2) In 1949, petitioner sent Stalin a telegram congratulating him on his 70th birthday and praising the Soviet

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[42] The only evidence to support the insinuation in the quoted sentence of some, though insubstantial, financial aid between 1940 and 1944, rests on testimony of Budenz which should have been stricken. See *infra*, pp. 128-39.

[43] The Modified Report finds that Mrs. Flynn's conversations abroad were not reports. By omission, however, it gives an inadequate and misleading account of the conversations. Cf. the evidence (R. 1298) with the account in the Modified Report (R. 2605).

Union (R. 2609-10). (3) In December 1950, the Communist Party of the Soviet Union sent a telegram of greetings to petitioner's national convention (R. 2611-12). (4) Petitioner's publications sometimes reprinted articles from Soviet publications, and its leaders and members sometimes read the publication of the now-defunct Communist Information Bureau (R. 2542). (5) The Daily Worker had a correspondent in Moscow (*ibid.*).

The fact that there were so few and such trivial contacts between petitioner and the Soviet Union over the ten-year period from 1940 to the administrative proceeding is a convincing demonstration that the Soviet Union does not direct, dominate or control petitioner. Nor can this fact be minimized by any claim that petitioner has concealed other contacts. For the Board itself expressly disclaimed making any finding that petitioner engages in secret practices in order to conceal foreign control (R. 2615 ftn. 116).

Moreover, petitioner's witnesses Gates and Flynn testified that during their tenure on petitioner's National Committee (since 1938 and 1946, respectively—R. 2650), there were no foreign representatives to petitioner, and petitioner received no foreign supervision or control (R. 1211-16, 1223-24; Tr. 15783-96).

The court below misconstrued the foreign control component by eliminating the essential ingredient of a means for exaction by the Soviet Union of compliance with its desires. The court stated in its second opinion (Ops. 93-94):

> "The words [of section 3 (3)] are 'substantially directed, dominated, or controlled.' The statute uses the word 'substantially.' An organization or a person may be substantially under the direction or domination of another person or organization by voluntary compliance as well as through compulsion. This is especially true if voluntary compliance is simultaneous in time with the direction and is undeviating over a period of time and under variations of direction. If the Soviet Union directs a line of policy and an organization voluntarily follows the direction, the terms of this statutory definition would be met."

For reasons already stated, this is an erroneous interpretation of the control component. But even this interpretation requires evidence that there were Soviet directives which petitioner could voluntarily follow. The Board, however, found none; the court below cited none; and, in fact, there is no evidence of any such directives since petitioner's disaffiliation from the Communist International In 1940.

In its third opinion the court below summarized the "major characteristics in the facts," as follows (Ops. 131):

> "But the facts beyond dispute are that there is a Communist Party in Europe, based upon Marxism-Leninism, and in power in Soviet Russia; that our present petitioner was for years a member of the Communist International, and its separation from that organization was not accompanied by a repudiation, either of objectives or of methods; that it is by its own choice named the Communist Party of the United States of America, a self-imposed description not to be ignored without reason; that it once forsook the line laid down by the Communist Party abroad but, upon being severely brought to task by a leading European Communist in an open letter to Communists, reorganized itself, even to the extent of expelling its erring leader, and went back to the line; and that, save for that period of waywardness, it has never differed from the program and policy of the Communist Party abroad and has always adhered to that program and policy even in sharp changes."

As can most readily be seen from the Summary of the Modified Report (R. 2642-44), the Board relied on the same factors.

The quoted passage demonstrates that the evidence does not satisfy the foreign-control component as correctly construed or even as misconstrued by the court. It rests on two propositions. The first, petitioner's relations with the Communist International prior to 1940 is irrevelant for reasons discussed *infra*, pp. 105-11. The second is that petitioner is an adherent of Marxism-Leninism and subscribes to Soviet policies. This shows only voluntary agree-

ment, which does not satisfy even the court's definition of control because the agreement was not occasioned by Soviet directives. The court itself likened petitioner to "one who attaches himself by intellectual affiliation to a cause" (Ops. 131). But intellectual attachment is plainly the antithesis of a control relationship.

## II. The Board and the court below misapplied the objectives component of Section 3(3).

The second component of the section 3(3) definition is that an accused organization "operates primarily to advance the objectives of such world Communist movement as referred to in section 2." As we have seen, an initial difficulty in applying this component is the Act's failure to define the objectives referred to (*supra*, pp. 30-31). Nor was a definition attempted by either the Board or the court below. We suggested a definition to the court below, which accepted it arguendo (Ops. 94-95). This definition, in our view, is the one of the several possibilities which comes closest to satisfying the First Amendment requirement that the accused organization must be proved to be engaged in activities endangering the national security (see *supra*, pp. 30-32).[44]

Under our definition the objectives of the world Communist movement "as referred to in section 2" are: (a) the overthrow of all existing capitalist governments by espionage, sabotage, terrorism, or force and violence (secs. 2(1), (6)); (b) the establishment in all countries of "Communist totalitarian dictatorships" (secs. 2(1), (2), (3)) which (c) "will be subservient to the most powerful existing Communist totalitarian dictatorship" (secs. 2(1), (6)).[45]

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[44] Adoption of our definition would not, however, eliminate the other First Amendment defects of the Act.

[45] The element of subservience also appears from section 2(15) which states that the Act is required "to preserve the sovereignty of the United States as an independent nation," and from section 4(a) which is directed against the establishment in this country of a totalitarian dictatorship only if it is under foreign control.

Contrary to the court below (Ops. 94-95), the Board did not find, and could not have found from the evidence, that petitioner operates to advance these objectives.

1. Because of First Amendment considerations, an organization cannot be found to be advancing the first objective unless it engages in or incites illegal action. The Board did not and could not find that petitioner engages in or incites such action. It did find (R. 2633) that petitioner "advocates the overthrow of the Government of the United States by force and violence if necessary." But, as we have seen, this is a finding not of incitement, but of the advocacy of abstract doctrine; nor could the evidence have supported a finding of incitement. (See *supra*, p. 32.)

2. Section 2(2) spells out the second objective of the world Communist movement by describing "totalitarian dictatorship" as a form of government that "results in the suppression of all opposition to the party in power, the subordination of the rights of the individual to the state, the denial of fundamental rights and liberties which are characteristic of a representative form of government, such as freedom of speech, of the press, of assembly, and of religious worship, and results in the maintenance of control over the people through fear, terrorism and brutality." Section 3(15) defines "totalitarian dictatorship" in similar terms.

The Modified Report finds from its examination of Marxist writings that the primary objective of Communism is to supplant capitalist governments "by socialist states under dictatorships of the proletariat (working class), which we find is a dictatorship [*sic*] of a Communist party" (R. 2452, and see also R. 2507, 2509, 2642). The court below incorrectly held this to be a finding that it is petitioner's objective to establish a totalitarian dictatorship within the meaning of the Act (Ops. 94). In any event, a finding which equates a "dictatorship of the proletariat" with

the "totalitarian dictatorship" described in section 2, is contrary to the plain meaning of the texts on which the Board relied as well as to this Court's reading of the same texts. *Schneiderman v. United States*, 320 U. S. 118, 142, described the dictatorship of the proletariat as follows:

> "In the general sense the term may be taken to describe a state in which the workers or the masses, rather than the bourgeoisie or capitalists are the dominant class. Theoretically it is control by a class, not a dictatorship in the sense of absolute and total rule by one individual. So far as the record before us indicates, the concept is a fluid one, capable of adjustment to different conditions in different countries. There are only meager indications of the form the 'dictatorship' would take in this country. It does not appear that it would necessarily mean the end of representative government or the federal system."

The uncontradicted testimony of petitioner's witness Aptheker establishes that petitioner understands and uses the term dictatorship of the proletariat in the sense defined by the Court (R. 2443).

It is thus apparent that the term, as understood by the Court and petitioner, has nothing in common with the "totalitarian dictatorship" which section 2 postulates as an objective of the world Communist movement. Accordingly, if the Board found to the contrary, its finding is without evidentiary support.

3. The Modified Report does not find, and there is no evidence, that petitioner has the objective of establishing a government in this country that will be subservient to the Soviet Union. Moreover, the Modified Report seems to recognize that existing Communist governments outside of the Soviet Union are not Soviet puppets. For it finds that the governments of China and the Communist countries of Eastern Europe are "dictatorships of the proletariat controlled by a *national* Communist Party *in alliance with* the Soviet Union" (R. 2500, emphasis supplied, and see R. 2507).

**III. The Board and the court below erroneously relied on evidence of conduct discontinued before enactment of the Act.**

Sections 13(g) and (h) make it the duty of the Board to determine whether a respondent in a proceeding before it "is" or "is not" a Communist-action organization. Similarly, the definition of a Communist-action organization in section 3(3) and the evidentiary tests of section 13(e) are all phrased in the present tense. Accordingly, the issue before the Board was the current character of petitioner, i.e., whether or not it was a Communist-action organization at the time of the administrative proceeding, or, in any event, after September 23, 1950, the date of enactment of the Act.

The express terms of the Act are re-enforced by the principle favoring the prospective construction of legislation and by the constitutional prohibition of ex post facto laws. *White* v. *United States*, 191 U. S. 545, 552; *Shreveport* v. *Cole*, 129 U. S. 36; *Cummings* v. *Missouri*, 4 Wall. (71 U. S.) 277; *Ex Parte Garland*, 4 Wall. (71 U. S.) 333; *Pierce* v. *Carskadan*, 16 Wall. (83 U. S.) 284; *Burgess* v. *Salmon*, 97 U. S. 381.

The Board's order, therefore, must be supported by proof of relevant acts and practices of petitioner subsequent to the date of the Act. Evidence of petitioner's conduct prior to that date is relevant, if at all, only to the extent that it serves to interpret or explain the significance and purpose of relevant post-Act activities. The rule is "that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends to show the purpose or character of the particular transactions under inquiry." *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 705.[46]

[46] That case indicates, however, that evidence of past transactions is not admissible even for this limited purpose, where the effect of the proceedings is not to regulate future practices but, as in this case, "to punish or to fasten liability on respondents for past conduct" (p. 706).

Since the Board's order must be based on post-Act conduct the Board was required to show by its findings a basis for its order in post-Act evidence (Sec. 13(g)). This the Board failed to do. Instead, the Modified Report ranges over the entire thirty-three years of petitioner's history, indiscriminately commingling discussion of a few alleged contemporary practices with findings of alleged episodes of the remote past. The overwhelming mass of the Attorney General's evidence dealt with the period prior to the Act, for the most part prior to 1940.

Our examination of the 268 pages of the Second Modified Report (R. 2376-2644) shows that the only post-Act matters cited by the Board are the following:

1. Petitioner's constitution provides that "personal or political relations with enemies of the working class or the nation are incompatible with membership in the Communist Party" (R. 2535).

2. Petitioner currently has certain officers who held positions in the Communist International prior to 1940 and had visited, and in some cases studied, in the Soviet Union prior to 1940 (R. 2522-25).

3. The Daily Worker receives and prints news dispatches from abroad, including Moscow, and stations a correspondent in Moscow (R. 2542).

4. The newspaper of the Communist Information Bureau was purchased, read and discussed by some of petitioner's members (R. 2542).

5. A report to petitioner's 1950 convention warned against factionalism and said that renegacy from Communism inevitably leads the renegade to hostility towards the Soviet Union (R. 2535).

6. At a 1951 regional convention of petitioner, "considerable attention was devoted to the principle of industrial concentration, the necessity of infiltrating the trade unions" (R. 2567).

7. In 1951 petitioner expelled Warwick Thompkins (otherwise unidentified) for trying to get its members to distribute anti-Soviet leaflets (R. 2534).

8. Petitioner published statements which: (a) urged that the main direction of petitioner's trade-union work be among members of A. F. L. and C. I. O. unions (R. 2567-68); (b) approved formation of the Labor Youth League as part of the fight to win the youth and promote internationalism and peace (R. 2571-72); (c) commented favorably on the role and position of youth in the Soviet Union (R. 2572); (d) stated that the Negro people in the United States are an important source of strength to the working class in its struggle against reaction and for the ultimate establishment of socialism (R. 2577-78); (e) called upon its members to guard Party unity and maintain Party discipline (R. 2532); (f) stated that Lenin's teachings are triumphing because they are true (R. 2633).

9. Petitioner advanced views similar to those of the Soviet Union on certain questions of foreign policy, including advocacy of the admission of Communist China to the United Nations, opposition to the peace treaty with Japan, and advocacy of a cease-fire in Korea (R. 2581).

10. Petitioner engages in "secret practices," such as the reduction in the size of Party branches and committees, the discontinuance of membership cards and lists, etc. (R. 2613-31). The court below held, however, that the evidence did not support a finding that these practices were engaged in for either of the purposes specified in section 13(e)(7) (Ops. 73-74, 126).

11. Petitioner adheres to Marxism-Leninism, whose doctrines, according to the Board's reading of standard Communist works, include the tenets that capitalist governments must be overthrown by force and violence, if necessary, and that the Soviet Union has the role of leader of the world Communist movement (R. 2452-53, 2632).

12. According to the Modified Report, two witnesses (Evans and Janowitz) whose membership in petitioner extended beyond the date of the Act testified that petitioner advocates the overthrow of the government by violence, if necessary (R. 2633). In fact, neither witness so testified, expressly or impliedly. (See R. 1092-1114, testimony of Evans; R. 1016-24, testimony of Janowitz.)

This evidence is a mixture of absurdly irrelevant matters and petitioner's ideological adherence to Communism. Obviously it cannot establish that petitioner is a Communist-action organization as defined by the Act.

The opinion below and the Modified Report show on their face that the court below and the Board did not find against petitioner on the basis of this evidence of its current practices. They erroneously based their findings of foreign control on claimed practices of petitioner which were concededly discontinued at least ten years prior to enactment of the Act. This appears from the Summary of the Modified Report (R. 2642-44), whose dominant theme is as follows:

1. Petitioner, by joining and assuming the obligations of membership in the Communist International, thereby subjected itself to Soviet control.

2. Petitioner's disaffiliation from the Communist International in 1940 and the dissolution of the Communist International in 1943 were of no consequence because both the Soviet Union and petitioner continue to believe in and practice the principles of Communism.

3. Ergo, the Soviet control of petitioner which existed while petitioner was a member of the Communist International continues.

As the Board summarized its Summary (R. 2644):

> "The short of it is this * * * the Communist Party began its history by voluntarily submitting to the control of the Soviet Union and adopting that nation's international program for the Communist movement. The record shows that neither the basic

> program or objectives of the Soviet led world Communist movement nor those of [petitioner] have changed."

This theory was not visible in the original Report and was plagiarized from the first opinion of the court below (Ops. 63). The court adhered to the theory in its latest opinion when it emphasized that petitioner "was for years a member of the Communist International, and its separation from that organization was not accompanied by a repudiation, either of objectives or of methods" (Ops. 131).

This theory is palpably unsound. The question is whether petitioner is currently controlled by the Soviet Union. The Board and the court below start from the premise that prior to 1940 petitioner was controlled by the Soviet Union through the Communist International. If this was so, it was because members of the International who failed to conform to its decisions were liable to expulsion, a circumstance which might supply a means of control. Also, according to the Board's findings, the International subsidized petitioner (R. 2596), and hence the possible withdrawal of subsidies gave it another lever of control. Furthermore, according to the findings, the International not only could, but did, control petitioner, giving it directives which petitioner obeyed, requiring it to expel dissident members, supervising petitioner through foreign representatives, and receiving reports from petitioner (R. 2525-26, 2532-33, 2579, 2603-05).

But petitioner withdrew from the International in 1940, and the International dissolved in 1943. Petitioner could not be expelled from an organization to which it no longer belonged or which no longer existed. Possible withdrawal of financial aid could not be a lever of control because petitioner no longer received any. All manifestations of the exercise of control likewise ceased. There is no evidence that subsequent to the disaffiliation petitioner received foreign directives, disciplined its members at the behest of the

Soviet Union, reported to it, or was supervised by it. In fact, as we have seen (*supra*, pp. 99-100), after the disaffiliation there were no significant contacts or communications between petitioner and the Soviet Union. Hence, with and as a result of the disaffiliation from the International (not to mention the latter's dissolution), there disappeared all of the means and practices by which, according to the Board, the Soviet Union had controlled petitioner.

The fact that petitioner continued to have Communist views and programs did not continue the control. For the control depended on the existence of an apparatus which could enforce compliance, and the exercise of authority through this apparatus. Once petitioner's connection with the apparatus, later dismantled, had been severed, authority no longer was or could be exercised over petitioner. Therefore, there was no control. It is irrelevant that after the disaffiliation petitioner continued to adhere to its previous views and agreed with the Soviet Union's. For this adherence and agreement were by its voluntary choice, not a product of control.

Nor is it significant that petitioner disaffiliated from the International to avoid registration under the Voorhis Act and regarded the disaffiliation as a "friendly divorce" (R. 2514-15). Petitioner's motivation did not affect the fact or consequences of disaffiliation, and a friendly divorce effectively dissolves a marriage. Moreover, the divorce was followed by the death of the International in 1943.

It is clear, therefore, that the Board and the court below violated the *Cement Institute* rule (at 705) that "prior transactions" may be used only "to show the purpose and character of the particular transactions under inquiry." This rule assumes a showing of relevant current matters whose purpose and character are ambiguous and can be illuminated by reference to the past. In the present case, relevant current matter would be the existence of some means through which the Soviet Union could exercise con-

trol over petitioner or, at least, some instances in which the Soviet Union gave orders to petitioner. But there was no evidence of any semblance of Soviet orders to petitioner after 1940, much less of a possible means of enforcing compliance with orders. Hence there were no relevant current "transactions" to be explained by the abandoned practices. The fact is that the Board and the court below irrationally treated evidence of the termination of control in 1940 as proof of the existence of control in 1950.

The situation here is an aggravated version of that in *United States* v. *Oregon Medical Society*, 343 U. S. 326. There the Court reversed an anti-trust injunction, saying (at 334):

> "Striking the events prior to 1941 out of the Government's case, except for purposes of illustration or background information, little of substance is left. The case derived its coloration and support almost entirely from the abandoned practices."

## IV. The Board and the court below misconstrued and misapplied Section 13(e).

### A. "Non-Deviation," Sec. 13(e)(2).

We deal with this criterion first because the Board and the court below regarded "non-deviation" as "one of the chief items of evidence in the case" (Ops 71).

The Board's findings on the subject rest primarily on the testimony of the Attorney General's expert witness, Mosely (R. 2580). Mosely testified that petitioner and the Soviet Union held similar or "parallel" views on each of 44 different issues dealing exclusively with international relations and foreign affairs, and ranging in time and subject from the League of Nations in 1919 to the Korean War in

1950. With respect to each issue he identified documents which purportedly illustrated the asserted similarity or parallelism. (R. 2581.)

The Mosely testimony and exhibits had no tendency to prove "non-deviation" within the meaning of section 13(e)(2), and had no rational relation to the 3(3) definition of a Communist-action organization. In relying on this evidence, the Board and the court below committed three basic errors.

### The Date-Sequence Error.

Mosely at no time testified that petitioner's views on the 44 issues to which he addressed himself did not "deviate" from those of the Soviet Union. Instead, he stated that the views of each were "parallel." (*E.g.*, R. 518, 520, 524.)

The Act, however, requires proof of "non-deviation." This is different from a parallelism or similarity of views. The definition of "deviation" is "variation from the common way, from an established standard, position, etc." *Webster's New International Dictionary.* Accordingly, deviation or non-deviation cannot occur unless there is a pre-existing "established standard, position, etc.," from which it is possible to deviate.

Applying this definition to section 13(e)(2), non-deviation can be proved only by showing (1) that the Soviet Union first established a position on a given issue; and (2) that thereafter petitioner, knowing of the Soviet position, did not "deviate" from it, but expressed a similar view or policy on the given issue.

Any contrary construction of section 13(e)(2) leads to an absurd result. A parallelism of ideas can have no conceivable relation to the issue of foreign control unless it appears that the alleged domestic agent adopted ideas pre-

viously enunciated by its alleged foreign principal.[47] It is impossible to infer foreign domination or control from a showing that the alleged domestic agent adopted its views before the alleged foreign principal adopted similar views.

Yet the indispensable element of chronological sequence is absent from the record. At no time did the Attorney General offer any evidence that the Soviet view on a subject dealt with by Mosely was adopted, much less communicated, prior to petitioner's adoption of a view on the same subject. As the Modified Report points out, the exhibits were introduced for their content alone, and were not intended to establish priority of the Soviet view (R. 2582).[48] Counsel for the Attorney General stated (R. 836):

> "As I am saying, we have not made any attempt to show how the Communist Party reached the views that it did. All we are attempting to show is that it reached the view."

Accordingly, the Mosely testimony establishes no more than the bare fact that the petitioner and the Soviet Union have held similar views on a number of international questions. There is nothing in his testimony on which to predicate a finding that the petitioner did not "deviate" from Soviet policies. Nor did the Board make any determination of the date sequence of the views in question inde-

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[47] The court below held that the non-deviation standard is relevant only to the foreign control component of section 3(3), and not to the objectives component (Ops. 45). Our discussion accepts this premise. If the standard is considered relevant to the objectives component, then the Board committed still another error by refusing to allow petitioner to prove that the views concerning which Mosely testified were calculated to promote the best interests of the United States (e. g., R. 839, 844, 861, 864), and therefore were not evidence that petitioner was promoting the seditious objectives described in section 2.

[48] This disclaimer was necessary because it appears from the face of the exhibits that in 28 out of the 44 issues dealt with by Mosely, the domestic exhibits antedated the foreign exhibits. See Tr. 10903.

pendently of Mosely's testimony. Instead, it relied on all of the examples testified to by Mosely indiscriminately. It did so despite the uncontradicted testimony of petitioner's witness, Gates, that petitioner has often taken positions in advance of the Soviet Union and has taken positions on many questions as to which the Soviet Union has never expressed a view (R. 1227).

In affirming the finding of the Board, the court below dismissed petitioner's contention that consideration of the date sequence of the views was required by the terms of section 13(e)(2) with the statement (Ops. 69) that, "The statutory phrase refers to identity or coincidence and not to chronological adoption." Accordingly, both the Board and the court below misconstrued section 13(e)(2) by substituting similarity of views for "non-deviation."

**The Error of Disregarding the Truth, Reasonableness and General Acceptance of the Views.**

If the "non-deviation" criterion is to have any possible relevance in establishing that a domestic organization is the agent of a foreign principal and operates to advance the policies of the latter, the application of the criterion must be confined to views and policies which are peculiarly characteristic of the alleged principal. For example, it would be absurd to infer from proof that two organizations oppose racial segregation that one is "dominated or controlled" by the other or operates "to advance the objectives" of the other. Yet the Board and the court below relied on views of this character in concluding that the evidence satisfied the "non-deviation" criterion.

The hearing panel precluded petitioner from proving that the views involved in Mosely's testimony were true, reasonable, or generally accepted by individuals and groups (including, in some instances, the United States government) concededly not under Soviet control or en-

gaged in promoting Soviet policies.[49] The Board affirmed this ruling (R. 2582), concurring in the position taken by the Attorney General (Tr. 8878) that "it does not matter whether the Soviet view on these issues which were raised were [*sic*] right or wrong, or whether the Soviet view was held by many people, by some people, or by all the people." The court below affirmed the finding of the Board on "non-deviation" without discussion of this question (Ops. 69, 71).

This application of the non-deviation criterion predicated the finding that petitioner is a seditious, foreign-controlled organization in part upon such entirely legitimate and widely held views as the need for a cease-fire in Korea, the desirability of the seating of the Peoples Republic of China in the U. N., and the belief that the Syngman Rhee regime was a corrupt dictatorship (R. 2586). It is plain that so applied the non-deviation test is wholly irrational.

### The Error of Disregarding the Independent Origin of the Views.

At most, "non-deviation" supplies tenuous circumstantial evidence of the foreign control component of the section 3(3) definition. The fact that two people or organizations hold similar views in a particular field of thought may, and usually does, have nothing to do with domination by one over the other. The similarity may arise from the

[49] For example, these rulings were applied to the following views, among others: that there should be negotiations for a cease-fire in Korea (R. 864); that the Chiang Kai-shek regime was a corrupt dictatorship (R. 836-7); that the establishment of a second front in World War II was desirable (R. 844-45); that the League of Nations as originally organized promoted imperialist purposes (R. 839; Tr. 9063); that the Syngman Rhee government was a corrupt police state (R. 862-64). Citations are to exclusions on cross-examination. For renewal of the exclusionary rulings in petitioner's affirmative case, see R. 1274-75.

voluntary acceptance by each of a common premise. Thus all pacifists will oppose a particular war.

The hearing panel, however, precluded petitioner from proving that the similarity of views of petitioner and the Soviet Union on various international questions were attributable to the independent application by each of the premises and analytical approach supplied by Marxist principles.[50] Nevertheless, the Board then proceeded to reject petitioner's contention that the similarities between views of petitioner and those of the Soviet Union and Communists of other lands are attributable to the independent application by each of Marxist-Leninist principles. It did so on the ground that "the great weight of the evidence is to the contrary" (R. 2589-90).

The Board failed to state what this evidence was, and there is none. Worse, the Board concealed the fact that any lack of evidence by petitioner on this issue was the result of the panel's ruling excluding proof on the subject. Moreover, Mosely testified that he was unable to conclude from the similarities of the views of petitioner and the Soviet Union that the former had not arrived at its views independently. He regarded the exhibits introduced through him only as evidence of the views and reasoning expressed therein, "but not of the thought processes or political processes by which one or the other

[50] For example, petitioner's counsel asked Mosely whether petitioner's opposition to World War II at the time of its outbreak in 1939 was not based on Marxist concepts as to the cause and nature of wars and the distinction between just and unjust wars. Counsel for the Attorney General objected to the question as irrelevant, stating: "It does not make any difference how they arrived at the view as to the war" (R. 842). In the colloquy that followed, counsel for the petitioner addressed the following question to the panel chairman and received the following reply (R. 843): "Mr. Marcantonio: * * * In other words how [petitioner] came about reaching certain decisions and taking certain public positions on various issues is irrelevant? Mr. Brown: Yes, sir."

arrived at the position which he stated" (R. 837-38). The Board, however, ignored the expert's evaluation of his own testimony.

### B. "Directives and Policies," Sec. 13(e)(1).

As we have seen (*supra*, p. 98), there was no evidence and the Board made no finding that petitioner received directives from the Soviet Union after its disaffiliation from the Communist International. Petitioner was therefore entitled to a favorable finding on the "directives" portion of the "directives and policies" standard. The Board, however, found that petitioner had received Soviet directives through the Communist International prior to 1940 (R. 2579-80), and erroneously used this finding to support its ultimate finding that petitioner is currently controlled by the Soviet Union (R. 2642-44).

On the "policies" portion of the standard, the Board found (R. 2580) that petitioner's "policies, programs, and activities regarding trade unions, youth, and national minorities have as their fundamental purpose to effectuate the policies of the Soviet Union and to further the world Communist movement." The subsidiary findings from which this is drawn show that it is based on nothing more than that petitioner and other Communist parties all consider it important to win the adherence of trade unionists, youth, and minority groups in order to achieve socialism (R. 2562-69). There is nothing to show that petitioner's programs in these areas have any purpose other than to promote its own objectives. The Board's conclusory finding is, therefore, unsupported.

### C. "Financial Aid," Sec. 13(e)(3).

The Board did not and could not find that petitioner receives foreign aid. It found (R. 2596):

> "The record contains no evidence of substantial financial aid subsequent to 1940 and none after

1944.[51] However, the disappearance, so far as this record shows, of such assistance when respondent became a going organization does not detract from the probity of this evidence to show the character of the Party during the period in which the aid was rendered. And it is a tile in the mosaic."

Under the subsection, the Board should have considered that the absence of financial aid during the relevant period tended to negate foreign control. Instead the Board erroneously treated long discontinued aid as "a tile in the mosaic" of foreign control.

**D. "Instruction and Training," Sec. 13(e)(4).**

The Board found (R. 2602), "There is no credited evidence showing training of [petitioner's] members in the Soviet Union subsequent to the outbreak of World War II."[52]

On the Board's own statement, therefore, it should have found that the absence of evidence of current foreign training tended to negate foreign control. But as in the case of "financial aid," the Board failed to do so. Instead, after indulging in vaporous speculation as to the reasons for the termination of foreign training, it proceeded to base its ultimate finding in part upon a finding that there was such training prior to 1939 (R. 2602-03).

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[51] The reference to insubstantial financial aid between 1940 and 1944 is based on testimony of Budenz that a Moscow news agency supplied cable news dispatches free to the Intercontinent News, which relayed them to the Daily Worker at a nominal cost (R. 2591-92). As we later show (*infra*, pp. 128-39), the Board erred in failing to strike all of the Budenz testimony.

[52] In fact, the Report shows that the Board credited no evidence of foreign training by petitioner's members subsequent to 1936 (R. 2598).

## E. "Reporting," Sec. 13(e)(5).

The Modified Report found (R. 2613) that petitioner "upon occasion reports to the Soviet Union and its representatives." This finding is contradicted by the Board's evidentiary findings on the subject.

The last instance of reporting cited by the Modified Report occurred in 1935 (R. 2604). In addition, the Modified Report contains an undated reference to reporting through Soviet agents in the United States (R. 2606). In the cross-referenced subsection on "Foreign Representatives in the United States," the only person found to have been a foreign representative after 1940 was Eisler, who is found to have been acting as such in 1945 (R. 2526-27). This finding obviously cannot support a finding of reporting after 1945. Nor can it support a finding of reporting up to 1945 because the evidence and findings fail to show that petitioner ever reported to Eisler. In fact there is no finding or evidence that Eisler did anything in his supposed capacity as a foreign representative. Finally, the reference to Eisler's status after 1940 is based on testimony of Budenz, which was not only thoroughly discredited on cross-examination (R. 1187-91), but should have been stricken for the reasons stated *infra*, pp. 128-39.[53]

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[53] The Modified Report's discussion of "reporting" also refers to a telegram sent by petitioner in 1949 to Stalin congratulating him on his 70th birthday. The Modified Report does not find that this was a "report," and from its text, as well as the testimony cited by the Board on its "significance," it clearly was not under any intelligible meaning of the term. (R. 2610-11.) The same discussion states that "by means unknown" the Frenchman, Duclos, in 1945 knew the contents of a letter written by Foster (R. 2606). There is no finding that this involved "reporting." Nor could such a finding have been made in view of the absence of any evidence as to how Duclos learned of the letter and the fact that the letter, addressed to petitioner's national committee, was a personal dissent by Foster from petitioner's policies (R. 2536; see A. G. Ex. 208).

**F. "Discipline," Sec. 13(e)(6).**

In applying this criterion, the Modified Report first quotes statements from a number of American and foreign Communists to the effect that Communist Parties place great emphasis on the need for internal unity and discipline, demand adherence to party decisions, and condemn factionalism and opportunism (R. 2528-32). Obviously, however, the fact that petitioner has a policy of strict internal discipline is no evidence that it or its members are under foreign discipline.

In an effort to show otherwise, the Modified Report (R. 2528) refers back to its prior discussion of "democratic centralism." The Board finds (R. 2431) that under this principle "all directing bodies of the Party shall be elected; that they give periodic reports to Party organizations; that there be strict Party discipline and the subordination of the minority to the majority; and that all decisions of higher bodies shall be absolutely binding on lower bodies and on all Party members." The Board finds that under this principle, as applied, authority flows from "the top of the movement" (R. 2529), meaning presumably, the Soviet Union. But none of the Marxist passages cited by the Board (R. 2431-34) bears out this conclusion. They indicate merely that democratic centralism operates *within an organization*. When petitioner was a member of the Communist International prior to 1940, democratic centralism, therefore, required it to accept decisions of the International. However, petitioner disaffiliated from the International in 1940, and the International dissolved in 1943. After 1940, therefore, petitioner was not obliged to accept International decisions, and after 1943 there was no international organization within which democratic centralism could operate.

Petitioner's constitution provides that its national convention is its highest governing body, and that between conventions the governing authority rests in its national committee (A. G. Ex. 374; R. 1698-1704). Petitioner's

witness Gates testified that petitioner is a self-governing organization which applies democratic centralism as its internal principle of organization (R. 1204-05, 1224). The Attorney General's witness Lautner corroborated this testimony, stating that democratic centralism "pertains to rules and regulations by which the Communist Party *governs itself*" (R. 965, emphasis added). There is no evidence to the contrary.

The Modified Report also cites "specific instances of disciplinary action" (R. 2532).

1. The Modified Report finds three occasions on which members of petitioner were expelled or otherwise disciplined on the initiative of the Communist International during the period of petitioner's affiliation with that organization. The most recent of these occurred in 1934. (R. 2532-33.) For reasons already stated, the submission to discipline of the International has no tendency to prove foreign discipline after petitioner's disaffiliation from that organization.

2. The Modified Report finds that in the early 1930's, several of petitioner's members performed missions in foreign countries on behalf of the Communist International (R. 2537). This is irrelevant for like reasons.

3. The Modified Report cites a statement by William Z. Foster, petitioner's chairman, that he would have faced expulsion in 1944 had he openly opposed the policies of petitioner's secretary, Earl Browder (R. 2536). It finds that in 1945, Browder and a number of his followers were expelled "for deviating from the true line of Marxism-Leninism" (R. 2533). It also finds that between 1939 and 1951 petitioner expelled a number of officers and members for refusing to accept its position on the Hitler-Stalin pact; "for political differences with the Party;" "for disagreeing with Party policies;" on untrue charges of being a police spy; and "for trying to organize Communist members to distribute [anti-Soviet] leaflets" (R. 2533-34). The

Report does not suggest that the Soviet Union had anything to do with any of these cases of internal discipline, and no such suggestion could be supported by the record.

4. The Modified Report alludes to the stringent criticism of the Titoist regime in Yugoslavia by the Communist Information Bureau and states that petitioner agreed with this criticism (R. 2544).

The alleged incidents which occurred during petitioner's membership in the Communist International sixteen or more years prior to the Act, the more recent scattered instances of internal discipline, and petitioner's agreement with the condemnation of Tito, cannot conceivably support the Board's finding that petitioner and its members are subject to Soviet discipline. Instead, the testimony of petitioner's witnesses that its leaders and members are not subject to and do not recognize the disciplinary power of any foreign government or organization (R. 1223-24) was uncontradicted.

### G. "Secret Practices," Sec. 13(e)(7).

The original Report found, in the terms of this criterion, that petitioner engages in secret practices for the purposes of promoting its objectives and concealing foreign control (R. 117). The court below struck Board's finding as to purposes, as not supported by the evidence (Ops. 73-74). This had the effect of making the criterion wholly inapplicable, since section 13(e)(7) makes such practices significant only if engaged in for one or both of the described purposes.

The Board refused to accept the court's holding. The Modified Report found (R. 2631) that petitioner engages in secret practices "within the meaning of the Act, for the primary purposes of promoting its objectives and thereby to advance those of the world Communist movement." It did however disclaim any finding that petitioner engages in secret practices for the purpose of concealing foreign control (R. 2615 ftn. 116).

In its last review, the court below adhered to its previous conclusion, holding that the evidence did not support the finding of the Modified Report (Ops. 126). As the record stands, therefore, the registration order rests in part on an erroneous finding. For this reason alone the judgment below should be reversed (see *infra*, pp. 144-46). In any event, on the Board's own premises, application of the "secret practices" criterion lends no support to the ultimate finding of foreign control. The Board's disclaimer also establishes that the absence of evidence of foreign control cannot be attributed to concealment.

### H. "Allegiance," Sec. 13(e)(8).

The Board's finding under this criterion rested on two bases:

(1) The Board found that petitioner advocates the overthrow of the government by force and violence "if necessary" to establish a dictatorship of the proletariat. This finding was based primarily on the Board's interpretation of writings of Marx, Engels, Lenin and Stalin, and on the conclusory testimony of informer witnesses of the Attorney General (R. 2632-33).[54] The Board held (R. 2635) that petitioner's adherence to this concept "is completely incompatible with, and the exact antithesis of, allegiance to the United States."

The Board's conclusion thus flies in the face of *Schneiderman* v. *United States*, 320 U. S. 118, in which the Court held, after a study of the same texts cited by the Board, that adherence to Marxism-Leninism is not inconsistent with attachment to the principles of the Constitution and being well-disposed toward the good order and happiness of the United States. And cf. *Nowak* v. *United States*, 356 U. S. 660.

[54] The Board also relied on the Smith Act convictions of a number of petitioner's leaders (R. 2635). Characteristically, however, it did not consider that Smith Act acquittals of other leaders were relevant (R. 2401).

The Board also relied on the Marxist-Leninist concepts of imperialism and just and unjust wars (R. 2640), and referred to petitioner's position that the Korean War was an unjust war on the part of the United States (R. 2641). The Marxist views of imperialism and just and unjust wars were, however, contained in the texts examined by *Schneiderman* (at 149-52).

(2) The only other basis for the Board's finding on "allegiance" consists of a hodge-podge of findings (R. 2636-40). Most of these relate to the pre-1940 period, when petitioner was affiliated with the Communist International. None of them deals with any post-Act matter. Aside from their remoteness, most of them have no perceptible relation to the subject of "allegiance" apart from the Board's erroneous conception that adherence to Marxism-Leninism and admiration for the Soviet Union *ipso facto* demonstrate disloyalty to the United States.

It thus appears from the Modified Report on its face that the Board misconstrued or misapplied each of the criteria of section 13(e). Since its order rests in part on findings under each criterion, a misconstruction or misapplication of any one of them requires setting aside of the Board's order (see *infra*, pp. 145-46).

## V. The court below misconstrued and misapplied the Act's definition of "world Communist movement."

As we have seen (*supra*, pp. 57-58), the court below held that the findings of section 2 of the Act with reference to the existence and nature of a world Communist movement were conclusive upon the Board and the courts. Nevertheless it reviewed and sustained the finding of the Board that on the evidence, "there exists a world Communist movement, substantially as described in section 2 of the Act" (Ops. 61; R. 2509). This conclusion was based on the court's finding that there is a world Communist movement in the sense

that the various Communist parties throughout the world have a common outlook and work in their respective countries for the revolutionary attainment of a "classless, stateless society ruled by the proletariat of the world" (Ops. 60).

The movement found by the court below is palpably not *the* world Communist movement postulated in section 2 of the Act. The key characteristics of that movement are a highly centralized world-wide organization, rigid Soviet control, and use of violent and criminal means, if necessary. Thus sub-sections (1), (5) and (8) of section 2 describe the movement as operating, "through the medium of a world-wide Communist organization," of which the Communist parties of the various countries are "sections" and "affiliated constituent elements." Subsections (4) and (5) find that the control of the world Communist movement is vested in the "Communist dictatorship of a foreign country" through the medium of "action organizations" which are "sections of a world-wide Communist organization." And subsections (1) and (6) find that the world Communist movement employs espionage, sabotage, terrorism, treachery, violence and other unlawful means, if necessary.

Neither the court below nor the Board found, or could have found from the evidence, the existence of a movement having these characteristics. The only organization which was a "world-wide Communist organization" was the Communist International, dissolved in 1943.[55] In the absence

[55] The now-defunct Communist Information Bureau, mentioned by the court below (Ops. 60), was not, and was not found to be, the organization described in section 2. Its membership was not world-wide, but was confined to the Communist parties of eight European countries (R. 2487, 1592). It was not a centralized organization; as the Board's Original Report stated, and a witness for the Attorney General testified, it was a medium for "mutual consultation and voluntary coordination of action" among the member parties (R. 7; 937-38; 971). Moreover, the court below acknowledged (Ops. 65) that petitioner was not affiliated with the Communist Information Bureau, and the uncontradicted evidence shows that petitioner never had dealings with it (R. 1205-10, 1286-89).

of such an organization, there could be no Soviet control of the movement "through the medium" of the organization. Likewise the record contains no evidence or finding that the Soviet Union or its Communist Party controls the various Communist parties of the world. Finally, the record is devoid of evidence and findings of the means employed by the various Communist parties of the world to achieve their objectives.

## VI. The order of the Board is not supported by the evidence.

Under section 14(a), the order of the Board must be supported by a preponderance of the evidence. The Modified Report and the opinions below show on their face that this evidentiary burden was not met for the following reasons:

(1) The evidence does not support a finding adverse to petitioner under the foreign control component of section 3(3) as properly construed, or even as misconstrued by the court below (*supra*, pp. 98-102).

(2) The evidence does not support a finding adverse to petitioner under the objectives component of section 3(3) (*supra*, pp. 102-04).

(3) There is no evidence that the practices described in section 13(e) are engaged in by petitioner (*supra*, pp. 111-24).

(4) There is no evidence that there is a world Communist movement which meets the description of section 2 (*supra*, pp. 124-26).

(5) The Board and the court below erroneously rested their decision on evidence of practices which terminated long before enactment of the Act and on petitioner's voluntary adherence to Communist principles and views (*supra*, pp. 105-11).

The proscription of petitioner without an evidentiary basis, if allowed to stand, will result in the condemnation of numerous other organizations and thousands of individuals. The Act contemplates that once petitioner is finally found to be a Communist-action organization, this determination is conclusive on organizations accused of being "fronts" or "infiltrated" and on individuals required to register themselves as members of petitioner. In issuing the first registration order against an organization accused of being a Communist-front, the Board held that "the prior determination by the Board that the Communist Party is a Communist action organization is conclusive and applicable in this proceeding without further proof." Report of the Board, *Rogers* v. *Labor Youth League*, Board Docket No. 102-53, Feb. 15, 1955, pp. 54-55. The Board has applied the same rule in all subsequent cases.

The case against petitioner rests not on evidence, but on environmental factors. The American people have been so thoroughly indoctrinated on the subject of Communism that most of them cannot—and others dare not—admit the possibility that the Communist Party of the United States is not a subversive Soviet agent. Nor can they admit that such a well-known, self-evident "fact" requires demonstration. So in the twelfth century it was clear to most people that the sun revolves around the earth. The preconceptions against petitioner were written into the Act, were applied by the Board, and were not surmounted by the court below.

## PART THREE: OTHER GROUNDS FOR REVERSAL

### I. The Board and the court below erred in refusing to strike all the testimony of the Attorney General's witness Budenz.

The Board and the court below refused to strike all of the testimony of the Attorney General's witness Louis Budenz when petitioner was deprived of the opportunity to cross-examine him with the aid of his prior statements on two key matters. This was an error which requires that the case be remanded for administrative redetermination on a record expurgated of Budenz' testimony.

At the original Board hearing in 1952, Budenz testified about two supposed incidents which are referred to in the litigation as the Starobin letter and the Weiner conversation. We describe this testimony *infra*, pp. 132, 135.

On cross-examination, Budenz stated that he had orally reported these incidents to the FBI (R. 1184-85, 1180-82). He conveyed the impression that no recording or transcription of any of his oral reports had been made. Objections interposed by the Attorney General and sustained by the Board precluded petitioner from exploring the matter further. (Tr. 14003-04, 14120-22.) Petitioner moved for the production of any FBI reports of interviews with Budenz concerning the Starobin letter and the Weiner conversation. The Attorney General objected to the motions, and the Board denied them. (R. 1184-85, 2277-78, 128.)

Following the remand by this Court, petitioner again moved the Board for the production of the FBI reports on the Starobin and Weiner matters or for their *in camera* inspection by the Board. Again the Board sustained objections interposed by the Attorney General. (R. 2187-89, 2217-18, 2225,) The court below initially affirmed this ruling on the ground that there did not appear to be any state-

ments[56] on the two matters in the possession of the FBI (Ops. 106-07), government counsel having so represented in their brief (Respondent's Brief Following Remand, pp. 18, 46). Thereafter, in response to a petition for rehearing filed by petitioner, the government disclosed for the first time that the FBI had in its possession disc recordings of a five-day interview with Budenz in 1945, which contained statements pertinent to the Starobin and Weiner matters (R. 2685-87). As a consequence, the court below ordered the production to petitioner of statements made by Budenz to the FBI concerning the two matters (Ops. 122-23).

In the Board proceedings that followed, statements by Budenz relating to the Starobin letter and the Weiner conversation were excerpted from the recorded interview and from FBI memoranda of later interviews and furnished to petitioner (R. 2387-89).[57] As we later show, these statements were inconsistent with and contradictory of his testimony. Petitioner therefore demanded that Budenz be recalled for cross-examination with the aid of these statements. Budenz' ill health made this impossible. Petitioner then moved to have all his testimony stricken because of his unavailability for cross-examination. The Board struck Budenz' testimony on the Starobin and Weiner matters but refused to strike anything else. (R. 2301-02, 2387-89.) The court below affirmed these rulings, Judge Bazelon dissenting on the ground that Budenz' unavailability required that all of his testimony be stricken (Ops. 128-29, 132).

As the court below held, and as respondent does not dispute, petitioner was entitled to cross-examine Budenz with the aid of statements made by him to the FBI on subjects concerning which he testified. Cf. *Jencks* v. *United States*,

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[56] As defined by 18 U. S. C. 3500, which was enacted after the conclusion of the proceedings before the Board on this Court's remand.

[57] The unexcised documents were made part of the record as sealed exhibits (Bd. Exs. 2, 5, 6, 7).

353 U. S. 657; 18 U. S. C. 3500. Petitioner's exercise of this right, initially denied by the Board, was prevented on the remand by Budenz' illness. The issue presented is what consequences flow from this deprivation of cross-examination.

Wigmore states the applicable principles as follows (*Evidence*, 3rd ed., sec. 1390, emphasis in original):

> "Where the witness' *death* or *lasting illness* would not have intervened to prevent cross-examination but for the *voluntary act* of the witness himself or the party offering him—as by a postponement or other interruption brought about immediately after direct examination, it seems clear that the direct testimony must be struck out * * *. But where the death or illness prevent cross-examination under such circumstances that *no responsibility of any sort* can be attributed either to the witness or to the party, it seems harsh measure to strike out all that has been obtained on direct examination. Principle requires in strictness nothing less. But the true solution would be to avoid any inflexible rule, and to leave it to the trial judge to admit the direct examination so far as the loss of cross-examination can be shown to him to be not in that instance a material loss. Courts differ in their treatment of this difficult situation; except that by general consensus, a cross-examination begun but unfinished suffices if its purposes have been substantially accomplished."[58]

These principles require that Budenz' testimony be stricken in its entirety for each of two reasons: (1) the Attorney General and the Board were responsible for depriving petitioner of the right to cross-examine Budenz with the assistance of his FBI statements; and (2) the deprivation was a material loss to petitioner.

It is clear, and the majority below did not dispute, that the Attorney General and the Board were responsible for

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[58] In addition to the cases cited by Wigmore, see *United States* v. *Malinsky*, 153 F. Supp. 321. This Court has never dealt with the subject.

the deprivation. First, the Attorney General's objections and the Board's rulings denied petitioner access to the statements at a time when the witness was available for cross-examination. Second, the Attorney General withheld the fact that the FBI had the statements in its possession until it was too late to recall Budenz.[59] Under Wigmore's rule (never mentioned by the majority below), these facts alone required that all of Budenz' testimony be stricken, without considering whether the deprivation of cross-examination was a material loss to petitioner.

In addition, the deprivation of petitioner's right to cross-examine Budenz with the aid of the prior statements was a material loss, which was not repaired by striking his testimony on the Starobin and Weiner matters. As the dissenting opinion pointed out (Ops. 132), "Without such cross-examination the Party is denied the right to show the extent, if any, to which the rest of Budenz' testimony is tainted." A showing of taint would have required the Board to downgrade or strike all of his testimony. *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115; *Mesarosh* v. *United States*, 352 U. S. 1. This might well have eliminated a number of important findings prejudicial to petitioner which were based on Budenz' testimony.[60]

The majority below held that cross-examination could not have established any taint because Budenz' testimony and prior statements on the Starobin and Weiner matters "bear a solid similarity in essentials and differ no more than truthful accounts under such conditions may well differ" (Ops. 128). This defeats the principle that "only the defense is adequately equipped to determine the effective

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[59] Budenz' health would have permitted his recall when petitioner renewed its motions for production of the statements after this Court's remand (R. 2187, 2191, 2225; Tr. 18122; Bd. Ex. 3-C).

[60] E.g., that petitioner received financial aid from the Soviet Union after petitioner's disaffiliation from the Communist International, and that Eisler was a Soviet representative to petitioner after the disaffiliation. (R. 2591-92, 2526-27).

use" of a witness' prior statement for the purpose of impeachment. *Jencks* v. *United States*, 353 U. S. 657, 688-89. Furthermore, the court's holding flies in the face of the facts, as appears from a comparison of the testimony and the statements.

### The Weiner Conversation

Budenz testified that in 1939 he and Morris Childs came from Chicago to New York where they had a conversation with Weiner, then treasurer of the Communist Party, about securing funds for the Midwest Daily Record, of which Budenz was the editor. Childs asked Weiner "if he couldn't get some money from abroad."[61] Weiner replied that "we could normally, but the channels of communication abroad had been broken for the time being, and perhaps could be re-established so money could come" (R. 1124-25).

Budenz was first interviewed by the FBI for five days from December 6-12, 1945 (R. 2298). At that time he made several references to the financial problems of the Midwest Daily Record and spoke of making frequent trips to New York to raise money for it. Nevertheless, he did not mention the above or any other conversation with Weiner. To the contrary, he stated in answer to repeated questions that he had no knowledge or "indication" of the availability of Soviet or other foreign funds for the Communist Party or its publications. (R. 2358, 2361-64.)[62] When pressed by further questions as to the possibility of foreign sources for funds Budenz added:

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[61] Budenz testified that "abroad" meant "Moscow" (R. 1126).

[62] Budenz' remarks on this subject are summarized as follows in an FBI memorandum on the December, 1945 interview: "He said he had no indication of any 'Moscow money' being given to the Communist Party or to the 'Daily Worker'" (R. 2370). "He said he had no knowledge as to foreign or Soviet funds available to the Party" (R. 2371).

> "Now the only thing I think is indicative is Weiner's position because I can't see any reason, never did, for Weiner's being sort of a super, ahhh—*that's just surmise you understand.* You must be very careful on that. But I can't see why he's a super financial person. See, unless there's something." (R. 2364; emphasis supplied.)

Five months after this initial interview with the FBI, Budenz took the first step in the process of transforming his "surmise" concerning Weiner into a conversation indicating Soviet financial aid to petitioner. In an interview on May 22, 1946, he informed the FBI (R. 2366, 2343):

> "* * * that he could recall only one instance wherein it was indicated that the Soviet Union might be sending money to the United States for the purpose of aiding the Communists in disseminating propaganda. This instance occurred when Budenz was affiliated with the Daily Record, Communist organ in Chicago, Illinois. Budenz stated that his newspaper in Chicago was in extremely poor financial condition; that he went to New York to discuss the matter with Communist officials; that he met with Maurice Childs and William Weiner, on which occasion Childs said to Weiner, "Don't you soon expect a consignment from across the sea?" Weiner immediately changed the subject matter, indicating that he did not want to discuss the question of transmission of Soviet funds in the presence of Budenz, even though Budenz was a trusted Communist. Budenz concluded from the remark that was made that funds were actually being sent to this country at that time by the Soviet Union for propaganda purposes."

Of course, the inference expressed in this statement, drawn from Weiner's supposed effort to change the subject of the conversation, was not acceptable as evidence. Ten months later Budenz began to rectify this defect. On February 26, 1947, he "recalled" for the FBI a new version of the conversation, as follows: (R. 2371):

> "Childs suggested that Weiner try to get some money from Moscow to finance the paper. Weiner stated that he had temporarily lost his contacts in Moscow, hence, he could not do anything."

In this perfected version of the conversation, Weiner lost his reluctance to discuss Soviet financial aid in front of Budenz. Instead of changing the subject, Weiner buttoned it down.

In a later interview on July 13, 1950, Budenz gave the FBI still another version of the supposed Weiner conversation (R. 2367):

> "In regard to the transmission of funds between Russia, including the satellite countries, and the CP, USA, Budenz advised that he has no direct knowledge of such transmissions. However, he stated that he has always been under the impression that there was [sic] such transmissions as the Party needed much more money to carry on its operations than it could possibly raise from dues and its various fund drives * * *.
>
> "Further, that while he was in the Party, particularly during the time he was editor of the Mid-West Daily Record, in Chicago, he had a conversation with Weiner and Mort Childs, CP officials in Chicago at the time, in regard to funds and Childs asked that funds be advanced him by Weiner from the reserve fund and Weiner advised that he didn't have any at that time as his communication system had temporarily broken down. Budenz *took this to mean that* Weiner's source of supply was from foreign countries, particularly Russia." (Emphasis supplied)

In this statement, the conversation retained a comment by Weiner in place of his silence in the May 1946 version. But this time the comment lost most of the punch of the February 1947 account, because it was silent on the source of the funds, which Budenz had to supply by interpretation.

On taking the stand in this case, where Soviet financial aid to petitioner was a key issue, Budenz substantially adopted the most damaging of his mutually contradictory prior statements to the FBI—that of February 1947. Thus he had Weiner say that money normally was available from "abroad," meaning "Moscow." But he embellished this version by having Weiner add that "the channels of communication abroad * * * perhaps could be re-established so money could come."

### The Starobin Letter

Budenz testified that in May 1945, before the Duclos article criticizing dissolution of the American Communist Party was known in this country (see *supra*, pp. 11-12), he hastily read part of a letter from Starobin, a Daily Worker correspondent at the United Nations Conference in San Francisco. The letter reported that Manuilsky, a Soviet delegate, had expressed indignation that petitioner had not criticized United States government officials more severely and had said that "the American Party should observe more carefully the guidance and the counsel of the French Communists."[63] (R. 1135-37, 1182.) The obvious inference from this testimony is that the Duclos article was a Soviet directive to petitioner, and the court below so regarded it in its first opinion (Ops. 66).

Budenz' first interview with the FBI in December, 1945, is completely inconsistent with this testimony, but contains the germ of his subsequent fabrication.

In that interview, Budenz was asked whether it was not a fact that petitioner reversed its policy of collaboration with the United States government during the second week of the San Francisco conference, when the United States

[63] Budenz testified that he regarded the Starobin letter as an important matter and that it was "fastened in his memory" (Tr. 14107, 14121).

delegation voted to admit Argentina into the United Nations (R. 2359). Budenz replied (R. 2360):

> "Well, whether that was the time or not, it was in San Francisco * * * and you see Fields and Starobin were in San Francisco, and it was clear from their dispatches—from their private communications sent from Starobin to us, which were very lengthy and disturbed, that we already were attacking the United States and that was pretty early, I should say."

After making this statement, Budenz agreed with the suggestion of the FBI agent conducting the interview that Starobin was not "a big enough man" to have been responsible for the reversal in petitioner's policy. The interview continued as follows (R. 2360):

> "Q. Do you think then that the instructions relative to this change of policy that Starobin and Fields must have received came from the Russian delegation? Oh, you said maybe Manuilsky, the Ukrainian delegate?[64] A. Sure, sure, I mean—after all, they got the atmosphere there. In fact I mentioned Manuilsky very much, because definitely he is a figure in the CI.
>
> "Q. He certainly is. A. He used to lay down the law like a general, you know, to his troops. He was there as the Ukranian President or something."

Thus, in his initial FBI interview, only eight months after the alleged event, Budenz had no knowledge of the origin of petitioner's change in policy. He simply acceded to the suggestion of the FBI agent that the proposal *might* have come from Manuilsky via Starobin. Five months later, however, Budenz began to manufacture a tale to

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[64] It should not be assumed from this question that there had been a reference to Manuilsky earlier in the interview. The examiner stated that the recording contained no such reference (Tr. 17708).

document this suggestion. An FBI report of an interview with him on May 22, 1946 states (R. 2365-66, 2343):

> "Budenz recalled that within a few days after the United Nations Conference on International Organization was convened at San Francisco, the Communist Party in this country reversed its policy completely with regard to the question of supporting the United States. Budenz advised that this reversal in policy, as evidenced so completely in the Daily Worker, was predicated upon receipt of a lengthy letter * * * by Joseph Starobin * * * In this letter * * * Starobin advised that 'the French comrades have the line and the support of the Soviet Union—and the French comrades blasted Stettinius and the United States Delegation, and therefore Starobin directed that the Party in this country should imediately blast Stettinius and the United States Delegation.' Bundenz stated that in this letter Starobin *inferred* that he and/or his associates at the Conference had conferred with Manuilsky regarding this question, and that the changed policy was predicated upon Manuilsky's instructions as well as on advice received from the French Communists at UNICO." (Emphasis supplied.)

In this version, the "French comrades" appear for the first time and are made the principal actors in the affair. Manuilsky's role is no longer a matter of pure speculation, as it was five months earlier, but is now "inferred" from an unspecified statement in Starobin's letter.

Six months later, in his first appearance before the House Committee on Un-American Activities, Budenz further improved his story. He there testified (R. 1184) that Starobin had written:

> "toward the end of the San Francisco conference, that the French Comrades, who were used largely to beat the Americans, asserted that there should be more of an attack upon Stettinius by the American Communists. He added that this was 'likewise the opinion of Comrade Manuilsky.'"

As in his May, 1946 version of the incident, the "French comrades" remain the principal source of the view that petitioner should launch an attack on United States policy. But Manuilsky's concurrence in this advice no longer rests on "inference." Budenz now invents documentation in the form of a direct quote from Starobin's letter.

Budenz again refashioned his story when he testified in this proceeding, giving it a twist to fit the issue before the Board. In its final version, the Starobin letter no longer quotes the "French comrades" as advising petitioner to attack U. S. policy. Instead, it is Manuilsky who is quoted as expressing indignation at the failure of petitioner to criticize the government and ordering it "to observe more carefully the guidance and the counsel of the French Communists" (R. 1137).

The foregoing review of the genesis and evolution of Budenz' stories concerning the Weiner conversation and the Starobin letter indicates not only that his testimony in this proceeding was false but also a process of fabrication. In the first stage of the process, at the December 1945 interview, the FBI evinced interest in evidence that petitioner was the recipient of Soviet financial aid and that petitioner's 1945 change in policy was in response to a Soviet directive. Budenz disclaimed knowledge of any such evidence and could do no more than indulge in unsupported conjecture as to its possible existence. At the second stage of the process, some months later, he "recalled" a conversation and a letter from the equivocal contents of which he "inferred" the facts which the FBI desired to establish. This was followed by a third stage in the process during which Budenz "recalled" several inconsistent variants of the conversation and the letter. At the fourth and final stage, when he took the witness stand in this case, he refashioned the conversation and the letter into flat admissions highly damaging to petitioner.

Contrary to the view of the majority below, the inference is almost inescapable that Budenz either concocted

his Starobin and Weiner testimony or is incapable of distinguishing fact from fantasy. In any event, petitioner might have established this by cross-examination with the aid of the statements. Petitioner suffered a material loss by being deprived of this opportunity (*supra*, p. 131). Under the Wigmore rule, therefore, all of Budenz' testimony should have been stricken even if the Attorney General and the Board had not been responsible for the deprivation.

## II. The court below and the Board erred in refusing to require production of relevant prior statements of witnesses for the Attorney General.

### A. The Gitlow Memoranda.

In 1940, Benjamin Gitlow gave the FBI a quantity of minutes of meetings of leading committees of petitioner and other documents which he had collected during his Party membership. He also prepared and gave the FBI memoranda which interpreted the documents (R. 2253-55, 2257). On direct examination as a witness for the Attorney General, Gitlow identified the documents and explained their contents and significance (R. 243-64; 1343-1421; Ops. 126). The Modified Report relies heavily on Gitlow's testimony and the documents for its findings concerning petitioner's relations with the Communist International.[65]

On cross-examination of Gitlow, petitioner moved for the production of the memoranda. The motion was denied (R. 2257-58, 128). After the remand by this Court, petitioner renewed its motion, which was again denied (R. 2191, 2225).

A majority of the court below, Judge Bazelon dissenting, affirmed this ruling in its second decision (Ops. 96-104,

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[65] E.g., the findings that the Communist International controlled petitioner (R. 2511-12), subsidized it (R. 2590-95), and supervised it through foreign representatives in this country (R. 2525-26).

121). It held that the Board had erred in denying petitioner's production motions, but that the error could not be assigned in the proceeding to review the Board's order. Citing *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 225-26, it ruled that petitioner's exclusive remedy was a motion for leave to adduce the memoranda as additional evidence pursuant to section 14(a) of the Act.

Although disagreeing with this ruling, petitioner promptly moved under section 14(a) for leave to adduce the Gitlow memoranda as additional evidence (R. 2681-85). The motion pointed out: (1) The court's earlier denial of a motion by petitioner under section 14(a), which sought reversal of the Board's refusal to order production of impeaching documentary evidence relating to another witness, had led petitioner to believe that the court did not consider such a motion available for that purpose. (2) The court had recognized that its ruling was a novel extension of the *Consolidated Edison* rule, and petitioner could not, therefore, have reasonably anticipated it. (3) Since the court had remanded the proceeding for other reasons, allowance of the motion would not materially delay ultimate disposition of the case.

The court denied petitioner's motion (Ops. 122), stating, "We adhere to the views expressed in our opinion promulgated January 9, 1958." But those views, as we have seen, were that petitioner was entitled to get the Gitlow memoranda by such a motion. Petitioner called this paradox to the attention of the court in its brief following the second remand (pp. 14-15) and asked for reconsideration of the earlier ruling. In its opinion of July 30, 1959, the court adhered to its position, but this time on the ground that "a litigant cannot cure procedural defects *nunc pro tunc* after an appellate court has passed upon his contentions in the matter" (Ops. 127).

The majority below clearly erred in both its rulings.

In *Consolidated Edison*, the Labor Board erroneously excluded rebuttal testimony tendered by an employer. The

case held that this error could not be availed of in the proceeding to review the Board's order, but only by a statutory motion for leave to adduce additional evidence.

*Consolidated Edison* is, we think, dubious. In any event, it does not apply to the facts of this case. For here petitioner sought to obtain documents for possible use on cross-examination, not to introduce additional testimony of its own witness. Cross-examination of an adversary's witness is not the introduction of additional evidence within any reasonable reading of section 14(a). Moreover, as the court below recognized, the administration of justice will be hampered by a rule which requires a motion for leave to adduce additional evidence to review every claimed denial of the right of cross-examination. Such a rule would necessitate multiple interlocutory appeals from the exclusionary rulings of administrative agencies operating under standard statutory review provisions. Accordingly, even if the *Consolidated Edison* rule were applicable here, the majority below, like the Eighth Circuit, should have held that the rule was satisfied by petitioner's assignment of the exclusionary ruling as error in the petition for review (R. 142). *Mississippi Valley Structural Steel Co.* v. *N. L. R. B.*, 145 F. 2d 664.

Even if the majority below had been right in insisting on the need for a separate motion for leave to adduce, it was inexcusable to deny such a motion when it was filed. As already stated, granting the motion would not have delayed the proceeding, which was being reopened anyway. Nor could petitioner have anticipated the court's novel extension of *Consolidated Edison*. The motion was not an attempted "*nunc pro tunc*" cure of procedural defects, as viewed by the court below. The motion was prospective only. Nor are we aware of any doctrine that procedural omissions may not be remedied so long as the case is still pending and the other side is not prejudiced. The interests of justice required correction of the Board's error, not the erection of artificial measures for preserving it.

### B. Budenz' Statements to the FBI.[66]

As we have seen (*supra*, p. 129), the Attorney General first disclosed the existence of disc recordings of Budenz' 1945 interview with the FBI after petitioner had petitioned for a rehearing of the decision below of January 9, 1958. Petitioner then moved under section 14(a) for the production of so much of the recordings and FBI memoranda of subsequent interviews with Budenz as related to the subject matter of his testimony (R. 2681, 2688). The court below, Judge Bazelon dissenting, denied the motion except insofar as it related to statements of Budenz concerning the Starobin letter and the Weiner conversation (Ops. 122-23). The court later ruled in an explanatory memorandum, Judge Bazelon dissenting, that petitioner was not entitled to statements concerning other matters on which Budenz had testified because it had not moved for their production at the original hearing and because the "blanket demand" made in its 14(a) motion was "a fishing expedition" and untimely (R. 2696-97).

The court below was wrong on all three counts.

(1) Before Budenz' appearance at the original hearing, the Board denied petitioner's motions for the prior statements of two other witnesses. These rulings were based on the erroneous premise that a witness' prior statements were producible only if it were first shown that they were inconsistent with his testimony.[67] Bowing to this ruling,

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[66] The point raised in this subsection requires decision only if the Court disagrees with our argument that all of Budenz' testimony must be stricken because of the deprivation of petitioner's right to cross-examine him (*supra*, pp. 128-39).

[67] The Board's doctrine was first adopted in its ruling denying petitioner's motion for the production of the memoranda of Gitlow, the first witness called by the Attorney General (R. 2255-57, 128; Tr. 2886). Thereafter, and before Budenz' appearance on the stand, the Board issued a written opinion repeating its doctrine in denying another production motion (Tr. 12659-60).

petitioner confined its subsequent production motions to situations in which, it contended, such a showing had been made. It was on this ground that petitioner moved for Budenz' statements on the Starobin and Weiner matters (R. 1184-85, 2275; Tr. 14076-80).

On these facts, it was error for the majority below to hold that petitioner was not entitled to prior statements of Budenz on other subjects because it had not moved for their production at the original hearing. The Board had already established a principle under which such motions would have been denied if made. Obviously petitioner was not obliged to make futile motions.

(2). Petitioner's motion under section 14(a) for all prior statements relating to the subject matter of Budenz' testimony was not a "fishing expedition," but conformed to the procedure specified in 18 U. S. C. 3500, and contemplated in *Jencks* v. *United States*, 353 U. S. 657.

(3) As Judge Bazelon held (R. 2696-97), and as the record discloses (R. 2688-92), Budenz' testimony at the original hearing, the action of the Board in cutting off cross-examination, and representations made by the government to the court below, had misled petitioner into believing that there were no verbatim transcriptions of FBI interviews with Budenz. Since petitioner moved for the relevant portions of the transcriptions as soon as it learned of their existence, its motion was not untimely.[68]

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[68] Budenz' unavailability at the time of the last Board hearing does not moot the question under discussion. He may have recovered sufficiently to take the stand by the time the case gets back to the Board. If not, the Board, consistently with its ruling on the Weiner and Starobin matters (*supra*, p. 129), will be required to strike Budenz' testimony on all subjects to which the prior statements relate.

### C. Other Statements to the FBI by Witnesses for the Attorney General.

In its decision of January 9, 1958, modified on April 11, 1958, the court below held (Ops. 111, 123) that the principles of *Jencks* v. *United States, supra*, and 18 U. S. C. 3500 were applicable to proceedings before the Board. Accordingly, after the case had been remanded to the Board by the court below, petitioner moved for the production of all statements as defined in 18 U. S. C. 3500, which had been made by witnesses for the Attorney General and which related to the subject matter of their testimony (R. 2338). After the Board denied the motion (R. 2346-47), petitioner sought production of the statements by a motion in the court below for leave to adduce them as additional evidence pursuant to section 14(a) (R. 2697).[69]

The court below denied the motion, stating (Ops. 127-28), "The motion comes too late, and in any event it is not supported by any authority," and that the *Jencks* case disapproved "fishing expeditions." These are the same grounds on which the court refused to order production of the Budenz statements and which, as we have shown, are fallacious.

## III. The court below, having stricken a key finding of the Board, erred in not remanding the case for administrative redetermination.

One of the eight criteria of a Communist-action organization is the organization's use of secret practices "for the purpose of concealing foreign direction, domination, or control, or of expediting or promoting its objectives" (sec. 13(e)(7)). The Board in its original Report found that petitioner engaged in secret practices for both of the stated purposes (R. 117). In the first decision below, the court struck the purpose findings as not supported by the evi-

[69] Petitioner's brief in the court below also assigned the Board's ruling as error. The motion was filed because of the court's prior erroneous ruling that a motion was the only available remedy (*supra*, pp. 140-41).

dence (Ops. 73-74). This holding made the subsection inapplicable. Nevertheless, the court affirmed the order of the Board.[70]

The Modified Report, issued by the Board after the first remand, eliminated the original finding that one of the purposes of the secret practices was concealment of foreign control (R. 2615 ftn. 116). However, it retained the other purpose finding stricken by the court below, namely, that the secret practices were engaged in for the purpose of promoting petitioner's objectives (R. 2631). The court below in its latest opinion adhered to its former ruling that this purpose finding was unsupported by the evidence (Ops. 126). Nevertheless the court affirmed the Board's order, Judge Bazelon dissenting (Ops. 132).

The importance of the secrecy finding is clear. It relates to one of the eight standards of section 13(e). The Board devoted to it nineteen pages of the Modified Report (R. 2613-31). It is also the only one of the 13(e) standards concerning which there was any substantial amount of evidence of post-Act practices. The importance attached to the subject by the Board further appears from its retention of the finding after the court below held it unsupported by the evidence. And even then the Board refrained from stating that this doubtful finding was not essential to the result.

It was error for the court below to affirm the order of the Board while setting aside one of the major findings on which the order was based. The court's action violated section 14 of the Act, which permits affirmance of a registration order only if the *findings* of the Board are supported by a preponderance of the evidence. The decision also violated the principle that, "The grounds upon

[70] One of the questions on which certiorari was granted in this case in 1954 was whether the court below erred in failing to remand the proceeding after striking the secret practices finding. Petition in No. 718, Oct. Term 1954, p. 3.

which an administrative order must be judged are those upon which the record discloses that its action was based." *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80, 87. As further stated in *Chenery*:

> "The Commission's action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate safeguard for the interests protected by the Act." (At 94.)
>
> "We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." (At 95.)

See also, *I. C. C.* v. *C. B. & Q. R. R.*, 186 U. S. 320, 341; *Colorado Wyoming Gas Co.* v. *F. P. C.*, 324 U. S. 626, 634; *Atchison Ry.* v. *United States*, 295 U. S. 193, 201-03; *F. P. C.* v. *Idaho Power Co.*, 344 U. S. 17, 20.

The decision below contravenes *N. L. R. B.* v. *Virginia Electric & Power Co.*, 314 U. S. 469. There the Court remanded an administrative order because the agency's ultimate conclusion rested on findings which had insufficient evidentiary support. The Court recognized that the agency might validly have reached the same ultimate conclusion by making other findings supportable by the record before it. Nevertheless it remanded the case for agency redetermination.

The majority below justified its failure to remand on the ground that "the Board is entitled to adhere to its view on the point until our view of it has been tested in the Supreme Court" (Ops. 126). Thus the court failed to exercise its statutory duty of review and violated the rules of *Chenery* and *Virginia Electric & Power Co.*, which laid down principles to be followed by the Courts of Appeals as well as by the Supreme Court.

## Conclusion

If the judgment below is sustained, the immediate effect will be to outlaw petitioner and to lay the foundation for criminal prosecutions against petitioner's officers and members. This will be the first time in our history that the Communist Party or any other political organization has been outlawed by federal legislation. Yet Marxist groups and parties have been active in this country since the middle of the last century,[71] and petitioner has existed as a legal political party since 1919.

No other major democracy outlaws its Communist Party. Only the Congress of the United States asserts that such a measure is necessary for the national safety or compatible with its institutions. Validation of the Act would give notice to the world that America has lost faith in the democratic process and confidence in its Bill of Rights.

The proscription of the Communist Party will also deeply affect non-Communists. The Board has already ordered thirteen organizations to register as "Communist-fronts," and has pending before it a case charging an international labor union as an "infiltrated" organization. The alleged "fronts" include two schools for social studies and groups promoting such causes as civil liberties, Soviet-American amity, the interests of the foreign born, economic

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[71] American Marxists helped form the Republican Party, backed Lincoln's candidacy in 1860, made significant contributions to the cause of the Union in the Civil War, helped form the first national federation of American trade unions, and played a leading role in organizing the American Federation of Labor. See R. 1262-65, 1270-71; Gompers, *Seventy Years of Life and Labor* (N. Y. 1925) v. 1, 51-60. Marx once observed, "Socialism and Communism did not originate in Germany, but in England, France and North America." *Selected Essays* (N. Y. 1926) 140.

security for the aged, and the defense of individuals charged under the Smith Act.[72].

The number of "front" and "infiltrated" organizations can be readily multiplied in the light of the comprehensive criteria of sections 13(f) and 13(A)(e).[73] Moreover, if the present categories of condemned organizations turn out to be too restricted, new ones can be created. Having moved from "action" and "front" organizations to "infiltrated" organizations, the Act could next be extended to groups which are "contaminated" and, finally" "politically unreliable."

Thus a vast number of organizations will be at the mercy of governmental displeasure if the Act is held valid.

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[72] The organizations ordered to register as "fronts" are Jefferson School of Social Science, California Labor School, Civil Rights Congress, National Council of American-Soviet Friendship, Veterans of the Abraham Lincoln Brigade, United May Day Committee, Washington Pension Union, Labor Youth League, American Peace Crusade, Colorado Committee to Protect Civil Liberties, Connecticut Volunteers for Civil Rights, California Emergency Defense Committee, American Committee for Protection of the Foreign Born. The pending "infiltrated" case is against the International Union of Mine, Mill and Smelter Workers.

[73] An illustration of these criteria in operation is supplied by the following typical allegation made by the Attorney General in a petition to require an organization to register as a front: "The Committee supported the views, policies and objectives of the Communist Party by opposing the enactment of certain legislation regarded by the Party as inimical to its interests, such as the Mundt-Nixon Bill, the Hobbs Bill, and the Internal Security Act of 1950." Par. III(4)(c) of Amended Petition in *Rogers* v. *American Committee for Protection of Foreign Born*, Docket No. 109-53, Subversive Activities Control Board. In another case, the gravamen of the Board's findings in support of a registration order was that the organization "came into existence at Denver, Colorado, in the fall of 1954, that it was created by the Communist Party to raise defense and bail funds for the Colorado seven and to mobilize public opinion for them and against the Smith Act and prosecutions thereunder." Report of the Board, p. 17, in *Rogers* v. *Colorado Committee to Protect Civil Liberties*, Board Docket No. 120-57.

For if the Constitution is held to authorize the premises which underlie the condemnation of petitioner, there will remain little room for constitutional objections to application of the Act to other organizations. And the techniques and interpretations of the Act used against petitioner by the Board and the court below, if sustained, can be applied so as to destroy virtually any group whose views are not officially approved.

If the order of the Board becomes final, the civil sanctions and criminal penalties which the Act imposes on petitioner's members will be extended far beyond those who are its members by any conventional or rational standards, in view of the all-embracing criteria of section 5 of the Communist Control Act. Worse, the order will have a disastrous effect on freedom of association and expression. As the President said in his veto message (H. R. Doc. 708, 81st Cong., 2d Sess., pp. 6-7):

> "Obviously, if this law were on the statute books, the part of prudence would be to avoid saying anything that might be construed by someone as not deviating sufficiently from the current Communist-propaganda line. And since no one could be sure in advance what views were safe to express, the inevitable tendency would be to express no views on controversial subjects."

The events of recent years have once more demonstrated the historic lesson that repression cannot be contained. What began as a drive against Communists inexorably led to the victimization of thousands of non-Communists, who were persecuted, dismissed from their jobs, blacklisted, ostracized, barred from public platforms, deported, denied the right to leave or enter the country, and otherwise persecuted. A climate of fear was created, and America's international reputation was seriously impaired.

The justification advanced for the Act is that it is needed to protect the national security against the menace of Communism. The fact is that the Act is a supreme example

of the truth of the statement that "Security is like liberty, in that many are the crimes committed in its name." *Knauff v. Shaughnessy*, 338 U. S. 537, 551. The Act does not protect, but undermines, the national security. It destroys the values most essential to be secured and on which our true security rests. As applied in this case, the Act suppresses peaceable advocacy and assembly, imputes guilt for association and belief, coerces self-incrimination, condemns by legislative fiat, compels trial before a biased tribunal, and authorizes judgment on the basis of irrational and vague standards. If these execrable techniques, so recently condemned both at home and abroad as "McCarthyism," may lawfully be applied to petitioner, they will inevitably be extended to the people as a whole.

The Act was enacted in the summer of 1950, when "the Western world as a whole believed that Korea was the opening campaign of the third world war." Walter Lippman, N. Y. Herald Tribune, Nov. 11, 1952. Even under such circumstances, the Act's wholesale sacrifice of civil liberties would not have advanced the national security. On the contrary, as President Truman stated in his veto message, it is the registration provisions of the Act which "represent a clear and present danger to our institutions" (H. R. Doc. 708, *supra*, at p. 5).

Moreover, events have disproved the accuracy of the political estimate which fathered the Act. The order of the Board is already an anachronism. To sustain it would vainly surrender our heritage of freedom and forfeit the respect and confidence of the peoples of the world.

The judgment below should be reversed.

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# APPENDIX: STATUTES INVOLVED

## Subversive Activities Control Act

The Internal Security Act of 1950, 64 Stat. 987, 50 U. S. C. 781 ff., as amended, provides in part as follows:

### An Act

To protect the United States against certain un-American and subversive activities by requiring registration of Communist organizations, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America and Congress assembled,* That this Act may be cited as the "Internal Security Act of 1950".

### TITLE I—SUBVERSIVE ACTIVITIES CONTROL

Section 1. (a) This title may be cited as the "Subversive Activities Control Act of 1950."

(b) Nothing in this Act shall be construed to authorize, require, or establish military or civilian censorship or in any way to limit or infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States and no regulation shall be promulgated hereunder having that effect.

#### Necessity for Legislation

Sec. 2. As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress hereby finds that—

(1) There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration

into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization.

(2) The establishment of a totalitarian dictatorship in any country results in the suppression of all opposition to the party in power, the subordination of the rights of individuals to the state, the denial of fundamental rights and liberties which are characteristic of a representative form of government, such as freedom of speech, of the press, of assembly, and of religious worship, and results in the maintenance of control over the people through fear, terrorism, and brutality.

(3) The system of government known as a totalitarian dictatorship is characterized by the existence of a single political party, organized on a dictatorial basis, and by substantial identity between such party and its policies and the government and governmental policies of the country in which it exists.

(4) The direction and control of the world Communist movement is vested in and exercised by the Communist dictatorship of a foreign country.

(5) The Communist dictatorship of such foreign country, in exercising such direction and control and in furthering the purpose of the world Communist movement, establishes or causes the establishment of, and utilizes, in various countries, action organizations which are not free and independent organizations, but are sections of a world-wide Communist organization and are controlled, directed, and subject to the discipline of the Communist dictatorship of such foreign country.

(6) The Communist action organizations so established and utilized in various countries, acting under such control, direction, and discipline, endeavor to carry out the objective of the world Communist movement by bringing about the overthrow of existing governments by any available means, including force if necessary, and setting up Communist totalitarian dictatorships which will be subservient to the most powerful existing Communist totalitarian dictatorship. Although such organizations usually designate themselves as political parties, they are in fact constituent elements of the world-wide Communist movement and promote the objectives of such movement by conspiratorial and coercive tactics, instead of through the democratic processes of a free elective system or through the freedom-preserving means employed by a political party which operates as an agency by which people govern themselves.

(7) In carrying on the activities referred to in paragraph (6), such Communist organizations in various countries are organized on a secret, conspiratorial basis and operate to a substantial extent through organizations, commonly known as "Communist fronts", which in most instances are created and maintained, or used, in such manner as to conceal the facts as to their true character and purposes and their membership. One result of this method of operation is that such affiliated organizations are able to obtain financial and other support from persons who would not extend such support if they knew the true purposes of, and the actual nature of the control and influence exerted upon, such "Communist fronts".

(8) Due to the nature and scope of the world Communist movement, with the existence of affiliated

constituent elements working toward common objectives in various countries of the world, travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement.

(9 In the United States those individuals who knowingly and willfully participate in the world Communist movement, when they so participate, in effect repudiate their allegiance to the United States, and in effect transfer their allegiance to the foreign country in which is vested the direction and control of the world Communist movement.

(10) In pursuance of communism's stated objectives, the most powerful existing Communist dictatorship has, by the methods referred to above, already caused the establishment in numerous foreign countries of Communist totalitarian dictatorships, and threatens to establish similar dictatorships in still other countries.

(11) The agents of communism have devised clever and ruthless espionage and sabotage tactics which are carried out in many instances in form or manner successfully evasive of existing law.

(12) The Communist network in the United States is inspired and controlled in large part by foreign agents who are sent into the United States ostensibly as attaches of foreign legations, affiliates of international organizations, members of trading commissions, and in similar capacities, but who use their diplomatic or semi-diplomatic status as a shield behind which to engage in activities prejudicial to the public security.

(13) There are, under our present immigration laws, numerous aliens who have been found to be

deportable, many of whom are in the subversive, criminal, or immoral classes who are free to roam the country at will without supervision or control.

(14) One device for infiltration by Communists is by procuring naturalization for disloyal aliens who use their citizenship as a badge for admission into the fabric of our society.

(15) The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such preparations by Communist organizations in other countries have aided in supplanting existing governments. The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States.

## DEFINITIONS

SEC. 3. For the purposes of this title—

(1) The term "person" means an individual or an organization.

(2) The term "organization" means an organization, corporation, company, partnership, association, trust foundation, or fund; and includes a group of persons, whether or not incorporated, permanently or temporarily associated together for joint action on any subject or subjects.

(3) The term "Communist-action organization" means—

(a) any organization in the United States (other than a diplomatic representative or mission of a foreign government accredited as such by the Department of State) which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title; and

(b) any section, branch, fraction, or cell of any organization defined in subparagraph (a) of his paragraph which has not complied with the registration requirements of this title.

(4) The term "Communist-front organization" means any organization in the United States (other than a Communist-action organization as defined in paragraph (3) of this section) which (A) is substantially directed, dominated, or controlled by a Communist-action organization, and (B) is primarily operated for the purpose of giving aid and support to a Communist-action organization, a Communist foreign government, or the world Communist movement referred to in section 2 of this title.

(4A) The term "Communist-infiltrated organization" means any organization in the United States (other than a Communist-action organization or a Communist-front organization) which (A) is substantially directed, dominated, or controlled by an individual or individuals who are, or who within three years have been actively engaged in, giving aid or support to a Communist-action organization, a Communist foreign government, or the world Communist movement referred to in section 2 of this title, and (B) is serving, or within three years has served, as a means for (i) the giving of aid or support to any such organization, government, or movement, or (ii) the impairment of the military strength of the United States or its industrial capacity to furnish logistical or other material support required by its Armed Forces: *Provided, however*, That any labor organization which is an affiliate in good standing of a national federation or other labor organization whose policies and activities have been directed to opposing Communist organizations, any Communist foreign government, or the world Communist movement, shall be presumed prima facie not to be a "Communist-infiltrated organization."[1]

(5) The term "Communist organization" means any Communist-action organization, Communist-front organization, or Communist-infiltrated organization.[2]

(6) The term "to contribute funds or services" includes the rendering of any personal service and the making of any gift, subscription, loan, advance, or deposit, of money or of anything of value, and also the making of any contract, promise, or agreement to contribute funds or services, whether or not legally enforcible.

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[1] Added by sec. 7(a) of the Communist Control Act of 1954, 68 Stat. 777.

[2] As amended by sec. 7(b) of the Communist Control Act of 1954, 68 Stat. 778.

(7) The term "facility" means any plant, factory or other manufacturing, producing or service establishment, airport, airport facility, vessel, pier, water-front facility, mine, railroad, public utility, laboratory, station, or other establishment or facility, or any part, division, or department of any of the foregoing. The term "defense facility" means any facility designated and proclaimed by the Secretary of Defense pursuant to section 5(b) of this title and included on the list published and currently in effect under such subsection, and which is in compliance with the provisions of such subsection respecting the posting of notice of such designation.

(8) The term "publication" means any circular, newspaper, periodical, pamphlet, book, letter, post card, leaflet, or other publication.

(9) The term "United States", when used in a geographical sense, includes the several States, Territories and possessions of the United States, the District of Columbia, and the Canal Zone.

(10) The term "interstate or foreign commerce" means trade, traffic, commerce, transportation, or communication (A) between any State, Territory, or possession of the United States (including the Canal Zone), or the District of Columbia, and any place outside thereof, or (B) within any territory or possession of the United States (including the Canal Zone), or within the District of Columbia.

(11) The term "Board" means the Subversive Activities Control Board created by section 12 of this title.

(12) The term "final order of the Board" means an order issued by the Board under section 13 of this title, which has become final as provided in section 14 of this title.

(13) The term "advocates" includes advises, recommends, furthers by overt act, and admits belief in; and the giving, loaning, or promising of support or of money or anything of value to be used for advocating any doctrine shall be deemed to constitute the advocating of such doctrine.

(14) The term "world communism" means a revolutionary movement, the purpose of which is to establish eventually a Communist totalitarian dictatorship in any or all the countries of the world through the medium of an internationally coordinated Communist movement.

(15) The terms "totalitarian dictatorship" and "totalitarianism" mean and refer to systems of government not representative in fact, characterized by (A) the existence of a single political party, organized on a dictatorial basis, with so close an indentity between such party and its policies and the governmental policies of the country in which it exists, that the party and the government constitute an indistinguishable unit, and (B) the forcible suppression of opposition to such party.

(16) The term "doctrine" includes, but is not limited to policies, practices, purposes, aims, or procedures.

(17) The giving, loaning, or promising of support or of money or any other thing of value for any purpose to any organization shall be conclusively presumed to constitute affiliation therewith; but nothing in this paragraph shall be construed as an exclusive definition of affiliation.

(18) "Advocating the economic, international, and governmental doctrines of world communism" means advocating the establishment of a totalitarian Communist dictatorship in any or all of the countries of the world through the medium of an internationally coordinated Communist movement.

(19) "Advocating the economic and governmental doctrines of any other form of totalitarianism" means advocating the establishment of totalitarianism (other than world communism) and includes, but is not limited to, advocating the economic and governmental doctrines of fascism and nazism.

CERTAIN PROHIBITED ACTS

SEC. 4. (a) It shall be unlawful for any person knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship, as defined in paragraph (15) of section 3 of this title, the direction and control of which is to be vested in, or exercised by or under the domination or control of, any foreign government, foreign organization, or foreign individual: *Provided, however,* That this subsection shall not apply to the proposal of a constitutional amendment.

(b) It shall be unlawful for any officer or employee of the United States or of any department or agency thereof, or of any corporation the stock of which is owned in whole or in major part by the United States or any department or agency thereof, to communicate in any manner or by any means, to any other person whom such officer or employee knows or has reason to believe to be an agent or representative of any foreign government or an officer or member of any Communist organization as defined in paragraph (5) of section 3 of this title, any information of a kind which shall have been classified by the President (or by the head of any such department, agency, or corporation with the approval of the President) as affecting the security of the United States, knowing or having reason to know that such information has been so classified, unless such officer or employee shall have been specifically authorized by the President, or by the head of the department

agency, or corporation by which this officer or employee is employed, to make such disclosure of such information.

(c) It shall be unlawful for any agent or representative of any foreign government, or any officer or member of any Communist organization as defined in paragraph (5) of section 3 of this title, knowingly to obtain or receive, or attempt to obtain or receive, directly or indirectly, from any officer or employee of the United States or of any department or agency thereof or of any corporation the stock of which is owned in whole or in major part by the United States or any department or agency thereof, any information of a kind which shall have been classified by the President (or by the head of any such department, agency, or corporation with the approval of the President) as affecting the security of the United States, unless special authorization for such communication shall first have been obtained from the head of the department, agency, or corporation having custody of or control over such information.

(d) Any person who violates any provision of this section shall, upon conviction thereof, be punished by a fine of not more than $10,000, or imprisonment for not more than ten years, or by both such fine and such imprisonment, and shall, moreover, be thereafter ineligible to hold any office, or place of honor, profit, or trust created by the Constitution or laws of the United States.

(e) Any person may be prosecuted, tried, and punished for any violation of this section at any time within ten years after the commission of such offense, notwithstanding the provisions of any other statute of limitations: *Provided*, That if at the time of the commission of the offense such person is an officer or employee of the United States or of any department or agency thereof, or of any corporation the stock of which is owned in whole or in major part by the United States or any department or agency

thereof, such person may be prosecuted, tried, and punished for any violation of this section at any time within ten years after such person has ceased to be employed as such officer or employee.

(f) Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. The fact of the registration of any person under section 7 or section 8 of this title as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute.

EMPLOYMENT OF MEMBERS OF COMMUNIST ORGANIZATIONS

SEC. 5. (a) When a Communist organization, as defined in paragraph (5) of section 3 of this title, is registered or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful—

(1) For any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

(A) in seeking, accepting, or holding any nonelective office or employment under the United States, to conceal or fail to disclose the fact that he is a member of such organization; or

(B) to hold any nonelective office or employment under the United States; or

(C) in seeking, accepting, or holding employment in any defense facility, to conceal or fail to disclose the fact that he is a member of such organization; or

(D) if such organization is a Communist-action organization, to engage in any employment in any defense facility; or

(E) to hold office or employment with any labor organization, as that term is defined in section 2(5) of the National Labor Relations Act, as amended (29 U. S. C. 152), or to represent any employer in any matter or proceeding arising or pending under that Act.[3]

(2) For any officer or employee of the United States or of any defense facility, with knowledge or notice that such organization is so registered or that such order has become final—

(A) to contribute funds or services to such organization; or

(B) to advise, counsel or urge any person, with knowledge or notice that such person is a member of such organization, to perform, or to omit to perform, any act if such act or omission would constitute a violation of any provision of subparagraph (1) of this subsection.

(b) The Secretary of Defense is authorized and directed to designate and proclaim, and from time to time revise, a list of facilities, as defined in paragraph (7) of section 3 of this title, with respect to the operation of which he finds and determines that the security of the United States requires the application of the provisions of subsection (a) of this section. The Secretary shall cause such list as designated and proclaimed, or any revision thereof, to be promptly published in the Federal Register, and shall promptly notify the management of any facility so listed; whereupon such management shall immediately post con-

[3] Added by sec. 6 of the Communist Control Act of 1954, 68 Stat. 777.

spicuously, and thereafter while so listed keep posted, notice of such designation in such form and in such place or places as to give reasonable notice thereof to all employees of, and to all applicants for employment in, such facility.

### Denial of Passports to Members of Communist Organizations

Sec. 6. (a) When a Communist organization as defined in paragraph (5) of section 3 of this title is registered, or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful for any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

(1) to make application for a passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States; or

(2) to use or attempt to use any such passport.

(b) When an organization is registered, or there is in effect a final order of the Board requiring an organization to register, as a Communist-action organization, it shall be unlawful for any officer or employee of the United States to issue a passport to, or renew the passport of, any individual knowing or having reason to believe that such individual is a member of such organization.

### Registration and Annual Reports of Communist Organizations

Sec. 7. (a) Each Communist-action organization (including any organization required, by a final order of the Board, to register as a Communist-action organization) shall, within the time specified in subsection (c) of this sec-

tion, register with the Attorney General; on a form prescribed by him by regulations, as a Communist-action organization.

(b) Each Communist-front organization (including any organization required, by a final order of the Board, to register as a Communist-front organization) shall, within the time specified in subsection (c) of this section, register with the Attorney General, on a form prescribed by him by regulations, as a Communist-front organization.

(c) The registration required by subsection (a) or (b) shall be made—

(1) in the case of an organization which is a Communist-action organization or a Communist-front organization on the date of the enactment of this title, within thirty days after such date;

(2) in the case of an organization becoming a Communist-action organization or a Communist-front organization after the date of the enactment of this title, within thirty days after such organization becomes a Communist-action organization or a Communist-front organization, as the case may be; and

(3) in the case of an organization which by a final order of the Board is required to register, within thirty days after such order becomes final.

(d) The registration made under subsection (a) or (b) shall be accompanied by a registration statement, to be prepared and filed in such manner and form as the Attorney General shall by regulations prescribe, containing the following information:

(1) The name of the organization and the address of its principal office.

(2) The name and last-known address of each individual who is at the time of filing of such registra-

tion statement, and of each individual who was at any time during the period of twelve full calendar months next preceding the filing of such statement, an officer of the organization, with the designation or title of the office so held, and with a brief statement of the duties and functions of such individual as such officer.

(3) An accounting, in such form and detail as the Attorney General shall by regulations prescribe, of all moneys received and expended (including the sources from which received and the purposes for which expended) by the organization during the period of twelve full calendar months next preceding the filing of such statement.

(4) In the case of a Communist-action organization, the name and last-known address of each individual who was a member of the organization at any time during the period of twelve full calendar months preceding the filing of such statement.

(5) In the case of any officer or member whose name is required to be shown in such statement, and who uses or has used or who is or has been known by more than one name, each name which such officer or member uses or has used or by which he is known or has been known.

(6) A listing, in such form and detail as the Attorney General shall by regulation prescribe, of all printing presses and machines including but not limited to rotary presses, flatbed cylinder presses, platen presses, lithographs, offsets, photo-offsets, mimeograph machines, multigraph machines, multilith machines, duplicating machines, ditto machines, linotype machines, intertype machines, monotype machines, and all other types of printing processes, typesetting machines or any mechanical devices used

or intended to be used, or capable of being used to produce or publish printed matter or material, which are in the possession, custody, ownership, or control of the Communist-action or Communist-front organization or its officers, members, affiliates, associates, group, or groups in which the Communist-action or Communist-front organization, its officers or members have an interest.[4]

(e) It shall be the duty of each organization registered under this section to file with the Attorney General on or before February 1 of the year following the year in which it registers, and on or before February 1 of each succeeding year, an annual report, prepared and filed in such manner and form as the Attorney General shall by regulations prescribe, containing the same information which by subsection (d) is required to be included in a registration statement, except that the information required with respect to the twelve-month period referred to in paragraph (2), (3), or (4) of such subsection shall, in such annual report, be given with respect to the calendar year preceding the February 1 on or before which such annual report must be filed.

(f) (1) It shall be the duty of each organization registered under this section to keep, in such manner and form as the Attorney General shall by regulations prescribe, accurate records and accounts of moneys received and expended (including the sources from which received and purposes for which expended) by such organization.

(2) It shall be the duty of each Communist-action organization registered under this section to keep, in such manner and form as the Attorney General shall by regulations prescribe, accurate records of the names and addresses of the members of such organizations and of persons who actively participate in the activities of such organization.

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[4] Added by P. L. 557, 83d Cong., 2d Sess., 68 Stat. 586.

(g) It shall be the duty of the Attorney General to send to each individual listed in any registration statement or annual report, filed under this section, as an officer or member of the organization in respect of which such registration statement or annual report was filed, a notification in writing that such individual is so listed; and such notification shall be sent at the earliest practicable time after the filing of such registration statement or annual report. Upon written request of any individual so notified who denies that he holds any office or membership (as the case may be) in such organization, the Attorney General shall forthwith initiate and conclude at the earliest practicable time an appropriate investigation to determine the truth or falsity of such denial, and, if the Attorney General shall be satisfied that such denial is correct, he shall thereupon strike from such registration statement or annual report the name of such individual. If the Attorney General shall decline or fail to strike the name of such individual from such registration statement or annual report within five months after receipt of such written request, such individual may file with the Board a petition for relief pursuant to section 13(b) of this title.

(h) In the case of failure on the part of any organization to register or to file any registration statement or annual report as required by this section, it shall be the duty of the executive officer (or individual performing the ordinary and usual duties of an executive officer) and of the secretary (or individual performing the ordinary and usual duties of the secretary) of such organization, and of such officer or officers of such organization as the Attorney General shall by regulations prescribe, to register for such organization, to file such registration statement, or to file such annual report, as the case may be.

REGISTRATION OF MEMBERS OF COMMUNIST-ACTION ORGANIZATIONS

SEC. 8 (a) Any individual who is or becomes a member of any organization concerning which (1) there is in effect a final order of the Board requiring such organization to register under section 7(a) of this title as a Communist-action organization, (2) more than thirty days have elapsed since such order has become final, and (3) such organization is not registered under section 7 of this title as a Communist-action organization, shall within sixty days after said order has become final, or within thirty days after becoming a member of such organization, whichever is later, register with the Attorney General as a member of such organization.

(b) Each individual who is or becomes a member of any organization which he knows to be registered as a Communist-action organization under section 7(a) of this title, but to have failed to include his name upon the list of members thereof filed with the Attorney General, pursuant to the provisions of subsections (d) and (e) of section 7 of this title, shall, within sixty days after he shall have obtained such knowledge, register with the Attorney General as a member of such organization.

(c) The registration made by any individual under subsection (a) or (b) of this section shall be accompanied by a registration statement to be prepared and filed in such manner and form, and containing such information, as the Attorney General shall by regulations prescribe.

KEEPING OF REGISTERS; PUBLIC INSPECTION; REPORTS TO PRESIDENT AND CONGRESS

SEC. 9. (a) The Attorney General shall keep and maintain separately in the Department of Justice—

(1) a "Register of Communist-Action Organizations", which shall include (A) the names and

addresses of all Communist-action organizations registered under section 7, (B) the registration statements and annual reports filed by such organizations thereunder, and (C) the registration statements filed by individuals under section 8; and

(2) a "Register of Communist-Front Organizations", which shall include (A) the names and addresses of all Communist-front organizations registered under section 7, and (B) the registration statements and annual reports filed by such organizations thereunder.

(b) Such registers shall be kept and maintained in such manner as to be open for public inspection: *Provided*, That the Attorney General shall not make public the name of any individual listed in either such register as an officer or member of any Communist organization until sixty days shall have elapsed after the transmittal of the notification required by section 7(g) to be sent to such individual, and if prior to the end of such period such individual shall make written request to the Attorney General for the removal of his name from any such list, the Attorney General shall not make public the name of such individual until six months shall have elapsed after receipt of such request by the Attorney General, or until thirty days shall have elapsed after the Attorney General shall have denied such request and shall have transmitted to such individual notice of such denial, whichever is earlier.

(c) The Attorney General shall submit to the President and to the Congress on or before June 1 of each year (and at any other time when requested by either House by resolution) a report with respect to the carrying out of the provisions of this title, including the names and addresses of the organizations listed in such registers and (except to the extent prohibited by subsection (b) of this section) the names and addresses of the individuals listed as members of such organizations.

(d) Upon the registration of each Communist organization under the provisions of this title, the Attorney General shall publish in the Federal Register the fact that such organization has registered as a Communist-action organization, or as a Communist-front organization, as the case may be, and the publication thereof shall constitute notice to all members of such organization that such organization has so registered.

USE OF THE MAILS AND INSTRUMENTALITIES OF INTERSTATE OR FOREIGN COMMERCE

SEC. 10. It shall be unlawful for any organization which is registered under section 7, or for any organization with respect to which there is in effect a final order of the Board requiring it to register under section 7, or determining that it is a Communist-infiltrated organization,[5] or for any person acting for or on behalf of any such organization—

(1) to transmit or cause to be transmitted, through the United States mails or by any means or instrumentality of interestate or foreign commerce, any publication which is intended to be, or which it is reasonable to believe is intended to be, circulated or disseminated among two or more persons, unless such publication, and any envelope, wrapper, or other container in which it is mailed or otherwise circulated or transmitted, bears the following, printed in such manner as may be provided in regulations prescribed by the Attorney General, with the name or the organization appearing in lieu of the blank: "Disseminated by ————————————, a Communist organization"; or

(2) to broadcast or cause to be broadcast any matter over any radio or television station in the

[5] Reference to Communist-infiltrated organizations added by sec. 8(a) of the Communist Control Act of 1954, 68 Stat. 778.

United States, unless such matter is preceded by the following statement, with the name of the organization being stated in place of the blank: "The following program is sponsored by ————————, a Communist organization".

DENIAL OF TAX DEDUCTIONS AND EXEMPTIONS

SEC. 11. (a) Nothwithstanding any other provisions of law, no deduction for Federal income-tax purposes shall be allowed in the case of a contribution to or for the use of any organization if at the time of the making of such contribution (1) such organization is registered under section 7, or (2) there is in effect a final order of the Board requiring such organization to register under section 7 or determining that it is a Communist-infiltrated organization.[6]

(b) No organization shall be entitled to exemption from Federal income tax, under section 101 of the Internal Revenue Code, for any taxable year if at any time during such taxable year (1) such organization is registered under section 7, or (2) there is in effect a final order of the Board requiring such organization to register under section 7 or determining that it is a Communist-infiltrated organization.[7]

SUBVERSIVE ACTIVITIES CONTROL BOARD

Sec. 12. (a) There is hereby established a board, to be known as the Subversive Activities Control Board, which shall be composed of five members, who shall be appointed by the President, by and with the advice and consent of the Senate Not more than three members of the Board shall be members of the same political party. The terms of office of the members of the Board in office on the date of enactment of the Subversive Activities Control Board Tenure

[6] See footnote 5.
[7] See footnote 5.

Act, shall expire at the time they would have expired if such Act had not been enacted. The term of office of each member of the Board, appointed after the date of enactment of the Subversive Activities Control Board Tenure Act shall be for five years from the date of expiration of the terms of his predecessor, except, that (1) the terms of office of that member of the Board who is designated by the President and is appointed to succeed one of the two members of the Board whose terms expire on August 9, 1955, shall be for five years from the date of expiration of the terms of his predecessor, and (2) the term of office of any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be for the remainder of the term of his predecessor. Upon the expiration of his term of office a member of the Board shall continue to serve until his successor shall have been appointed and shall have qualified.[8] The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

(b) Any vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board, and three members of the Board shall, at all times, constitute a quorum. The Board shall have an official seal which shall be judicially noticed.

(c) The Board shall at the close of each fiscal year make a report in writing to the Congress and to the President stating in detail the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees of the Board, and an account of all moneys it has disbursed.

(d) Each member of the Board shall receive a salary of $20,000 a year,[9] shall be eligible for reappointment, and

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[8] Provisions relating to tenure amended by the Subversive Activities Control Board Tenure Act, 69 Stat. 539.

[9] Originally $12,500. Raised to present figure for Board members and $20,500 for the Board Chairman by secs. 105 and 106 of the Federal Executive Pay Act of 1956, P. L. 854, 84th Cong., 2d Sess.

shall not engage in any other business, vocation, or employment.

(e) It shall be the duty of the Board—

(1) upon application made by the Attorney General under section 13(a) of this title, or by any organization under section 13(b) of this title, to determine whether any organization is a "Communist-action organization" within the meaning of paragraph (3) of section 3 of this title, or a "Communist-front organization" within the meaning of paragraph (4) of section 3 of this title; and

(2) upon application made by the Attorney General under section 13(a) of this title, or by any individual under section 13(b) of this title, to determine whether any individual is a member of any Communist-action organization registered, or by final order of the Board required to be registered, under section 7(a) of this title; and

(3) upon any application made under subsection (a) or subsection (b) of section 13A of this title, to determine whether any organization is a Communist-infiltrated organization.[10]

(f) Subject to the civil-service laws and Classification Act of 1949, the Board may appoint and fix the compensation of a chief clerk and such examiners and other personnel as may be necessary for the performance of its functions.

(g) The Board may make such rules and regulations, not inconsistent with the provisions of this title, as may be necessary for the performance of its duties.

(h) There are hereby authorized to be appropriated to the Board such sums as may be necessary to carry out its functions.

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[10] Added by sec. 9(a) of the Communist Control Act of 1954, 68 Stat. 778.

REGISTRATION PROCEEDINGS BEFORE BOARD [11]

SEC. 13. (a) Whenever the Attorney General shall have reason to believe that any organization which has not registered under subsection (a) or subsection (b) of section 7 of this title is in fact an organization of a kind required to be registered under such subsection, or that any individual who has not registered under section 8 of this title is in fact required to register under such section, he shall file with the Board and serve upon such organization or individual a petition for an order requiring such organization or individual to register pursuant to such subsection or section, as the case may be. Each such petition shall be verified under oath, and shall contain a statement of the facts upon which the Attorney General relies in support of his prayer for the issuance of such order.

(b) Any organization registered under subsection (a) or subsection (b) of section 7 of this title, and any individual registered under section 8 of this title, may, not oftener than once in each calendar year, make application to the Attorney General for the cancellation of such registration and (in the case of such organization) for relief from obligation to make further annual reports. Within sixty days after the denial of any such application by the Attorney General, the organization or individual concerned may file with the Board and serve upon the Attorney General a petition for an order requiring the cancellation of such registration and (in the case of such organization) relieving such organization of obligation to make further annual reports. Any individual authorized by section 7(g) of this title to file a petition for relief may file with the Board and serve upon the Attorney General a petition for an order requiring the Attorney General to strike his name from the registration statement or annual report upon which it appears.

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[11] "Registration" added by sec. 9(b) of the Communist Control Act of 1954, 68 Stat. 778.

(c) Upon the filing of any petition pursuant to subsection (a) or subsection (b) of this section, the Board (or any member thereof or any examiner designated thereby) may hold hearings, administer oaths and affirmations, may examine witnesses and receive evidence at any place in the United States, and may require by subpoena the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records deemed relevant, to the matter under inquiry. Subpoenas may be signed and issued by any member of the Board or any duly authorized examiner. Subpoenas shall be issued on behalf of the organization or the individual who is a party to the proceeding upon request and upon a statement or showing of general relevance and reasonable scope of the evidence sought. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States at any designated place of hearing. Witnesses summoned shall be paid the same fees and mileage paid witnesses in the district courts of the United States. In cases of disobedience to a subpoena, the Board may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence. Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, issue an order requiring such person to appear (and to produce documentary evidence if so ordered) and give evidence relating to the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. No person shall be held liable in any action in any court, State or Federal, for any damages resulting from (1) his production of any documentary

evidence in any proceeding before the Board if he is required, by a subpoena issued under this subsection, to produce the evidence; or (2) any statement under oath he makes in answer to a question he is asked while testifying before the Board in response to a subpoena issued under this subsection, if the statement is pertinent to the question.

(d)(1) All hearings conducted under this section shall be public. Each party to such proceeding shall have the right to present its case with the assistance of counsel, to offer oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. An accurate stenographic record shall be taken of the testimony of each witness, and a transcript of such testimony shall be filed in the office of the Board.

(2) Where an organization or individual declines or fails to appear at a hearing accorded to such organization or individual by the Board pursuant to this section, the Board, may, without further proceedings and without the introduction of any evidence, enter an order requiring such organization or individual to register or denying the application of such organization or individual, as the case may be. Where in the course of any hearing before the Board or any examiner thereof a party or counsel is guilty of misbehavior which obstructs the hearing, such party or counsel may be excluded from further participation in the hearing.

(e) In determining whether any organization is a "Communist-action organization", the Board shall take into consideration—

(1) the extent to which its policies are formulated and carried out and its activities performed, pursuant to directives or to effectuate the policies of the foreign government or foreign organization in which

is vested, or under the domination or control of which is exercised, the direction and control of the world Communist movement referred to in section 2 of this title; and

(2) the extent to which its views and policies do not deviate from those of such foreign government or foreign organization; and

(3) the extent to which it receives financial or other aid, directly or indirectly, from or at the direction of such foreign government or foreign organization; and

(4) the extent to which it sends members or representatives to any foreign country for instruction or training in the principles, policies, strategy, or tactics of such world Communist movement; and

(5) the extent to which it reports to such foreign government or foreign organization or to its representatives; and

(6) the extent to which its principal leaders or a substantial number of its members are subject to or recognize the disciplinary power of such foreign government or foreign organization or its representatives; and

(7) the extent to which, for the purpose of concealing foreign direction, domination, or control, or of expediting or promoting its objectives, (i) it fails to disclose, or resists efforts to obtain information as to, its membership (by keeping membership lists in code, by instructing members to refuse to acknowledge membership, or by any other method); (ii) its members refuse to acknowledge membership therein; (iii) it fails to disclose, or resists efforts to obtain information as to, records other than membership lists; (iv) its meetings are secret; and (v) it otherwise operates on a secret basis; and

(8) the extent to which its principal leaders or a substantial number of its members consider the allegiance they owe to the United States as subordinate to their obligations to such foreign government or foreign organization.

(f) In determining whether any organization is a "Communist-front organization", the Board shall take into consideration—

(1) the extent to which persons who are active in its management, direction, or supervision, whether or not holding office therein, are active in the management, direction, or supervision of, or as representatives of, any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2; and

(2) the extent to which its support, financial or otherwise, is derived from any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2; and

(3) the extent to which its funds, resources, or personnel are used to further or promote the objectives of any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2; and

(4) the extent to which the position taken or advanced by it from time to time on matters of policy do not deviate from those of any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2.

(g) If, after hearing upon a petition filed under subsection (a) of this section, the Board determines—

(1) that an organization is a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such organization an order requiring such organization to register as such under section 7 of this title; or

(2) that an individual is a member of a Communist-action organization (including an organization required by final order of the Board to register under section 7(a)), it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such individual an order requiring him to register as such under section 8 of this title.

(h) If, after hearing upon a petition filed under subsection (a) of this section, the Board determines—

(1) that an organization is not a Communist-action organization or Communist-front organization as the case may be, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney General an order denying his petition for an order requiring such organization to register as such under section 7 of this title; and send a copy of such order to such organization; or

(2) that an individual is not a member of any Communist-action organization, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney General an order denying his petition for an order requiring such individual to register as such member under section 8 of this title; and send a copy of such order to such individual.

(i) If, after hearing upon a petition filed under subsection (b) of this section, the Board determines—

(1) that an organization is not a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney General an order requiring him to cancel the registration of such organization and relieve it from the requirement of further annual report; and send a copy of such order to such organization; or

(2) that an individual is not a member of any Communist-action organization, or (in the case of an individual listed as an officer of a Communist-front organization) that an individual is not an officer of a Communist-front organization, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney General an order requiring him to (A) strike the name of such individual from the registration statement or annual report upon which it appears or (B) cancel the registration of such individual under section 8, as may be appropriate; and send a copy of such order to such individual.

(j) If, after hearing upon a petition filed under subsection (b) of this section, the Board determines—

(1) that an organization is a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such organization an order denying its petition for the cancellation of its registration and for relief from the requirement of further annual reports; or

(2) that an individual is a member of a Communist-action organization, or (in the case of an individual listed as an officer of a Communist-front organization) that an individual is an officer of a

Communist-front organization, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such individual an order denying his petition for an order requiring the Attorney General (A) to strike his name from any registration statement or annual report on which it appears or (B) to cancel the registration of such individual under section 8, as the case may be.

(k) When an order of the Board requiring registration of a Communist organization becomes final under the provisions of section 14(b) of this title, the Board shall publish in the Federal Register the fact that such order has become final, and publication thereof shall constitute notice to all members of such organization that such order has become final.

PROCEEDINGS WITH RESPECT TO COMMUNIST-INFILTRATED ORGANIZATIONS[12]

SEC. 13A. (a) Whenever the Attorney General has reason to believe that any organization is a Communist-infiltrated organization, he may file with the Board and serve upon such organization a petition for a determination that such organization is a Communist-infiltrated organization. In any proceeding so instituted, two or more affiliated organizations may be named as joint respondents. Whenever any such petition is accompanied by a certificate of the Attorney General to the effect that the proceeding so instituted is one of exceptional public importance, such proceeding shall be set for hearing at the earliest possible time and all proceedings therein before the Board or any court shall be expedited to the greatest practicable extent.

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[12] Section added by sec. 10 of the Communist Control Act of 1954, 68 Stat. 778.

(b) Any organization which has been determined under this section to be a Communist-infiltrated organization may, within six months after such determination, file with the Board and serve upon the Attorney General a petition for a determination that such organization no longer is a Communist-infiltrated organization.

(c) Each such petition shall be verified under oath, and shall contain a statement of the facts relied upon in support thereof. Upon the filing of any such petition, the Board shall serve upon each party to such proceeding a notice specifying the time and place for hearing upon such petition. No such hearing shall be conducted within twenty days after the service of such notice.

(d) The provisions of subsections (c) and (d) of section 13 shall apply to hearings conducted under this section, except that upon the failure of any organization named as a party in any petition filed by or duly served upon it pursuant to this section to appear at any hearing upon such petition, the Board may conduct such hearing in the absence of such organization and may enter such order under this section as the Board shall determine to be warranted by evidence presented at such hearing.

(e) In determining whether any organization is a Communist-infiltrated organization, the Board shall consider—

(1) to what extent, if any, the effective management of the affairs of such organization is conducted by one or more individuals who are, or within three years have been, (A) members, agents, or representatives of any Communist organization, and Communist foreign government, or the world Communist movement referred to in section 2 of this title, with knowledge of the nature and purpose thereof, or (B) engaged in giving aid or support to any such organization, government, or movement with knowledge of the nature and purpose thereof;

(2) to what extent, if any, the policies of such organization are, or within three years have been, formulated and carried out pursuant to the direction or advice of any member, agent, or representative of any such organization, government, or movement;

(3) to what extent, if any, the personnel and resources of such organization are, or within three years have been used to further or promote the objectives of any such Communist organization, government, or movement;

(4) to what extent, if any, such organization within three years has received from, or furnished to or for the use of, any such Communist organization, government, or movement any funds or other material assistance;

(5) to what extent, if any, such organization is, or within three years has been, affiliated in any way with any such Communist organization, government, or movement;

(6) to what extent, if any, the affiliation of such organization or of any individual or individuals who are members thereof or who manage its affairs, with any such Communist organization, government, or movement is concealed from or is not disclosed to the membership of such organization; and

(7) to what extent, if any, such organization or any of its members or managers are, or within three years have been, knowingly engaged—

(A) in any conduct punishable under section 4 or 15 of this Act or under chapters 37, 105, 115 of title 18 of the United States Code; or

(B) with intent to impair the military strength of the United States or its industrial capacity to furnish logistical or other support re-

quired by its armed forces, in any activity resulting in or contributing to any such impairment.

(f) After hearing upon any petition filed under this section, the Board shall (1) make a report in writing in which it shall state findings as to the facts and its conclusion with respect to the issues presented by such petition, (2) enter its order granting or denying the determination sought by such petition, and (3) serve upon each party to the proceeding a copy of such order. Any order granting any determination on the question whether any organization is a Communist-infiltrated organization shall become final as provided in section 14(b) of this Act.

(g) When any order has been entered by the Board under this section with respect to any labor organization or employer (as these terms are defined by section 2 of the National Labor Relations Act, as amended, and which are organizations within the meaning of section 3 of the Subversive Activities Control Act of 1950), the Board shall serve a true and correct copy of such order upon the National Labor Relations Board and shall publish in the Federal Register a statement of the substance of such order and its effective date.

(h) When there is in effect a final order of the Board determining that any such labor organization is a Communist-action organization, a Communist-front organization, or a Communist-infiltrated organization, such labor organization shall be ineligible to—

(1) act as representative of any employee within the meaning or for the purposes of section 7 of the National Labor Relations Act, as amended (29 U. S. C. 157);

(2) serve as an exclusive representative of employees of any bargaining unit under section 9 of such Act, as amended (29 U. S. C. 159);

(3) make, or obtain any hearing upon, any charge under section 10 of such Act (29 U. S. C. 160); or

(4) exercise any other right or privilege, or receive any other benefit, substantive or procedural, provided by such Act for labor organizations.

(i) When an order of the Board determining that any such labor organization is a Communist-infiltrated organization has become final, and such labor organization theretofore has been certified under the National Labor Relations Act, as amended, as a representative of employees in any bargaining unit—

(1) a question of representation affecting commerce, within the meaning of section 9(c) of such Act, shall be deemed to exist with respect to such bargaining unit; and

(2) the National Labor Relations Board, upon petition of not less than 20 per centum of the employees in such bargaining unit or any person or persons acting in their behalf, shall under section 9 of such Act (notwithstanding any limitation of time contained therein) direct elections in such bargaining unit or any subdivision thereof (A) for the selection of a representative thereof for collective bargaining purposes, and (B) to determine whether the employees thereof desire to rescind any authority previously granted to such labor organization to enter into any agreement with their employer pursuant to section 8(a) (3)(ii) of such Act.

(j) When there is in effect a final order of the Board determining that any such employer is a Communist-infiltrated organization, such employer shall be ineligible to—

(1) file any petition for an election under section 9 of the National Labor Relations Act, as amended

(29 U. S. C. 157), or participate in any proceeding under such section; or

(2) make or obtain any hearing upon any charge under section 10 of such Act (29 U. S. C. 160); or

(3) exercise any other right or privileege or receive any other benefit, substantive or procedural, provided by such Act for employers.

JUDICIAL REVIEW

SEC. 14. (a) The party aggrieved by any order entered by the Board under subsections (g), (h), (i), or (j) of section 13, or subsection (f) of section 13A,[13] may obtain a review of such order by filing in the United States Court of Appeals for the District of Columbia, within sixty days from the date of service upon it of such order, a written petition praying that the order of the Board be set aside. A copy of such petition shall forthwith be transmitted by the clerk of the court to the Board, and thereupon the Board shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon the filing of such petition the court shall have jurisdiction of the proceeding and shall have power to affirm or set aside the order of the Board; but the court may in its discretion and upon its own motion transfer any action so commenced to the United States Court of Appeals for the circuit wherein the petitioner resides. The findings of the Board as to the facts, if supported by the preponderance of the evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material, the court may order such additional evidence to be taken before the

[13] Matter between commas added by section 11 of the Communist Control Act of 1954, 68 Stat. 780.

Board and to be adduced upon the proceeding in such manner and upon such terms and conditions as to the court may seem proper. The Board may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by the preponderance of the evidence shall be conclusive, and its recommendations, if any, with respect to action in the matter under consideration. If the court shall set aside an order issued under subsection (j) of section 13 it may, in the case of an organization, enter a judgment canceling the registration of such organization and relieving it from the requirement of further annual reports, or in the case of an individual, enter a judgment requiring the Attorney General (A) to strike the name of such individual from the registration statement or annual report on which it appears, or (B) cancel the registration of such individual under section 8, as may be appropriate. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in title 28, United States Code, section 1254.

(b) Any order of the Board issued under section 13, or subsection (f) of section 13A,[14] shall become final—

(1) upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; or

(2) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Board has been affirmed or the petition for review dismissed by a United States Court of Appeals, and no petition for certiorari has been duly filed; or

(3) upon the denial of a petition for certiorari, if the order of the Board has been affirmed or the

[14] See footnote 13.

petition for review dismissed by a United States Court of Appeals; or

(4) upon the expiration of ten days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Board be affirmed or the petition for review dismissed.

PENALTIES

SEC. 15. (a) If there is in effect with respect to any organization or individual a final order of the Board requiring registration under section 7 or section 8 of this title—

(1) such organization shall, upon conviction of failure to register, to file any registration statement or annual report, or to keep records as required by section 7, be punished for each such offense by a fine of not more than $10,000, and

(2) each individual having a duty under subsection (h) of section 7 to register or to file any registration statement or annual report on behalf of such organization, and each individual having a duty to register under section 8, shall, upon conviction of failure to so register or to file any such registration statement or annual report, be punished for each such offense by a fine of not more than $10,000, or imprisonment for not more than five years, or by both such fine and imprisonment.

For the purposes of this subsection, each day of failure to register, whether on the part of the organization or any individual, shall constitute a separate offense.

(b) Any individual who, in a registration statement or annual report filed under section 7 or section 8, wilfully makes any false statement or willfully omits to state any fact which is required to be stated, or which is necessary to

make the statements made or information given not misleading, shall upon conviction thereof be punished for each such offense by a fine of not more than $10,000, or by imprisonment for not more than five years, or by both such fine and imprisonment. For the purposes of this subsection—

(1) each false statement wilfully made, and each wilful omission to state any fact which is required to be stated, or which is necessary to make the statements made or information given not misleading, shall constitute a separate offense; and

(2) each listing of the name or address of any one individual shall be deemed to be a separate statement.

(c) Any organization which violates any provision of section 10 of this title shall, upon conviction thereof, be punished for each such violation by a fine of not more than $10,000. Any individual who violates any provision of sections 5, 6, or 10 of this title shall, upon conviction thereof, be punished for each such violation by a fine of not more than $10,000 or by imprisonment for not more than five years, or by both such fine and imprisonment.

APPLICABILITY OF ADMINISTRATIVE PROCEDURE ACT

SEC. 16. Nothing in this title shall be held to make the provisions of the Administrative Procedure Act inapplicable to the exercise of functions, or the conduct of proceedings, by the Board under this title.

EXISTING CRIMINAL STATUTES

SEC. 17. The foregoing provisions of this title shall be construed as being in addition to and not in modification of existing criminal statutes.

* * *

## Immigration and Nationality Act

Pertinent provisions of sections 22 and 25 of the Subversive Activities Control Act have been carried forward in the Immigration and Nationality Act, 66 Stat. 163, adopted June 27, 1952, 8 U. S. C. secs. 1182, 1251, 1424, 1451, as follows:

SEC. 212. (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * *

(28) Aliens who are, or at any time have been, members of any of the following classes:

* * *

(E) Aliens not within any of the other provisions of this paragraph, who are members of or affiliated with any organization during the time it is registered or required to be registered under section 7 of the Subversive Activities Control Act of 1950, unless such aliens establish ~~that they~~ did not have knowledge or reason to believe at the time they became members of or affiliated with such an organization (and did not thereafter and prior to the date upon which such organization was so registered or so required to be registered have such knowledge or reason to believe) that such organization was a Communist organization.

SEC. 241. (a) Any alien in the United States (including any alien crewman) shall, upon the order of the Attorney General, be deported who—

* * *

(6) is or at any time has been, after entry, a member of any of the following classes of aliens:

* * * *

(E) Aliens not within any of the other provisions of this paragraph, who are members of or affiliated with any organization during the time it is registered or required to be registered under section 7 of the Subversive Activities Control Act of 1950, unless such aliens establish that they did not have knowledge or reason to believe at the time they became members of or affiliated with such organization (and did not thereafter and prior to the date upon which such organization was so registered or so required to be registered have such knowledge or reason to believe) that such organization was a Communist organization.

SEC. 313. (a) Notwithstanding the provisions of section 405(b), no person shall hereafter be naturalized as a citizen of the United States—

* * *

(2) * * * (G) who, regardless of whether he is within any of the other provisions of this section, is a member of or affiliated with any Communist-action organization during the time it is registered or required to be registered under the provisions of section 7 of the Subversive Activities Control Act of 1950; or (H) who, regardless of whether he is within any of the other provisions of this section, is a member of or affiliated with any Communist-front organization during the time it is registered or required to be registered under section 7 of the Subversive Activities Control Act of 1950, unless such alien establishes that he did not have knowledge or reason to believe at the time he became a member of or affiliated with such an organization (and did not thereafter and prior to the date upon which such organization was so registered or so re-

quired to be registered have such knowledge or reason to believe) that such organization was a Communist-front organization.

SEC. 340. * * * (c) If a person who shall have been naturalized after the effective date of this Act[15] shall within five years next following such naturalization become a member of or affiliated with any organization, membership in or affiliation with which at the time of naturalization would have precluded such person from naturalization under the provisions of section 313, it shall be considered prima facie evidence that such person was not attached to the principles of the Constitution of the United States and was not well disposed to the good order and happiness of the United States at the time of naturalization, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the revocation and setting aside of the order admitting such person to citizenship and the cancellation of the certificate of naturalization as having been obtained by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively.

## Communist Control Act

The Communist Control Act of 1954, 68 Stat. 775, 50 U. S. C. §§ 841-44, provides in part as follows:

### FINDINGS OF FACT

SEC. 2. The Congress hereby finds and declares that the Communist Party of the United States, although purport-

[15] The introductory clause of section 25(d) of the Subversive Activities Control Act reads "If a person who shall have been naturalized after January 1, 1951 * * *."

edly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. It constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution. Unlike political parties, which evolve their policies and programs through public means, by the reconciliation of a wide variety of individual views, and submit those policies and programs to the electorate at large for approval or disapproval, the policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement. Its members have no part in determining its goals, and are not permitted to voice dissent to party objectives. Unlike members of political parties, members of the Communist Party are recruited for indoctrination with respect to its objectives and methods, and are organized, instructed, and disciplined to carry into action slavishly the assignments given them by their hierarchical chieftains. Unlike political parties, the Communist Party acknowledges no constitutional or statutory limitations upon its conduct or upon that of its members. The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful political means. The peril inherent in its operation arises not from its numbers, but from its failure to acknowledge any limitation as to the nature of its activities, and its dedication to the proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear, present and continuing danger to the security of the United States. It is the means whereby individuals are seduced into the service of the world Communist movement, trained to do its bidding, and directed and controlled in the conspiratorial performance of their

revolutionary services. Therefore, the Communist Party should be outlawed.

PROSCRIBED ORGANIZATIONS

SEC. 3. The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the Government of the United States, or the government of any State, Territory, District, or possession thereof, or the government of any political subdivision therein by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party or any subsidiary organizaton by reason of the laws of the United States or any political subdivision thereof, are hereby terminated: *Provided, however,* That nothing in this section shall be construed as amending the Internal Security Act of 1950, as amended.

SEC. 4. Whoever knowingly and willfully becomes or remains a member of (1) the Communist Party, or (2) any other organization having for one of its purposes or objectives the establishment, control, conduct, seizure, or overthrow of the Government of the United States, or the government of any State or political subdivision thereof, by the use of force or violence, with knowledge of the purpose or objective of such organization shall be subject to all the provisions and penalties of the Internal Security Act of 1950, as amended, as a member of a "Communist-action" organization.

(b) For the purpose of this section, the term "Communist Party" means the organization now known as the Communist Party of the United States of America, the

Communist Party of any State or subdivision thereof, and any unit or subdivision of any such organization, whether or not any change is hereafter made in the name thereof.

SEC. 5. In determining membership or participation in the Communist Party, or any other organization defined in this Act, or knowledge of the purpose or objective of such party or organization, the jury, under instructions from the court, shall consider evidence, if presented, as to whether the accused person:

(1) Has been listed to his knowledge as a member in any book or any of the lists, records, correspondence, or any other document of the organization;

(2) Has made financial contribution to the organization in dues, assessments, loans, or in any other form;

(3) Has made himself subject to the discipline of the organization in any form whatsoever;

(4) Has executed orders, plans, or directives of any kind of the organization;

(5) Has acted as an agent, courier, messenger, correspondent, organizer, or in any other capacity in behalf of the organization;

(6) Has conferred with officers or other members of the organization in behalf of any plan or enterprise of the organization;

(7) Has been accepted to his knowledge as an officer or member of the organization or as one to be called upon for services by other officers or members of the organization;

(8) Has written, spoken or in any other way communicated by signal, semaphore, sign, or in any other form of communication orders, directives, or plans of the organization;

(9) Has prepared documents, pamphlets, leaflets, books or any other type of publication in behalf of the objectives and purposes of the organization;

(10) Has mailed, shipped, circulated, distributed, delivered, or in any other way sent or delivered to others material or propaganda of any kind in behalf of the organization;

(11) Has advised, counseled or in any other way imparted information, suggestions, recommendations to officers or members of the organization or to anyone else in behalf of the objectives of the organization;

(12) Has indicated by word, action, conduct, writing or in any other way a willingness to carry out in any manner and to any degree the plans, designs, objectives, or purposes of the organization;

(13) Has in any other way participated in the activities, planning, actions, objectives, or purposes of the organization;

(14) The enumeration of the above subjects of evidence on membership or participation in the Communist Party or any other organization as above defined, shall not limit the inquiry into and consideration of any other subject of evidence on membership and participation as herein stated.

* * * [16]

SEC. 12. If any provision of this title or the application thereof to any person or circumstances is held invalid, the remainder of the title, and the application of such provisions to other persons or circumstances, shall not be affected thereby.

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[16] The omitted sections amend the Subversive Activities Control Act.

## Social Security Act

The Social Security Act, as amended, provides in part as follows, 70 Stat. 824, 828, 839, 42 U. S. C. 410:

(a) The term "employment" means * * * any service, of whatever nature, performed after 1950 * * * (A) by an employee for the person employing him, irrespective of the residence or citizenship of either, (i) within the United States * * * except that, in the case of service performed after 1950, such term shall not include—

* * *

(17) Service in the employ of any organization which is performed (A) in any quarter during any part of which such organization is registered, or there is in effect a final order of the Subversive Activities Control Board requiring such organization to register, under the Internal Security Act of 1950, as amended, as a Communist-action organization, a Communist-front organization, or a Communist-infiltrated organization, and (B) after June 30, 1956.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1960

**No. 12**

COMMUNIST PARTY OF THE UNITED STATES,
*Petitioner,*

*vs.*

SUBVERSIVE ACTIVITIES CONTROL BOARD,
*Respondent.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1960

**No. 12**

COMMUNIST PARTY OF THE UNITED STATES,

Petitioner,

*vs.*

SUBVERSIVE ACTIVITIES CONTROL BOARD,

Respondent.

## BRIEF FOR *AMICI CURIAE*

### Introduction

The undersigned, as counsel for the *amici curiae* whose names are hereto attached (Appendix A), respectfully submit the accompanying brief. This brief is being filed with the written consent of all parties to the case, in accordance with Rule 42, subd. 2 of the Rules of this Court. Communications from the attorney for the petitioner and from the Solicitor General of the United States, expressing their consent to the filing, are printed in Appendix B.

This brief is a revision and expansion of one which was submitted when this case was originally before the Court at the October Term, 1955. The motion for leave to file the original brief was granted by this Court. 350 U. S. 859.

Before proceeding to our argument, we think it appropriate to say a few words in explanation of the desire of the persons on whose behalf this brief is submitted to participate, as *amici curiae*, in this proceeding.

Any American may be or may wish to become a member of an organization which may fall within the purview of the Act. We submit, therefore, that every American has an interest in the outcome of this case which is both real and direct. Every American, if the Act is upheld, may well hesitate to remain or become a member of, or a contributor to, any organization which is accused, or might be accused, under the Act's provisions. The Act establishes a barrier of non-association with any person who espouses "dangerous" causes and non-association in the affairs of any organization which espouses, or might espouse, controversial views.

The Act itself destroys the very democratic processes which, in another type of case, we would be asked to rely on for the redress of our grievances against legislative action. We therefore fall back on the power and duty of this honorable Court to enforce our written Constitution by keeping the powers of the Government from being expanded beyond the limits assigned them in that document.

We are aware that this solution of the problem gives rise to a procedural difficulty. On the one hand, the nature of the problem is such, and its bearing on the rights of every citizen so great and immediate, as to suggest that every interested individual ought to have a right to be heard before the tribunal charged with responsibility for the final decision. On the other hand, the judicial process is adapted to hearing the claims of a small number of persons whose involvement in the immediate problem makes them parties before the court. The device of the *amicus curiae* brief resolves this problem as well as we are able to resolve it. It permits us to express, in a form traditional and ap-

propriate to the judicial process, our profound conviction that it is our liberties—and not just those of the Communist Party—on which the Court is being asked to rule. Moreover, no matter how ably the attorneys for the Communist Party may present the case, it is their right and duty to present it from the point of view of, and with reference to its effect on, the Communist Party and Communists. We desire to present the evils of the Act from the point of view of non-Communists. Nor, we submit, is our presentation premature because different questions might arise in the application of the Act to organizations other than the Communist Party. The Act must be judged and its constitutionality determined in the light of its total impact and that impact is not limited by the details of this, or any, other, particular proceeding.

A summary of the points to be made is contained in the index of the brief.

## Preliminary Statement

The undersigned submit this brief in the profound conviction that decision of the present case is one of the most momentous constitutional responsibilities which has ever been thrust upon this Court.

Presented for the Court's decision is the constitutional validity of the Subversive Activities Control Act of 1950. This, of course, is the short title which Congress has assigned to those provisions of the Internal Security Act of 1950, constituting Title I of that Act, as amended (50 U. S. C. Secs. 781-798), which undertake to define "Communist-action," "Communist-front," and "Communist-infiltrated" organizations, which impose a variety of sanctions on those organizations and their members, which set up procedures and a tribunal by which any voluntary association of private citizens in the United States can be subjected to a political trial, and which impose on the

tribunal created to hold such trials a significant series of prejudgments.

This Act, we believe and will try to demonstrate more fully below, has two principal features. The first is that it imposes penalties and civil disabilities on American Communists, designed to destroy their movement as completely as possible, not for plotting violent revolution, not even for "advocating" it, not for anything they are found guilty of having done or said, not even for being "foreign agents," as that term is ordinarily understood, but simply for allegedly being associated with Communists of other countries in an international movement and for sharing the ideas of Communists of other countries, especially, of course, those of the Communist Party of the Soviet Union.

Since this aspect of the Act will be argued to the Court by parties to the record, we will focus our attention chiefly on the Act's second principal feature. This is that it represses the organizational activities of non-Communist Americans whenever they are found to have associated with Communists for any purpose, however innocent, to have collaborated with Communists for the attainment of any objective, however lawful and proper, or to have agreed with Communists concerning ideas and policies, even though the points of agreement may have been very remote indeed from the particular ideas and policies for which the Communists are assertedly condemned.

This, it seems to us, is nothing less than the legislation of a new orthodoxy. It is an orthodoxy of non-association with any person who is, or might become, suspect, of non-participation in the affairs of any organization which espouses, or might espouse, controversial views. Above all, it is an orthodoxy of non-deviation from the policies and proposals of those who, on any issue, most loudly and successfully contend that whoever does not agree with them must agree with the Communists and hence must be pro-

Communist. This would indeed produce "the unanimity of the graveyard." *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 641.

The great controversial issues of the day—the very issues on which we stand most in need of free, fearless and uninhibited discussion—are characteristically two-sided issues. There are conscientious Americans on both sides of each of them. In conformity with our traditions, we cannot assume that either side has acquired a monopoly of truth or that the other has nothing to say which it would be to our benefit to hear. Yet, as the late Professor Chafee has aptly demonstrated (63 Harvard Law Review 1382; THE BLESSINGS OF LIBERTY (1956) pp. 153-154), the effect of the Act is to make one side of each of these questions a dangerous point of view for an organization to embrace, while leaving the other side untouched.

As is well known, and as the record in this case demonstrates, the Communist Party has taken or is likely to take a position on one side or the other of every great controversial question of public policy. A religious or peace organization which urged the outlawing of atomic weapons, or continued efforts to end the "cold war" by negotiation, could be supporting a "Communist" objective. So would one which attacked as unrealistic, futile and self-defeating the policy of non-recognition of the de facto government of China and of continuing to exclude it from the United Nations. So would one which urged an expansion of public medicine or social security benefits, or support of this Court's decisions in the field of racial segregation, or repeal of the Internal Security Act of 1950. By the reasoning which underlies this Act, the side for which the Communists express a preference becomes automatically the Communist side. The existing organizations on that side must thenceforth change their views, disband, or risk being required to stand trial before the Subversive Activities Control Board on a charge of "nonconformity." The formation of new

organizations on that side becomes so difficult and hazardous that it is discouraged at the outset. Organizations, existing or proposed, which espouse the other side of each of these questions incur no corresponding burden. Instead, the silencing effect on their potential opposition tends to give them an automatic monopoly in the market place of ideas.

In our complexly interlocking society, exposed daily and hourly to the opinion-shaping influence of press, radio, television and other media of mass communication, the idea which is denied organized expression, while its rival enjoys these advantages, has no chance in the market place, whatever its intrinsic merit. The practical effect, therefore, is to suppress one side of each of these questions and to erect the other into a semi-official compulsory creed.

This is no chimera, for already the forces which produced this Act have carried us far along that road. Already, on many of the issues of the day, we have seen beginning to develop a safe and orthodox side, which the prudent espouse out of prudence with little examination, and a dangerous and "subversive" side, which only the bold care to listen to, read or examine. Just at the moment when this tendency is, happily, beginning to subside, this Act, if the Court upholds it, will freeze that tendency and convert it into an institution.

The Congress which adopted this Act thereby expressed its understanding that the current danger to our institutions is that the American people will judge ideas on their merits, rather than on the political backgrounds and associations of those who express them. This indiscretion, the Act seems to say, may cause them to be lured by handsome strangers with no security clearance into dark byways where they will be seduced by false doctrines and persuaded to betray their country.

We submit that, not only is this opinion without rational foundation, but even its irrational foundation has long since passed away. The real and present danger is that the sudden rise in the world of a powerful ideology, rival to our own, and the fears, hatreds, frustrations and confusions generated by this unexpected and unexplained phenomenon, may cause us to lose sight of the meaning of our own heritage and to destroy it in the name of defending it. This Act, we feel, brings precisely that danger to a profound crisis, perhaps to a turning point.

This danger threatens loss of liberty more gravely and more imminently than any minority political movement could ever threaten it. The danger, however, may not be limited to loss of liberty. Involved also is the fact that we are being urged—and, by this Act, compelled—to stake our survival on methods which history has shown have little survival value. We are asked to meet the challenge of the rival world ideology by becoming rigid and unbending, though history has shown that societies which cannot bend are not so much strong as brittle. We are urged to close ranks around our own ideology by adopting a coerced conformity. Yet the principal result of coerced conformity in other countries has been to destroy the delicate and complex machinery by which the mistakes that fallible leaders and statesmen must necessarily make can be detected and corrected before it is too late. We submit that the world of mid-Twentieth Century is not one in which even the world's strongest country should wish to walk blindfolded.

It is with these considerations in mind that we respectfully submit, for the Court's consideration, the following brief.

# ARGUMENT

## I

**The Act is unconstitutional as an overhanging threat to, and prior restraint on, the exercise of rights protected by the First Amendment.**

We think it unnecessary to dwell at length on a demonstration that, whatever conduct is reached by this Act is not merely regulated, but is penalized most severely—one might even say savagely.

Affected organizations are compelled to publish, when they publish anything, an estimate of themselves which, in the context of our time, must necessarily do them incalculable damage. Sec. 10 (50 U. S. C. Sec. 789). They are required to publish this in a form which resembles, as much as possible, a voluntary declaration representing their own opinion of their nature and purpose. Yet it may well amount to compulsory self-defamation, since those who believe in the organization and desire to see it continued may very well be the ones who stubbornly refuse to share the Board's opinion that it is "a Communist organization." Whether they share it or not, they are required to express it or be silent altogether, under extremely heavy criminal penalties. Sec. 15(c) (50 U. S. C. Sec. 794(c)). They are even required to express this opinion in a manner (putting it on the outside wrapper, as well as on the material itself) which could not conceivably serve any function or purpose except to frighten recipients into requesting that their names be removed from the mailing list.

If an organization which has fallen under the Board's ban desires to publish any opinion whatever, however moderate and reasoned, on any subject whatever, from social security to what ought to be done about the hydrogen bomb, it cannot do so without attaching to that opinion a

label. This label, whether justifiably or not, will be widely understood as a declaration that the enclosure is Communist propaganda and that social security (or whatever the organization desires to advocate) is "Communistic." That a given program is "Communistic" is typically the view, not of organizations formed to promote the program, but of the program's most fiery and irreconcilable opponents. Yet, in effect, it is *this* view, not its own, which the organization is required to publish—or be silent.

The labeling provisions of the Act are closely analogous to the device of compulsory arm-band identification, to which this Court has had occasion to refer. *American Communications Ass'n* v. *Douds*, 339 U. S. 382, 402. And they have been aptly described by Professor Chafee: "This novel stigma on enterprises which have violated no law recalls the practice of medieval princes to require Jews to wear special marks or colors on their coats." (63 Harv. L. Rev. 1382, 1384; The Blessings of Liberty (1956) p. 149).

Compulsory political stigmatization is far more repressive in its practical effect than a mere requirement that a handbill bear the name and address of the individual responsible, yet the latter was recently condemned by this Court in the following terms:

> There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression * * *
>
> Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. *Talley* v. *California*, 362 U. S. 60, 80 S. Ct. 536, 538.

Organizations which fall under the Board's ban are denied tax exemptions for which they may otherwise be eligible; and their efforts to raise money through contributions are placed under a severe handicap by denial of tax exemption to such contributions. Sec. 11 (50 U. S. C. Sec. 790). This result will frequently follow from the fact that they have expressed ideas or policies which, though perfectly lawful in themselves, become evidence of "non-deviation" because Communists had said something similar. The Act is therefore a use of the taxing power to restrain the expression of such ideas. *Speiser* v. *Randall*, 357 U. S. 513.

Solely for their membership in disapproved organizations, the Act bars an incalculable number of persons from employment by the government, by a "defense facility," or by a labor union. Sec. 5 (50 U. S. C. Sec. 784). The government is already our largest employer. Production in any major industry might affect the nation's ability to defend itself. Thus the doors close automatically to an enormous fraction of the labor market. If the term "defense facility" is broadly interpreted this can be expanded to cover very nearly the whole of it. It must be remembered also that many of the persons affected will be dependent for employment on special skills, knowledge or experience for which there is no demand outside the closed area. This is punishment of a most severe kind. *United States* v. *Lovett*, 328 U. S. 303. It is a proscription many times more sweeping than that involved in *Ex parte Garland*, 4 Wall. 333, and *Cummings* v. *Missouri*, 4 Wall. 277.

We put to one side as of little practical importance the distinction between members of "Communist-action" organizations, who are prohibited from accepting or retaining employment in a "defense facility," and members of "Communist-front" organizations who, "in seeking, accepting, or holding" such employment, must not "fail to disclose" their membership. The distinction is without a difference

under the circumstances. If the atmosphere were such that the employee could entertain substantial hope of being employed despite such a revelation, the Act would not have been passed.

Condemned organizations are required to file reports identifying all their contributors and, in the case of "Communist-action" organizations, their members as well. Sec. 7 (50 U. S. C. Sec. 786).

> It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as * * * (other forms of governmental action held invalid) * * * This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. * * * Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs. *National Ass'n for the Advancement of Colored People* v. *Alabama*, 357 U. S. 449, 462.

It is obvious that individuals identified in such reports would be severely jeopardized in their ability to retain current or obtain future employment, their chances of being admitted to licensed professions, and in many other ways. They would also, if listed as members, incur automatic disabilities under the Act itself. Secs. 5 and 6 (50 U. S. C. Secs. 784, 785). The reporting requirement would therefore operate as a powerful restraining influence on persons who might wish to join, remain members of, or contribute to organizations formed to advocate perfectly lawful ideas and programs. This restraining influence would affect not only organizations actually compelled to register, but also others which had merely been accused before the Board, and still others which had not even been accused, but which merely might be. Under such circumstances, the reporting

requirement is clearly an invasion of constitutional freedom to engage in association for the advancement of beliefs and ideas. *National Ass'n for the Advancement of Colored People* v. *Alabama*, 357 U. S. 449; *Bates* v. *Little Rock*, 361 U. S. 516.

It is true that the sanctions discussed above are apparently inapplicable to "Communist-infiltrated" organizations, since the Act does not require the latter to register. However, the face of the Act makes it plain that the "Communist-infiltrated" category is aimed primarily, if not exclusively, at labor unions. Unions found to fit this category are subject to virtual outlawry, since they are forbidden to carry on the most important functions which a union exists to fulfill, Sec. 13A(h) (50 U. S. C. Sec. 792a(h)), and procedures obviously aimed at their displacement by rival organizations are set up. Sec. 13A(i) (50 U. S. C. Sec. 792a(i)).

This Court has already recognized that, even without such sanctions, an official governmental designation of an organization as subversive severely cripples, if it does not proscribe it. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123. The designation plus the sanctions plainly attains the level of proscription by indirection. Chafee has pointed out that the total effect "virtually outlaws" affected organizations. (63 Harv. L. Rev. 1382, 1384; The Blessings of Liberty (1956) p. 150). And Congress itself has impliedly recognized right in the text of the Act that it was known to have, and intended to have, a highly penal effect. It is provided that the names of individuals shall not be published until they have had notice and an opportunity to deny the organizational connection. Sec. 9(b) (50 U. S. C. Sec. 788(b)). An elaborate procedure is set up by which those able to prove non-membership in the affected organizations can get their names struck from the official blacklist. Secs. 7(g), 13(b), 13(i), 14(a) (50 U. S. C. Secs. 786(g), 792(b), 792(i), 793(a)). If the Act

were genuinely regulatory, rather than punitive in substance and intent, such provisions would not have been thought necessary—or even thought of at all.

The real meaning of the Act is thus to be found in the conduct which organizations and individuals must forego in order to feel some assurance that these penalties will not be applied to them. We submit that the Act's standards are so vague, and their application so necessarily subjective, that no precaution can give entire assurance. However, the best hint as to what prudence requires is that given by Sec. 13(f)(4) (50 U. S. C. Sec. 792 (f)(4)):

> (f) In determining whether any organization is a "Communist-front organization," the Board shall take into consideration * * *
>
> (4) The extent to which the positions taken or advanced by it from time to time on matters of policy do not deviate from those of any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2.

As we pointed out in our opening remarks, and as this record amply demonstrates, the Communist Party takes a position on a vast variety of issues which have no apparent connection with communism, indeed, on virtually every issue which is the subject of current debate. Since an organization cannot know in advance what "extent of non-deviation" will seem significant to the Board, its only safe course is total deviation. The prudent organization, confronted with an issue, must resolve it by finding out what the Communist Party position is and then endorsing its opposite, whether or not that opposite seems to have any intrinsic merit.

Even this may not be quite enough. The Communist Party line is subject to sudden and drastic changes—or, at least, so we have often been told. The Board, in applying

the similar non-deviation test of Section 13(c)(2) (50 U. S. C. Sec. 792(c)(2)), found that parallel statements by Russian and American Communists were equally significant to show domination of the former by the latter, regardless of which came first in point of time. It seems, therefore, that even after the prudent organization has established with reasonable certainty that a proposed policy is not now the Communist position, it still may not be a safe policy to espouse—the Communists might endorse it later.

What this boils down to, as a practical matter, is that the prudent organization will take no position on any controversial issue which might offend the powerful, and the prudent individual will neither join nor contribute to an organization which has ever taken such a position or which might conceivably do so in the future. Thus the Act, as Professor Chafee has pointed out, interferes "by law with freedom of discussion through organizations" and "proposes to twist out of all recognizable shape one of the leading traditions of American life: the possibility of freely forming associations for all sorts of purposes—religious, political, social, and economic." 63 Harv. L. Rev. 1382, 1384; THE BLESSINGS OF LIBERTY (1956) p. 150.

Yet it has frequently been pointed out by commentators on the operation of the American political system that our democracy has functioned through and been vitalized by voluntary association. As Professor Henry Steele Commager of Columbia University put it: "Most of our major reforms, political, social, moral were carried through by voluntary political associations * * * Once the notion that joining may be dangerous is firmly established, all our organizations will be affected, and the American democracy will dry up at the roots." New York Times Magazine, November 8, 1953.

And this Court has recognized that "freedom to engage in association for the advancement of beliefs and ideas is

an inseparable aspect" of liberty, that the fact that government "has taken no direct action" to restrict it does not end the inquiry, *National Ass'n for the Advancement of Colored People* v. *Alabama*, 357 U. S. 449, 460, 461, and that this freedom is protected "not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates* v. *Little Rock*, 361 U. S. 516.

We realize that it may be argued that some of these questions are premature in the present proceeding, since the petitioner in this case, the Communist Party, is not charged with being a "Communist-front," nor does it, we assume, deny that it is in some sense of the term a "Communist organization," as its name asserts that it is. We submit, however, that the Act's validity must be decided in the light of its total impact on American freedom. That total impact is not limited by the details of this, or any particular, proceeding. *Thornhill* v. *Alabama*, 310 U. S. 88, 97. It is defined rather by the scope of the potential danger arising from the Act which an organization must assess before espousing any policy and which an individual must assess before venturing to join, remain a member of, or contribute to, an organization. This total impact can be determined only by examining the pattern of the Act as a whole.

Such an examination is also appropriate in these proceedings for other reasons:

***First:*** **The primary impact of the Act is not on the Communist Party, but on mixed organizations including non-Communist members.**

This fact is evident from the structure of the Act itself. The Board is created and staffed as a permanent organization; yet it can try the Communist Party only once and then devote the rest of its existence to other organizations. It is plain, also, that the trial of the Communist Party can only come first. The definitions of the Act are such. Sec.

3(4) and 3(4A) (50 U. S. C. Secs. 782(4), 782(4A)), that no organization can well be accused of being a "front" or of being "infiltrated," unless the Communist Party has first been tried and condemned. In practice, the Attorney General has so construed them by deferring his first group of front petitions until a few days after the Board issued its original registration order in the present case.

It is also evident from the Act's settings, both legal and practical. If the findings of Sec. 2 (50 U. S. C. Sec. 781) are assumed to be correct, no new legislation was necessary to impose registration requirements on the Communist Party —it was already subject to registration requirements under both the Voorhis Act, 18 U. S. C. Sec. 2386, and the McCormack Act, 22 U. S. C. Secs. 611 *et seq.* Furthermore Congress has rendered the Board's trial of the Communist Party perfunctory in advance by deciding that "*the* Communist organization in the United States," which could only refer to the Communist Party, constitutes "a clear and present danger." Sec. 2(15) (50 U. S. C. Sec. 781(15)) (emphasis added). It has been rendered even more perfunctory in retrospect by Sec. 4 (50 U. S. C. Sec. 843) of the Communist Control Act of 1954, 68 Stat. 775 *et seq.*, which specifically identifies the Communist Party as a Communist-action organization.

All of this taken together makes it very plain that, although the order under review subjects the petitioner and its members to sanctions, its primary function, in law as well as in fact, is to serve as a foundation for charges to be brought against other organizations.

***Second:*** **The primary impact of the Act is on organizations, a substantial number of whose members are neither Communists nor Communist sympathizers.**

Conceivably, the term "Communist-front" might be applied to an organization made up entirely of Communists, but which does not proclaim that to be the fact. The Act

makes evident that this is not what Congress had in mind. Section 13(1) (50 U. S. C. Sec. 792(1)), does not require or provide for proof that a majority, or even a substantial minority, of the members are Communists. The findings in Sec. 2(7) (50 U. S. C. Sec. 781(7)) speak of "fronts" as being "created and maintained, or used, in such manner as to conceal the facts as to their true character and purposes and their membership," and asserts that they are able to obtain "support from persons who would not extend such support if they knew the true purposes * * *." It is evident that what Congress is concerned about here is that organizations asserted to be under Communist influence are able to attract and to retain as members a substantial number of persons who are neither Communists nor Communist sympathizers. In the case of "Communist-infiltrated" organizations, the very name implies that the membership is chiefly non-Communist.

***Third:*** **The primary impact of the Act on a mixed organization is not on the Communist members, but on the non-Communist members.**

This fact, we think, is plainly evident. The citation of a mixed organization before the Board can mean little or nothing to the Communist members, as individuals. It threatens them with no penalty to which they are not already subject. By contrast, its impact on the non-Communist members is enormous. It threatens them with being transformed, at a single stroke, from first-class citizens into persons classed inferentially as spies by their automatic ineligibility for a passport, and as saboteurs by their blanket proscription from government, labor union, or defense-industry employment.

Professor Chafee has pointed out:

> Even if an enterprise is able to survive, it will have lost most of its moderate members and be wholly in-

the hands of extremists who don't care. Its unobjectionable activities will be crippled. Whatever it still does will be more radical than ever. THE BLESSINGS OF LIBERTY (1956) p. 150.

***Fourth:*** **The inhibitory effect of the Act on freedom of expression operates primarily not on insurrectionary ideas, but on non-insurrectionary ideas.**

This, we think, is also very plain. When this Act was passed, the expression of insurrectionary ideas was already fully and exhaustively dealt with in the Smith Act, 18 U. S. C. Sec. 2385, and by the concept of conspiracy to violate the Smith Act. *Dennis* v. *United States*, 341 U. S. 494. Obviously, therefore, it represents a Congressional judgment that activities which the Smith Act failed to reach should also be brought under control. This could only be the expression of ideas condemned not because of their insurrectionary nature, which would bring them within the purview of the Smith Act, but simply because they have Communist support.

## Summary of Point I

Taking all these factors into consideration, we think it very evident that the validity of the Act should be determined in this proceeding, not merely by its impact on the petitioner, but mainly by its impact on American civil liberties. *Thornhill* v. *Alabama*, 310 U. S. 88, 97; *Lovell* v. *Griffin*, 303 U. S. 444, 451, 453. If the Act fails for this reason, then it becomes immaterial whether Congress could validly have reached some activities of petitioner under a more narrowly-drawn statute. *Reese* v. *United States*, 92 U. S. 214; *James* v. *Bowman*, 190 U. S. 127; *Winters* v. *New York*, 333 U. S. 507.

Taking the impact of the Act as a whole, it is clear that its vagueness and breadth make it invalid by bringing within the scope of its repressive effect much constitution

ally protected conduct. *Stromberg* v. *California*, 283 U. S. 359; *Herndon* v. *Lowry*, 301 U. S. 242; *Winters* v. *New York*, 333 U. S. 507.

It is a statute in which vague and fluid words set a trap for the innocent. *United States* v. *Cardiff*, 344 U. S. 174, 176-7. It exacts "obedience to a rule or standard * * * so vague and indefinite as really to be no standard at all." *Small* v. *American Sugar Refining Co.*, 267 U. S. 233, 239. It is a prime example of the type of statute concerning which it has been well said that:

> Definiteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense. *Winters* v. *New York*, 333 U. S. 507, 540 (FRANKFURTER, J. dissenting).

It acts as an overhanging threat to, and therefore as a prior restraint on, the free dissemination of ideas, *Thornhill* v. *Alabama*, 310 U. S. 88, 101-102; *Follett* v. *McCormack*, 321 U. S. 573, 575; *Cantwell* v. *Connecticut*, 310 U. S. 296, 306; *Talley* v. *California*, 362 U. S. 60, as well as the freedom to engage in association for the advancement of beliefs and ideas. *National Ass'n for the Advancement of Colored People* v. *Alabama*, 357 U. S. 449; *Bates* v. *Little Rock*, 361 U. S. 516. Such previous restraint is to be especially condemned as a form of infringement upon freedom of expression. *Near* v. *Minnesota*, 283 U. S. 697; *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 503. And it can no more be reconciled with our national constitutional standard of freedom of speech and press when done in the guise of something else, than when attempted directly. *Konigsberg* v. *State Bar of California*, 353 U. S. 252, 269.

The Act authorizes a Board of five men to sit in judgment on organizations, to determine that some are deserving and others are not, to permit deserving organizations

free access to the market place of ideas, to deny access, except at the price of crippling restraints, to those deemed non-deserving. It is thus, in substance although not in form, a statute which provides for the licensing of expressions of opinion and which confers broad discretion on the licensing authority. Such statutes are invalid on their face. *Schneider* v. *State*, 308 U. S. 147; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Largent* v. *Texas*, 318 U. S. 418; *Niemotko* v. *Maryland*, 340 U. S. 268; *Kunz* v. *New York*, 340 U. S. 290; *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495; *Staub* v. *Baxley*, 355 U. S. 313.

## II

**The Act is unconstitutional because it rests on findings which are beyond congressional power.**

### A. It is beyond congressional power to declare that the dissemination of non-dangerous ideas should be repressed because the disseminators are connected with a dangerous movement.

Congress, understandably dubious of its power to enact the statute, has attempted to bolster that power by reciting that: "The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger * * *."

Congress, we submit, has no such authority. The existence of a clear and present danger which would, under the decisions of this Court, justify an abridgment of freedom of expression has been recently ruled to be a question of law, to be decided by a court. *Dennis* v. *United States*, 341 U. S. 494. Congress, of course, can make law within the limits of its legislative authority. It cannot decide questions of law, arising out of particular facts, in such a way as to make its decision binding on a court.

Furthermore, Congress cannot lift itself by its own boot straps; it cannot legislate its own powers. Consequently, when the constitutional validity of a statute abridging personal and political freedoms depends on a finding, it necessarily follows that that finding, whether of fact or law, cannot be made by the Congress. *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 638, 640; *Thomas* v. *Collins*, 323 U. S. 516, 529-30; *Thornhill* v. *Alabama*, 310 U. S. 88, 96; *Herndon* v. *Lowry*, 301 U. S. 242, 258.

The opposite result would virtually destroy our device of a written constitution and substitute legislative supremacy. If Congress can render an invalid statute valid by reciting that it finds the facts to be such as would render it necessary, then nullification of First Amendment guarantees, and of any or all constitutional guarantees, is no more than a drafting problem.

If Congress can do what it has done here, it could also "investigate" the "Protocols of Zion," draft an appropriate set of findings, and proceed to restore all the civil disabilities to which Jews were once subject. See Wormuth, *Legislative Qualifications as Bills of Attainder*, 4 Vanderbilt Law Rev. 603, 616. As a matter of fact, in an atmosphere of anti-Semitic excitement, comparable to the atmosphere of anti-Communist excitement which prevailed in 1950 when this Act was passed, it is easily conceivable that such findings might be rendered. It is also easily conceivable that they might be supported by substantial evidence in the investigative record, since in such an atmosphere there would always be witnesses willing, for self-interest or even for a flattering spotlight, to cater to and inflame the current passion.

The position of the Court below that these findings deal with a matter within the general scope of Congressional power, and are conclusive when rendered after "extensive investigation," 223 F. 2d 531, 565, is untenable for several other reasons.

The findings involved here deal principally with the nature and historic significance of the "world Communist movement," with the nature of the governments of foreign countries in which that movement has come to power, and with the intentions of those governments toward the governments of non-Communist countries including our own. The conclusion is that we cannot co-exist with those of our own citizens who are Communists, yet this conclusion is little more than an inference derived from the almost explicit assumption that we cannot co-exist with "the Communist dictatorship of a foreign country," in which "the direction and control of the world Communist movement is vested * * *" These findings have their roots in judgments in the field of international relations. This is a field which the Constitution entrusts almost entirely to the executive branch of the government. Yet the executive branch did not concur that this legislation was needed (see veto message of President Truman). Nor does it, evidently, now concur with the assumptions about international relations on which the findings are based. On the contrary, the executive branch, for at least the last five years, has adopted the position that co-existence with the Communist world is possible and desirable, and that it is being sought.

The findings deal with complex and emotionally charged relationships between people and between institutions and movements composed of people, and with the attitudes and intentions of the people who compose them. If an evaluation and interpretation of such matters can be said to be a "fact" at all, it is at most a very relative, conditional and unstable "fact." With respect to events and conditions subsequent to its enactment, it "can be no more than prophecy, and is liable to be controlled by events." *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543, 547. In the ten years since the Act was passed, there have been profound and far-reaching changes in this whole area and the assumption that further changes will take place is far more reasonable

than its opposite. For this reason alone, the position of the Court of Appeals that the fundamental rights of the American people for the present and the indefinite future must be subordinated to the fears expressed by Congress in 1950 is unreasonable, if not wholly irrational.

The finding, in any case, is not a constitutional clear and present danger finding. The constitutional test has always been whether *the particular statements which are being suppressed* give rise to a clear and present danger of substantive evils which Congress has a right to prevent. *Schenck* v. *United States*, 249 U. S. 47. *It is a vastly and fundamentally different thing to say that expressions of opinion which have no inherent tendency to bring about any evil can be suppressed because of the dangerous character of the speaker, or even because of the speaker's affiliation with a dangerous movement.* Despite the use of the phrase "clear and present danger," this goes back to, and even beyond, the old "bad tendency" test. Even the discredited "bad tendency" test at least purported to find the tendency in the speech, not in the speaker's political dossier.

It is not the law that the peaceful advocacy of lawful change can be suppressed or penalized because of the participation, influence or sponsorship of revolutionists. *De Jonge* v. *Oregon*, 299 U. S. 353.

**B. It is beyond congressional power to find that a specified group, association or movement, whether identified by name or by description, is engaging in proscribed activity.**

The findings included in Section 2 include a "purpose" to use treachery, deceit, infiltration, espionage, sabotage and terrorism. Subdiv. (1). The Board purports, in this proceeding, to have conducted an impartial trial of the question whether American Communists are foreign agents, yet the trial is held under an Act in which Congress instructs the Board at considerable length about the relations between

American Communists and the world Communist movement. Subdivs. 4, 5, 6, 8, 9, 12. It is found in subdiv. (6) that American Communists are endeavoring to overthrow the government by force and in subdiv. (9) that they have repudiated their allegiance to this country. In subdiv. (11) Congress reveals that Communists are engaged in committing espionage and sabotage so cleverly that the government is unable to prove it.

These are findings of guilt and, to a considerable extent, of criminal guilt. They amount to verdicts, rendered against each and every member of the Communist Party, finding them each guilty of a considerable variety of serious felonies, including Smith Act violations and conspiracies to incite rebellion or insurrection, to overthrow the government by force, to commit espionage, to commit sabotage. They are also, in effect, findings that the leaders of the Communist Party are criminally liable for failure to register it under the Voorhis and McCormack Acts, *supra*, although the government has had ample opportunity to indict them on such a charge and has never seen fit to do so.

The power to render findings of personal guilt is one so delicate, so easily subject to abuse, that the framers of our Bill of Rights devised for it a whole interlocking system of limitations and safeguards. Among these are the sifting of accusations by grand juries in order to protect the accused from the injury of unsubstantiated charges, the right to know the nature and cause of the accusation, to confront and cross-examine adverse witnesses, to subpoena and present defense witnesses, to be tried by jury, to be heard by counsel in his own defense before the verdict is rendered. All these laboriously constructed safeguards are automatically swept aside when Congress conducts the trial and renders the verdict in the form of "findings" attached to an enactment.

We think that the basic reasons why bills of attainder are constitutionally prohibited is that the legislative process does not permit of adequate guarantees that such questions will be decided justly. We also think that Section 2 of the Act is in substance a gigantic bill of attainder in which thousands of individuals have been simultaneously adjudged guilty of serious offenses. *United States* v. *Lovett*, 328 U. S. 303; *Cummings* v. *Missouri*, 4 Wall. 277; *Ex parte Garland*, 4 Wall. 333.

The fact that the verdict is rendered against all members of a group, instead of against named individuals, does not render the finding more legislative in character. *Rather, it shows that Congress has undertaken to convict not only those individuals against whom it has heard evidence, but also many thousands of others concerning whom, as individuals, no evidence whatsoever was produced. This merely complicates the abuses which the framers of the Constitution feared in legislative trials by adding to them a still further abuse.*

The purely verbal trick of substituting "the Communist movement in the United States" and "the Communist organization in the United States" for the name "Communist Party of the United States," is a disguise so paper-thin that it would be unworthy of comment but for the fact that it shows Congress' awareness that it was attempting, in Section 2, something which would be held unconstitutional if done too openly. It is otherwise without significance. The great constitutional guarantees deal with substance, not form.

It is true that, if we are right in our view that there is a fundamental constitutional principle that questions of guilt must be decided by the judicial process, then this Court's decision in *American Communications Association* v. *Douds*, 339 U. S. 382, must be regarded as a departure from that principle. Yet even that case, which we think the Court

will ultimately find it necessary to reconsider, is very far from providing any precedent for the upholding of the present Act. On the contrary, that case is specifically limited to situations where the penal effect on the individuals involved is slight, the number of individuals affected is small, and all of them are regarded as occupying strategic positions from which they can effect the flow of commerce. It was only because of those limitations that the Act there under consideration was upheld. In this case, as we have attempted to demonstrate under Point I, the penal effect is extremely severe, the number of individuals affected is enormous, and they are affected despite the fact that they may occupy positions of very minor importance, or none at all. Also, Section 2 of this Act undertakes to find its myriad defendants guilty of much more serious offenses than a tendency to indulge in political strikes. Even the *Douds* case, far from justifying the present Act, contains many indications by way of dicta that what has been here attempted would be invalid.

**C. It is beyond congressional power to evaluate political movements, pronounce them safe or dangerous, or to decide the relative merits of alternative forms of government.**

With its findings of guilt Section 2 mingles political interpretations and evaluations. It deals with the "purpose" and "nature" of the Communist movement. It pronounces on the desirability of Communism as a system of government. Subdivs. (2) and (3). It pronounces Communism as a political movement or tendency to be a dangerous aberration, which the government, subdiv. (15), must undertake to frustrate. It rules that Communist organizations, although they may "designate themselves as political parties," are "in fact" not political parties. Subdiv. (6).

Even those who wholeheartedly agree with all the political judgments embodied in Section 2 should recognize that

a body competent to reach them, *not as personal opinions but with official finality*, must necessarily be equally competent to determine, if it should ever be so inclined, that the Democratic Party should be suppressed because it is "in fact" a plot to bankrupt the country and disrupt the national economy, or the Republican Party because it is "in fact" nothing but a subservient tool of private corporate greed.

We submit that the First Amendment was adopted precisely to prevent governmental findings on such questions. Indeed, in the field of political liberty, the First Amendment could serve no other practical purpose. No constitutional limitations are needed to prevent governments from suppressing views which those in power *do not* consider dangerous and unwholesome.

It is not the function of the Congress to decide whether a form of government is good or bad, whether a political movement is a danger or a promise, whether a political theory is true or false. It is not its function to decide that persons who "designate themselves as political parties" should be denied the right to offer, endorse and oppose candidates, publish political platforms, support and oppose legislation, etc., because Congress disbelieves their political representations.

These are not questions of fact but questions of political evaluation. Their decision is an exercise, not of the delegated powers committed to a representative government, but of the ultimate powers reserved to a self-governing people. The power of determining such questions is withheld from the Congress by the First Amendment and reserved to the people by the Ninth and Tenth.

**D. The findings are not severable.**

The opinions which Congress has expressed in Section 2 constitute the foundation on which the Act's whole structure

is erected. The definitions in Section 3 of "Communist-action," "Communist-front," and "Communist-infiltrated" organizations are expresed in terms of the findings. Without the definitions and the findings on which they rest, the remainder of the "Subversive Activities Control Act of 1950," as amended, has nothing on which to operate.

Hence, in this instance, despite the presence of a severability clause, the fact that the findings are beyond Congressional power necessarily invalidates the Act as a whole.

## III

**The Act is unconstitutional because it authorizes ideological trials and penalizes beliefs, opinions and attitudes, not evidenced by overt acts.**

### A. The Act authorizes ideological trials.

The danger of any insurrectionary activity, we learn from Section 2 (15), is dependent on certain conditions precedent. There must first arise "a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement * * *." These, obviously, are remote and entirely hypothetical circumstances, which may never arise at all. Yet without them, not even an unsuccessful insurrectionary attempt is predicted. For the present and the predictable future, "the Communist movement * * * seeks converts * * * by * * * schooling and indoctrination."

It is also interesting to note that Congress has not thought it necessary to require that condemned organizations report on whether they possess arms, ammunition or explosives, nor even on their resources in the way of short-wave apparatus, cloaks, daggers and supplies of invisible ink. It has, however, required:

> "A listing, in such form and detail as the Attorney General shall by regulation prescribe, of all printing presses and machines including but not limited to rotary presses, flatbed cylinder presses, platen presses, lithographs, offsets, photo-offsets, mimeograph machines, multigraph machines, duplicating machines, ditto machines, linotype machines, intertype machines, monotype machines, and all other types of printing presses, typesetting machines or any mechanical devices used or intended to be used, or capable of being used to produce or publish printed matter or material, which are in the possession, custody, ownership, or control of the Communist-action or Communist-front organization or its officers, members, affiliates, associates, group, or groups in which the Communist-action or Communist-front organization, its officers or members have an interest." Sec. 7 (d) (6).

This section, although not part of the original Act but added by a later amendment, may be said to speak for itself as a Congressional construction of the nature of the "clear and present danger."

The Act's instructions to the Board as to the matters it shall "take into consideration" set the stage for an ideological trial by their heavy stress on parallelism in views and policies and on the subjective state of mind to be attributed to members or leaders of the accused organizations. This stress is matched by the Act's complete failure to require proof of any objective facts adequate to the determination of issues to which grave legal consequences have been attached.

Space does not permit a detailed analysis of the Board's voluminous report, yet we nevertheless submit that a close and critical analysis of that document, in particular its processes of inference, will make it clear that the abuses which the Act so obviously invites have in fact occurred.

A glance at either the original or the modified report is sufficient to make clear that references to historical works on Communist theory written by Europeans since deceased are enormously more numerous, and have much greater bearing on the Board's conclusions, than references to overt conduct found to have been engaged in by petitioner. By this method of reasoning, the Board would be competent, if it should ever be so inclined, to proscribe the Democratic Party on the basis that Jefferson and Madison advocated revolution under certain conditions, or the Republican Party on the basis of similar statements of Lincoln and Grant. See footnote to opinion of Justice JACKSON in *American Communications Ass'n* v. *Douds*, 339 U. S. 382, 440. On closer examination of the reasoning process, it becomes evident that the Board has not looked to petitioner's conduct as a test of what it really believes. On the contrary, it has started by attributing its own version of the theory to petitioner and then used this as a basis for inferring the significance and motivation of petitioner's conduct. Compare *Schneiderman* v. *United States*, 320 U. S. 118, 158-9. For example, when it wishes to know whether the Communist Party, despite its denials, intends to undertake violent revolution in the United States, the Board does not look to see whether the matter can be tested objectively, for example by inquiring whether overt preparations for such an undertaking, such as military drills and the accumulation of secret arms caches, have taken place. Instead, it looks to see what Lenin said about it.

The following example is representative:

> Equally basic with the international and revolutionary character of Marxism-Leninism is the tenet of the dictatorship of the proletariat. *In view of the divergence of testimony* of witnesses for petitioner and those of respondent concerning the meaning and application of this tenet, we have taken pains to *ascertain its real character*. (Modified Report, p. 19) (emphasis added).

It is assumed without discussion that the Communist Party's beliefs must correspond to the "real character" of this "tenet," whether or not it has ever expressed that version, much less acted on it. And the "real character" of the "tenet" is "ascertained" by a parade of quotations from the works of Lenin and Stalin.

In short, the Board has not tried the Communist Party. It has tried and condemned "Marxism-Leninism."

In the original report, this process reached its grotesque climax in findings that "Marxism-Leninism * * * has been promulgated and issued by the Soviet Union as the overall philosophy, authoritative rules, directives and instructions governing the world Communist movement" (p. 78) and that "the Marxist-Leninist classics are one of the chief means by which the Communist Party of the Soviet Union directs, dominates and controls the Communist Party of the United States" (p. 43). Thus, according to the Board's theory, if an American reads the "Communist Manifesto," a work written in England by German refugees more than half a century before the Russian revolution, and if he finds it convincing and adopts its ideas as his own, he thereby becomes *ipso facto* a Russian agent and falls under the sway of Russian Communist leaders who are "controlling and dominating" him through the medium of the book. This is witch-hunting at its weirdest.

In the modified report, this theory is not quite so frankly stated, but it is still present (for example, pp. 9-10) and still dominates the whole process of inference. And the Board expressly concludes: "It would seem clear that, the world Communist movement being Marxism-Leninism in action, there could be no substantive break with the movement without a substantial departure from or revision of Marxism-Leninism by respondent" (p. 204). In other words, not only is the Communist Party subject to the penalties of the Act, but nothing it could do or say, or refrain

from doing or saying, would change the matter, as long as it does not "substantially depart from or revise" its theory. And therefore, in substance, it is the theory itself, not words expressing it or conduct inspired by it, against which the penalties of the Act are being invoked.

**B. The Act penalizes beliefs.**

Under Point I we have discussed the sanctions of the Act and what is said there need not be repeated. At this point, we wish merely to take note that some, at least, of these sanctions permit of only two interpretations. Either they are penalties imposed for the mere holding of a belief or they are conclusive presumptions, drawn from the mere fact of belief, that the individual involved is disposed to commit offenses which he is not shown ever to have committed.

For example, the Act subjects any member of an organization ordered to register to a penalty of $10,000 fine and five years imprisonment, Sec. 15 (c), for the offense of applying for, using or attempting to use a passport, Sec. 6(a). No showing is required that the passport was used or intended for any improper purpose. Unless the intention is purely punitive, it must embody an implied Congressional judgment that *all* members of the Communist Party and *all* members of *all* "Communist-front" organizations are unfit to be trusted with passports. The Act contains nothing to explain or illuminate such a judgment, except the statement in Section 2(8) that "travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement."

Yet the Act does not require a scintilla of proof that the individual denied a passport has ever served as an international courier or evinced any willingness to do so. It

makes no provision for the consideration of affirmative proof as to why he needs to go abroad or what he intends to do. It does not permit the issuing officer to find that any combination of facts whatever outweigh the bare fact of an organizational membership. Indeed, it makes the officer guilty of a crime if he issues the passport with knowledge or "reason to believe" that the applicant is a member. If the right to a passport has in fact been cut off, not to punish the individual, but because of a supposed probability that he will serve as an international courier, then that probability has been conclusively presumed from the individual's supposed beliefs, attitudes and loyalties. Even the latter are inferred from the bare fact of membership and, in the case of a non-Communist member of a "front," from the bare fact of association.

Similarly, the Act conclusively presumes unfitness for government employment without proof of any disloyal act and for labor union employment without proof of any participation in a political strike.

Let us suppose the case of a skilled worker who has been in a defense industry for twenty years and for all that time has been a trusted and satisfactory employee. No job he worked on has ever been sabotaged. Now it develops that he must be banned from his present job, and from all defense industry, because of membership in an organization. Is this because he might commit sabotage? If so, why is the line of reasoning from his membership to his beliefs to his probable future conduct—an inference on an inference, winding up with a prediction—so compelling that his contrary record on the specific issue cannot even be taken into consideration?

The pretense that we are not punishing the heretic for his opinions, but are only guarding against the misconduct which his opinions might lead him to commit, is the most ancient and threadbare rationalization of persecution. It

is the very hallmark of bigotry. It was used for centuries by Catholics to justify the imposition of disabilities on Protestants. Protestants, when they came to power, imposed similar disabilities on Catholics and offered the same excuse. Both used it to defend and explain discrimination against the Jews. Why should such a hoary pretext for intolerance rise to haunt the United States in mid-Twentieth Century?

Lord Macaulay wrote more than a century ago:

> "It is altogether impossible to reason from the opinions which a man professes to his feelings and his actions; and in fact no person is ever such a fool as to reason thus, except when he wants a pretext for persecuting his neighbors" (Historical Essays, London, 1932, p. 92).

> "If such arguments are to pass current, it will be easy to prove that there was never such a thing as religious persecution since the creation. For there never was a religious persecution in which some odious crime was not, justly or unjustly, said to be obviously deducible from the doctrines of the persecuted party * * *.

> *"The true distinction is perfectly obvious. To punish a man because he has committed a crime, or because he is believed, though unjustly, to have committed a crime, is not persecution. To punish a man, because we infer from the nature of some doctrine which he holds, or from the conduct of other persons who hold the same doctrines with him, that he will commit a crime, is persecution, and is, in every case, wicked and foolish."* (Ibid, pp. 7-8). (Emphasis supplied.)

# IV

## The Act is not justified by any special danger or emergency.

### A. The First Amendment expresses the view that freedom, not repression, is the only road to true security.

The theory has recently become so popular that it is often treated as almost axiomatic, that freedom and security are competing values, and that problems under the First Amendment must therefore take the form of determining how much freedom it is necessary to sacrifice in order to attain "security."

We submit that, had this been the idea which the framers of the First Amendment desired to express, they might have written that the freedoms mentioned should not be "unduly" or "unnecessarily" abridged. They could not possibly have arrived at the formulation which they in fact used.

The framers undoubtedly believed that there were ways of speaking (such as obscenity) and uses of speech (such as fraud, libel, or counseling to crime) which were not part of "the freedom of speech" and therefore could be controlled without "abridging" that freedom. It does not follow that they supposed that a belief on the part of those in authority that a dangerous situation existed could ever justify throwing governmental force on one side or the other of public debate, restraining one point of view as to what the public interest requires, while permitting its opposite to be freely expressed.

On the contrary, they must have known that, only when those in authority feel that freedom of discussion should be sacrificed to "security" or some other "competing value," could there be any need to reinforce that freedom by means of a consitutional guarantee. No government ever has, or ever would, abridge it under any other circumstances.

The currently fashionable view requires two assumptions (usually inexplicit): (1) that security can be obtained by means of repression; and (2) that it cannot be obtained otherwise.

We submit that the verdict of history is to the contrary. Is it mere coincidence that Communists rule today in Russia (which, in the times of the Tsars, was a very model of "internal security," as that phrase has recently been used), but not in England (which has permitted Communists to teach and organize without interference for more than a century)? Is not the lesson of history that governments which have sought to make themselves secure through repression have found, not security, but a rigidity and blindness, an inability to grow and change and adapt, which only made their ultimate downfall the more bloody, and the more inevitable? Have not governments which dared to stake their existence on the continued confidence and support of a free people proved, in the long run, to be strengthened, not weakened, by that course?

We think this is the insight which underlies the First Amendment. We think that Amendment was designed to force our government to seek its security through freedom, by forbidding it to seek it in any other way.

This was the view expressed by Jefferson when he said, in his First Inaugural, "If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it," and went on to express his faith that such a course would not make the government weak, but would make it "the strongest government on earth."

This was the view expressed by Mr. Justice BRANDEIS in a great concurring opinion:

> Those who won our independence * * * knew that order cannot be secured merely through fear of punishment for its infraction; that *it is hazardous to discourage thought*, hope and imagination; that repression breeds hate; that hate menaces stable government; that *the path of safety lies in the opportunity to discuss freely* supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. *Whitney* v. *California*, 274 U. S. 357, 375-6 (concurring opinion) (emphasis added).

This is the view which, not so many years ago, was expressed by this Court, in an eloquent opinion by Chief Justice HUGHES, from which no Justice dissented:

> The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, *the more imperative is the need to preserve inviolate* the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. *Therein lies the security of the Republic*, the very foundation of constitutional government. *DeJonge* v. *Oregon*, 299 U. S. 353, 365 (emphasis added).

**B. Even on the assumption that the First Amendment is subject to exceptions or contractions to meet special situations, the present statute cannot be justified on such grounds.**

At least where First Amendment freedoms are at stake, it is not constitutionally permissible "to burn the house to roast the pig." *Butler* v. *Michigan*, 352 U. S. 380, 383. Legislation which impinges on such rights must be "reasonably restricted to the evil with which it is said to deal"

*Ibid.* It must be "narrowly drawn to prevent the supposed evil." *Cantwell* v. *Connecticut*, 310 U. S. 296, 307, 311. Legislative intervention to protect the people against abuses of First Amendment rights "can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed." *DeJonge* v. *Oregon*, 299 U. S. 353, 364-5. In restraining unlawful advocacy, government "must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights." *Speiser* v. *Randall*, 357 U. S. 513, 521. And even the power to regulate action "must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Cantwell* v. *Connecticut*, 310 U. S. 296, 304. Legal devices and doctrines which are, in most applications, consistent with the Constitution, "cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it." *Smith* v. *California*, 361 U. S. 147, 80 S. Ct. 215, 217.

It follows that, if emergency can create power to abridge freedom of speech and association, it can create at most a power to use temporary measures of an emergency nature. It "is an essential safeguard of freedom that emergency measures ought to be carefully confined to the emergency and not operate as everyday laws." Chafee, THE BLESSINGS OF LIBERTY (1956) p. 135. And this Court has recognized and enforced that principle, even when far less essential rights were being far less drastically curtailed. *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543.

But Title I of the Internal Security Act of 1950 is not temporary legislation. Nor is it, like Title II, limited to operate only in emergencies. It creates a permanent institution to supervise, in perpetuity, the political purity of voluntary associations. If approved by this Court, it would freeze our rights of discussion and association at a level much lower than we have customarily enjoyed—perhaps the

lowest level in our history. Such a change cannot be constitutionally justified by a plea of emergency, if only because it goes far beyond anything which an emergency might make necessary.

For similar reasons, it cannot be justified by reference to the "clear and present danger" doctrine. There is no such thing as a permanent "clear and present danger." If there were, it could not be established by the findings of a Congress not endowed with the gift of prophecy. But, even if there were and it could be so established, this still would not save the present Act, since it does not limit itself, or ever attempt to limit itself, to evils which Congress has a right to prevent. Instead it represses the processes by which a democratic public opinion is formed, at their very source, without regard to whether anything unlawful has been advocated or is likely to occur.

This Act expresses a state of mind which was a product of a very unique moment in our history. It was enacted in September, 1950, when the Korean War was three months old and still going badly. Hatred and fear of Communism was so intense as to make rational thinking on the subject difficult, and realism and objectivity impossible.

In the ten years intervening, we have had no registrations under this Act—and we have been in no way embarrassed or imperiled by the lack of them. That, in itself, should be a sufficient demonstration that, if any genuine emergency or "clear and present danger" requiring these measures existed in September, 1950, it quickly passed away without the application of the remedy which Congress deemed necessary.

Much else has happened during those ten years. The world Communist movement has been shaken to its foundations by the death of Stalin, the Khrushchev report on Stalin's crimes, and the events in Hungary. The Communist Party in this country has been virtually decimated

in its membership (which was never large) and much weakened in its influence. A trend toward greater individual freedom and greater security for the individual against arbitrary governmental action has set in in the U.S.S.R. The assumption that coexistence between the U.S.A. and the U.S.S.R. is impossible, so easily made in 1950, has given way to official recognition by both governments that such coexistence is necessary to spare the world the horrors of an atomic war and that, despite all difficulties and setbacks, some way to attain it can and must be found. It is much easier today than it was in 1950 to see that our government is competing with the U.S.S.R. for the sympathy of the uncommitted third of the world and that, in that competition, our reputation for genuine commitment to freedom is an asset which we cannot afford to fritter away for the sake of compiling political dossiers and blacklists on our own citizens.

In that ten years we have lived through the national fever popularly known as McCarthyism—of which this Act was an early and extreme expression. That unhealthy excitement has, fortunately, largely subsided. And we have learned—or should have learned—that the product of such methods is not security, but fear, conformity, suspicion and paralysis. Yet this Act, if upheld, would not only revive some of the worst features of McCarthyism, but would perpetuate them by erecting them into a permanent institution.

The present danger is not that the American people will be lured into catastrophe because of free and uninhibited discussion of public issues. The present danger is that we will permit the fears and passions of a transitory moment to induce us to do permanent damage to our institutions.

## CONCLUSION

**We submit that the Subversive Activities Control Act should be held unconstitutional on its face. It follows that the decision below should be reversed.**

Respectfully submitted,

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# APPENDIX A

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# APPENDIX B

## Letters of Consent

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August 11, 1960

Royal W. France, Esq.
154 Nassau Street
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Re: Communist Party v. S.A.C.B.
No. 12, Oct., Term, 1960

Dear Mr. France:

This is to inform you that the Communist Party consents to the filing by you in the Supreme Court of the United States of a brief *amicus curiae* in the case.

Very truly yours,

JOHN J. ABT

JJA/s

OFFICE OF THE SOLICITOR GENERAL
(SEAL) Washington, D. C.

158-1 August 17, 1960

Laurent B. Frantz, Esq.
936 Shevlin Drive
El Cerrito, California

Re: Communist Party of the United States
v. Subversive Activities Control Board,
Oct. Term, 1960, No. 12

Dear Mr. Frantz:

Mr. Royal W. France's letter of July 25, and your letter of August 10, ask consent, on behalf of a group of American citizens, to the filing of a brief *amici curiae* in this case. At my request, you have supplied me with a preliminary list of the friends of the Court on whose behalf the brief is to be submitted, and have indicated that further names will probably be added before the brief goes to the printer.

In view of the considerations suggested in your letter and that of Mr. France, and in view of the Court's granting leave to a similar group of *amici curiae* at the earlier stage of this case, 350 U. S. 859, I consent to the filing of the proposed brief.

We would very much appreciate it if your brief could be filed at approximately the same time as the brief of the petitioner, so that we can take account of your arguments in the brief we shall file on behalf of the respondent.

Sincerely yours,

/s/ J. LEE RANKIN
J. Lee Rankin
Solicitor General

cc:
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Clerk,
Supreme Court of the United States

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No. 12

# In the Supreme Court of the United States

OCTOBER TERM, 1960

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA, PETITIONER

*v.*

SUBVERSIVE ACTIVITIES CONTROL BOARD

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENT


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# In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 12

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA, PETITIONER

*v.*

SUBVERSIVE ACTIVITIES CONTROL BOARD

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENT

### OPINIONS BELOW

The original opinion of the court of appeals (R. 2078–2166[1]; Pet. App. A, pp. 1–89), Judge Bazelon dissenting, is reported at 223 F. 2d 531.

The opinion of this Court is reported at 351 U.S. 115.

[1] Like petitioner, we shall use "R." to refer to the printed record (pages 1–2169) filed with this Court at the October Term 1955 (No. 48). It consists of the Joint Appendix to the parties' briefs when the case originally was before the court of appeals, and the original proceedings in that court. We shall also use "R." to refer to the record (pages 2175–2723) filed in this Court after the second grant of certiorari on February 5, 1960, consisting of the proceedings before the Sub-

The second opinion of the court of appeals (R. 2652–2680; Pet. App. A, pp. 91–121), Judge Bazelon dissenting in part and concurring in part, is reported at 254 F. 2d 314. A memorandum of the court of appeals having reference to this opinion (R. 2694–2695; Pet. App. A, pp. 122–123) and an order clarifying the latter memorandum (R. 2695–2697) are not reported.

The third opinion of the court of appeals (R. 2699–2707; Pet. App. A, pp. 124–132), Judge Bazelon dissenting in part and concurring in part, is reported at 277 F. 2d 78.

The original Report of the Subversive Activities Control Board appears at R. 1–137 [1803–2051].[2] The Modified Report of the Board appears at R. 2406–2651, and the Modified Report of the Board on Second Remand appears at R. 2375–2405.

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versive Activities Control Board and the court of appeals subsequent to this Court's remand. "Tr." will be used, when necessary, to refer to the original typewritten transcript of the proceedings and evidence before the Board.

[2] The original Report as it appears at R. 1–137 is the unannotated version, published as Sen. Doc. No. 41, 83d Cong., 1st Sess. At R. 1803–2051 it appears in annotated form, *i.e.*, with record references to the supporting evidence. The annotated version was filed in the original proceedings in the court below as a special appendix to respondent's brief. Whenever we have occasion to refer to the Board's original Report, we shall refer to both versions in the manner indicated in the text, *i.e.*, with the reference to the annotated version appearing in brackets immediately following the reference to the unannotated version.

## JURISDICTION

The judgment of the court of appeals was entered on July 30, 1959 (R. 2708; Pet. App. B, p. 133), and a petition for rehearing was denied on August 27, 1959 (R. 2708, 2709). The petition for a writ of certiorari was filed on November 23, 1959, and granted on February 5, 1960 (361 U.S. 951; R. 2723). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 and Section 14(a) of the Subversive Activities Control Act of 1950.

## QUESTIONS PRESENTED

1. Whether the Subversive Activities Control Act of 1950, as amended, is unconstitutional on its face or as applied in this case (Pet. Ques. 1).

2. Whether the order of the Subversive Activities Control Board rests upon a proper construction and application of the Act (Pet. Ques. 2).

3. Whether the order of the Board is supported by the preponderance of the evidence (Pet. Ques. 3).

4. Whether it was error to refuse to strike all of witness Budenz' testimony because it was not possible for the witness, due to illness, to be subjected to cross-examination with the use of his statements to the F.B.I. on the Sfarobin and Childs-Weiner matters (Pet. Ques. 4).

5. Whether, in the particular circumstances, petitioner was entitled to the production of statements by the Attorney General's witnesses relating to their direct testimony (Pet. Ques. 5).

6. Whether the court below, having sustained the ultimate finding of the Board as supported by other findings and by the preponderance of the evidence, erred in refusing to remand because a subsidiary finding of the Board lacked evidentiary support (Pet. Ques. 6).

## STATUTES INVOLVED

The pertinent provisions of the Subversive Activities Control Act of 1950 (Title I of the Internal Security Act of [September 23,] 1950, c. 1024, 64 Stat. 987, 50 U.S.C. 781 *ff.*), as amended, the Immigration and Nationality Act of June 27, 1952, c. 477, 66 Stat. 163, the Communist Control Act of [August 24,] 1954, c. 886, 68 Stat. 775, and the Social Security Amendment of [Act of August 1,] 1956, c. 836, 70 Stat. 824, 42 U.S.C. 410, are set forth in an appendix to petitioner's brief (Br. A–1 to A–48).

## STATEMENT

A. *The original proceeding before the Board.*—On November 22, 1950, the Attorney General, pursuant to Section 13(a) of the Subversive Activities Control Act of 1950, filed with the respondent Subversive Activities Control Board a petition (R. 143–159) for an order requiring petitioner, the Communist Party of the United States, to register with him as a Communist-action organization in the manner required by Section 7(a), (c), and (d) of the Act. The petition alleged that the Party was a Communist-action organization as defined in the Act (Section 3(3)), and set forth numerous allegations of fact in support of the contention.

On February 14, 1951 petitioner filed "under protest" an answer denying generally that it was a Communist-action organization as defined in the Act (R. 160–161). The answer cited the fact that there was then pending in the United States District Court for the District of Columbia a suit to enjoin further proceedings before the Board (*ibid.*). Petitioner reserved the right to amend its answer in the event of an adjudication in the pending court proceeding that an answer was required (*ibid.*). On February 28, 1951, a statutory three-judge court, in the proceeding refgrred to, denied injunctive relief. *Communist Party of the United States* v. *McGrath*, 96 F. Supp. 47. On March 13, 1951, the district court issued an order staying answer and hearings before the Board to and including March 27, 1951, pending appeal (R. 1, fn. 1 [1804–1805]). On March 26, 1951, this Court denied a petition for an extension of this stay (*ibid.*; 340 U.S. 950). The suit was thereafter abandoned by petitioner (R. 1, fn. 1 [1804–1805]).

On April 3, 1951, petitioner filed an amended answer to the Attorney General's petition (R. 161–187), in which, *inter alia*, it admitted that it was

[3] The court (Letts and Pine, D. JJ.) based its decision on the grounds that petitioner had not exhausted its administrative remedies and that "the public interest is paramount to any threatened loss or damage" to petitioner "pending final determination of the case" (96 F. Supp. at 47). Circuit Judge Bazelon, concurring in the result, based his position on his determination that the Act was not unconstitutional on its face and that no circumstances appeared to warrant the intervention of a court of equity at that stage (*id.*, pp. 47–53).

munist Control Act of 1954, except insofar as it amended the Subversive Activities Control Act, had no application to this proceeding (R. 2125). The dissenting judge, being of the view that the registration provisions of the Act were unconstitutional as violative of the Fifth Amendment's prohibition against compulsory self-incrimination (R. 2153–2166), did not consider any of petitioner's other contentions (R. 2166).

C. *The original proceeding in this Court.*—This Court granted certiorari on May 31, 1955 (349 U.S. 943). After argument, the Court, on April 30, 1956, held that the court of appeals erred in refusing to return the case to the Board for consideration of the new evidence proffered by petitioner's motion and affidavit (351 U.S. 115). The Court reasoned that the taint resulting from the uncontested allegations of petitioner that the Board's findings were based in part on perjurious testimony by Crouch, Johnson, and Matusow was not removed merely because there was ample innocent testimony to support the Board's findings. Therefore, the case was ordered remanded to the Board "to make certain that the Board bases its findings upon untainted evidence." 351 U.S. at 125. The Court suggested that this could be accomplished either by holding a hearing to ascertain the truth of petitioner's allegations and to strike any testimony found to be discredited from the record, or to assume the truth of petitioner's allegations and without further hearing to strike the testimony of the three witnesses from the record. "In either event, the Board

must then reconsider its original determination in the light of the record as freed from the challenge that now beclouds it." *Ibid.*

D. *The proceeding before the Board on remand.*— On May 21, 1956, petitioner filed three motions with the Board. The first motion sought to reopen for additional evidence concerning events assertedly occurring since the earlier hearing. The second motion prayed the Board to strike the testimony of Attorney General's witnesses Gitlow, Budenz, Honig, and Scarletto as tainted or, alternatively, to hold a hearing on this issue. The third motion asked to reopen the proceeding for the introduction of evidence concerning Attorney General's witness Mrs. Markward, including evidence that she had lied in a Department of Defense security hearing concerning the Communist Party membership of Annie Lee Moss. The Board, on August 10, 1956, denied all three motions (R. 2171–2191).

On August 17, 1956, the Party moved in the court of appeals for leave to adduce additional evidence that would assertedly show that the Board's findings concerning petitioner were no longer true and that the testimony of Mrs. Markward was tainted with perjury. These motions were denied by the court of appeals except that the Board was given permission to entertain a motion as to the alleged perjury of Mrs. Markward in respect to Annie Lee Moss "if sufficient and appropriate showing is made to it * * *" (R. 2409). On November 16, 1956, petitioner moved the Board to hear evidence on charges that Mrs. Markward had committed perjury with regard to Annie

Lee Moss and, in addition, in a Smith Act prosecution (R. 2192–2206). On December 3, 1956, the Board granted the motion, in part, to allow petitioner to cross-examine Mrs. Markward in an effort to lay a basis for a broader investigation and hearing (R. 2206–2212). The hearing was reopened on December 11, 1956, with the full Board presiding and Mrs. Markward was cross-examined exhaustively (R. 2231-2253; Tr. 17081–17132).

On December 18, 1956, the Board issued its Modified Report (R. 2406–2651).[5] The Board concluded on the basis of observing the cross-examination of Mrs. Markward that she had not committed perjury concerning Annie Lee Moss and was a creditable witness (R. 2409–2411). Furthermore, consistent with the opinion of this Court, the Board expunged the testimony of Attorney General's witnesses Crouch, Johnson, and Matusow, and then reassayed the original findings (R. 2411). On the basis of a thorough analysis, the Board concluded that, after expunction of the testimony of the above three witnesses, all major findings of its original Report remain supported and that no substantial gaps had been left in the evidence (R. 2411). In short, after reconsidering the record (excluding the testimony expunged), the Board concluded "that the evidence establishes be-

[5] The Modified Report is described in greater detail below, pp. 212–221.

yond doubt that [petitioner] is substantially directed, dominated, and controlled by the Soviet Union * * * and operates primarily to advance the objectives of such world movement" (R. 2644). The Board therefore recommended that the court of appeals affirm the Board's order requiring registration (R. 2644–2645).

E. *The second proceeding before the court of appeals.*—On review of the Board's Modified Report, the court of appeals, on January 9, 1958, remanded for production to petitioner of certain reports made to the F.B.I. by witness Markward but affirmed the actions of the Board on all other points (254 F. 2d 314; R. 2652–2680). After the court of appeals' opinion of January 9, 1958, government counsel discovered, in the files of the F.B.I., mechanical recordings of an interview of the Attorney General's witness Budenz with the F.B.I., which had been recorded without Budenz' knowledge, and whose existence had not previously been known to counsel or to the Board (R. 2685–2687). The Board reported this discovery to the court, by an affidavit of counsel. The court by an order of April 11, 1958 (R. 2693–2695), construed by an order of June 16, 1958 (R. 2695–2696), enlarged the scope of the remand order to the Board to include the production of all "statements"—as defined by 18 U.S.C. 3500—of Budenz to the F.B.I. relating to the "Starobin letter" and the "Childs-Weiner conversation."

F. *The proceeding before the Board on second remand.*—On this remand, the reports covered by the orders of the court of appeals were made available to petitioner. The hearing before the Board was reopened before a member of the Board sitting as an examiner. The examiner, on September 19, 1958, granted in part and denied in part petitioner's motion to strike the testimony of Budenz, reevaluated the credibility of witnesses Markward and Budenz, reexamined the evidence, and recommended that certain modifications be made in the Modified Report and that the Board affirm its determination that petitioner is a Communist-action organization as defined in the Act (R. 2297–2328). After exceptions to this recommendation were filed and argued, the Board examined the record and itself reevaluated the credibility of witnesses Markward (R. 2377–2387) and Budenz (R. 2387–2400) and considered other points raised by petitioner (R. 2400–2402).

On February 9, 1959, the Board issued its Modified Report on Second Remand (R. 2375–2402), reaffirming the findings and conclusions in its Modified Report of December 18, 1956, with certain modifications, and again recommending that the court of appeals affirm the Board's order requiring petitioner to register as a Communist-action organization (R. 2402).

G. *The third proceeding before the court of appeals.*—On July 30, 1959, the court of appeals affirmed the Board's order (R. 2700–2707). The court held that the findings in the Modified Report on Second

Remand were fully supported by the original evidence as reduced by the expunction of parts of it and by the holdings of the Board finding certain other testimony uncreditable.

## SUMMARY OF ARGUMENT

### I

Consideration of the problems which led to the enactment of the Subversive Activities Control Act will tend to show the reasonableness of the Act, particularly as applied to petitioner, and thus to refute the contention that it arbitrarily invades basic constitutional liberties.

By 1939, Congress had before it a mass of evidence, collected over the previous nine years, pointing to the conclusion that the Communist International and the Communist Party of the United States were dedicated to the establishment of a proletarian dictatorship by force and violence in this country and throughout the world, and that the American Communist Party was completely controlled both as to policy and leadership by the Soviet Union through the Communist International. The weapons adopted by Congress to combat this evil included the Smith Act of 1940, punishing advocacy of or conspiracy to advocate the overthrow of this Government by force and violence (sustained as against eleven leaders of petitioner in *Dennis* v. *United States*, 341 U.S. 494), the Foreign Agent Registration Act of 1938 (considered in *Viereck* v. *United States*, 318 U.S. 236), and the 1940 Voorhis Act. The two latter Acts were aimed at the dissemination

in this country of unidentified foreign propaganda, the remedy adopted being compulsory identification and disclosure.

For various reasons these Acts could not be effectively enforced against organizations, such as petitioner, which threw a "smoke screen" around their operations and obscured the sources and nature of their foreign control. For example, petitioner, at its 1940 national convention, adopted a resolution "dissolving" its affiliation with the Communist International "for the specific purpose of removing itself from the terms of the so-called Voorhis Act." In addition, the Voorhis Act provided no adequate administrative machinery to search out the true facts regarding control by foreign dictatorships and the real objectives of domestic organizations which were believed to be subversive but which veiled their true ends behind a facade of respectability. The Act was addressed only to the formal, overt aspects of a particular group, and failed to reach the true but secret purposes which lay beneath the surface and which constituted a real threat to the security of the United States.

The post-World War II revelations of widespread espionage and infiltration of sensitive government agencies in Canada, England, and the United States by Soviet agents, recruited from the membership of the domestic Communist parties in those countries, showed more clearly the nature and dimensions of the danger. In addition, the evidence adduced at the trial and conviction in 1949 of the eleven leaders of

the American Communist Party under the Smith Act, and the commencement of hostilities in Korea in June 1950, furnished Congress with further reason to believe, in September 1950, when the Act in issue was passed, that the dissolution of the Communist International in 1943 had been merely a subterfuge and that there remained in existence a world Communist movement which endangered the security of the United States.

## II

The Subversive Activities Control Act is constitutional on its face and as applied to petitioner. While we believe that the Act is constitutional as a whole, the Court would be justified in declining to pass upon the sanctions until they actually come into play. Since the registration provisions have a purpose of their own, the Act's separability clause makes it clear that they would stand even if one or more of the sanctions were held invalid. It would therefore be consistent with the Court's long-standing policy to avoid the premature decision of constitutional issues—and more specifically "to delay passing upon the constitutionality of all the separate phases of a comprehensive statute * * * in advance of efforts to apply the separate provisions" (*Watson* v. *Buck*, 313 U.S. 387, 402)—for the Court to consider only the registration provisions at this time. In any event, we submit that all of the challenged provisions are valid.

A. *The hearing and registration provisions.*—1. The First Amendment does not prohibit Congress from requiring registration of, and disclosure of information by, domestic organizations dominated by foreign agencies whose purpose it is to establish a Communist dictatorship in this country. The freedoms guaranteed by the First Amendment are not absolute: Even direct limitations on those freedoms may be permissible where clearly necessary to the effectuation by Congress of an end within its power to bring about. A *fortiori,* those freedoms may be indirectly restrained in proper circumstances.

This Court has many times sustained statutes which placed indirect restraints on freedom of speech or of the press, where the statute's objective lay within the power of Congress or a state to bring about, and the restraint was a necessary and appropriate concomitant of the exercise of the power. Examples are the Hatch Act (*United Public Workers* v. *Mitchell,* 330 U.S. 75), the Federal Regulation of Lobbying Act (*United States* v. *Harriss,* 347 U.S. 612), the Federal Corrupt Practices Act (*Burroughs* v. *United States,* 290 U.S. 534), the non-Communist affidavit clause of the amended National Labor Relations Act (*American Communications Assn.* v. *Douds,* 339 U.S. 382), the ownership-disclosure requirements of the postal laws (*Lewis Publishing Co.* v. *Morgan,* 229 U.S. 288), and a state statute regulating associations having oath-bound memberships (*Bryant* v. *Zimmerman,* 278 U.S. 63). The Foreign Agents Registration Act (see *Viereck* v. *United States,* 318 U.S. 236, particularly

the dissenting opinion of Mr. Justice Black, with whom Mr. Justice Douglas concurred, 318 U.S. at 251) is another illustration of a statute of this type.

The various evils at which the statutes thus sustained were aimed, grave as they were, are dwarfed in comparison to the evil at which the Act at bar strikes—the threatened destruction, through force, violence, and deceit, of our constitutional form of government and the subjection of the nation to the domination and control of a foreign dictatorship. Indeed, this Court has repeatedly recognized the great seriousness of the evil and, because of its conspiratorial nature and avowal of illegal means, has refused to treat the Communist Party as an ordinary political party. *E.g., Galvan* v. *Press,* 347 U.S. 522; *Barenblatt* v. *United States,* 360 U.S. 109. In the light of that evil, the registration requirements do not invalidly restrict free speech, press, or association. The rationale underlying this Court's decisions sustaining "disclosure" statutes is that it is in the interest of both free speech and free association that Congress and the public be adequately and correctly informed, at least where the dangers stemming from non-disclosure are serious. The device of registration and disclosure is therefore a reasonable measure to be applied to the Communist Party, now that it has been found, after full hearing, to be directed and controlled by the Soviet Union and to be operating primarily to advance the objectives of the world Communist movement.

Petitioner's reliance on various criminal cases, and especially *Yates* v. *United States,* 354 U.S. 298, is mis-

placed. First, the registration provisions of the Act impose no criminal punishment for any action, let alone speech or advocacy, except failure to register. Thus, this Act imposes a far less serious restraint than the statutes involved in the other cases. Second, registration is not on the basis of speech; whatever restraint may exist on speech is an indirect result of registration based on other activities. Lastly, unlike its course in the area of criminal legislation like the conspiracy provisions of the Smith Act, this Court has never applied the clear and present danger standard to disclosure and registration requirements. But even if this standard were applied, both Congress and the court of appeals have found—on the basis of evidence which is clearly sufficient—that a clear and present danger exists.

2. Neither the registration provisions of the Act nor the Board's order violates the Fifth Amendment's prohibition against compulsory self-incrimination.

(a) The present case is not a proper vehicle for the litigation of the self-incrimination issues. Even if the officers who will eventually have the duty to effect the registration of petitioner will be personally privileged to decline to do so, that fact does not render the registration provisions of the Act invalid. At the present time, the self-incrimination issue is entirely hypothetical since no officers have as yet been called upon to register.

(i) The privilege applies only to natural individuals (*United States* v. *White*, 322 U.S. 694, 698), of whom there is none before the Court at this time. The present case is therefore not a proper vehicle for the litigation of self-incrimination issues.

(ii) The privilege must be personally and explicitly claimed. There has been no claim of privilege thus far, and there may never be one. Since this Court does not anticipate constitutional issues, petitioner's attempt to litigate the self-incrimination issue in this case, before it is raised, is premature. The officers of petitioner who will have the duty to effect its registration when the registration order becomes final will be able to claim their privilege on the registration form required to be filed with the Attorney General. The question of the validity of the claim, if its validity is disputed, can then be litigated. See *United States* v. *Sullivan*, 274 U.S. 259.

(iii) There are several reasons, moreover, why it cannot justifiably be assumed at this time that a substantial claim of privilege will inevitably be made and be required to be honored when petitioner is confronted by the statutory requirement that it register, after the order becomes final.

First, in seeking an injunction before the original Board hearing, petitioner stated that its officers would not appear because of fear of self-incrimination. Yet two of petitioner's important officers, one of whom, among others, might be responsible for registration under the Act, did appear and testify at length. This testimony may in fact constitute the waiver of their privilege.

Second, the top officials of petitioner, who are the ones who will have the duty of filing the registration statement, have never attempted to conceal their membership and places of leadership in petitioner. A

claim of privilege on their part would be on a different footing from a similar claim by a person not publicly and indisputably known as a Communist Party member. The privilege presupposes a real danger of legal detriment arising from disclosure. *Rogers* v. *United States*, 340 U.S. 367. Relevant to the issue of the *bona fides* of a claim of privilege against *self*-incrimination would be the fact that under the Act neither the holding of office nor membership in a Communist organization shall constitute *per se* a violation of any criminal statute, and the further fact that the registration of any person under the Act as an officer or member may not be received in evidence against him in any prosecution for an alleged violation of any criminal statute. Whatever the merits of these hypothetical questions, their determination should await their being maturely raised.

(iv) Even assuming, moreover, that a claim of privilege will be made and that, when made, it will be required to be honored, this would make the order to register at most unenforceable, not void. Congress could remove the barrier to non-enforceability by a grant of immunity; and in any event non-enforceability would not affect the "sanctions" which come into effect when an order to register becomes final. Furthermore, an important public function is served by the Board's finding that petitioner is a Communist-action organization and should register, regardless of whether the registration can actually be effected; Congress desired to have the facts sifted and established by quasi-judicial proceedings, and then made known to the public.

(b) If the Court should reject our argument that it should not now pass on the issue of whether an officer of petitioner can validly claim the privilege as a ground for not registering petitioner, and should desire to determine that issue in this proceeding, our position is that the privilege is not available to such officers, under the holding of *United States* v. *White*, 322 U.S. 694—that an officer of an organization who has custody of its records, if called upon to produce them pursuant to a subpoena, may not lawfully refuse even if they would tend to incriminate him personally. The rationale of this decision is not inapplicable on the ground that in that case physical records were in question, while the issue here is the compulsory submission of a registration statement containing the names and addresses of officers and members of petitioner and an accounting of moneys received and expended. The data required to be contained in the registration statement are reproductions of or extracts from organization records. If the officer can be compelled to produce the physical records, he can be compelled to translate their pertinent data to a registration form. Any valid privilege as to personal information can be claimed on the registration form. See *United States* v. *Sullivan*, 274 U.S. 259.

(c) The validity of the personal registration requirements of Section 8 is not in issue since no individual member of petitioner has been required to register and none is before the Court.

3. The registration provisions are in accord with due process.

(a) The Act does not predetermine petitioner's liability to registration so as to render the proceedings before the Board a formality; nor does it contain any "built-in" finding against petitioner. Petitioner's contrary argument ignores the crucial language in the Section 3(3) definition of a "Communist-action" organization. Under that definition, a domestic organization which is not substantially controlled by the foreign government or group controlling the world Communist movement, *or* which does not operate primarily to advance the objectives of that movement, is not a Communist-action organization and is not subject to the registration and other provisions of the Act, regardless of how "communistic" its philosophy might be, or how deep might be its bonds of sympathy and kinship with the foreign government or organization. The important point is that Congress required proof, which it made subject to judicial review, of the two fundamental operative facts (referred to above) by a preponderance of the evidence in proceedings before the Board—before the obligation to register or any other requirement of the Act could become effective.

Due process does not require that the congressional findings in Section 2 as to the existence of a world or an American Communist movement be the subject of redetermination before the Board. These are general *legislative* findings supporting the Act as a whole and not *adjudicative* facts forming the basis for an order against an individual organization. This Court has specifically recognized the validity of such legislative

findings. *Galvan* v. *Press*, 347 U.S. 522; *Carlson* v. *Landon*, 342 U.S. 524.

While the Communist Control Act of 1954 refers to petitioner by name, it was passed after petitioner was originally found to be a Communist-action organization. And in reaffirming the earlier determination in the Modified Report, the Board relied entirely on judicially reviewable evidence and did not even consider the characterization of petitioner in the Communist Control Act.

(b) The Act does not establish a Board which is "necessarily biased" against petitioner. Petitioner's contention to the contrary in effect charges that the structure and scheme of the Act are such that it would be impossible to staff the Board with members who would not enter upon their duties with the intention of violating their oaths of office. But courts should not assume in advance that an administrative hearing may not be fairly conducted, particularly where, as here, full opportunity for judicial review is afforded by the Act. *Fahey* v. *Mallonee*, 332 U.S. 245.

(c) The Act does not authorize a determination that an organization is a Communist-action organization on the basis of irrational or vague criteria or presumptions. The Act establishes no "tests" as to whether an organization is a Communist-action group other than that established by the definition of such an organization in Section 3(3) (see *supra*, p. 24), which petitioner originally conceded to be "definite and meaningful." While petitioner now attacks the "ob-

jectives" requirement of Section 3(3), the objectives which must be shown are fully set forth in Section 2(1). This Court has allowed Congress great latitude in delegating power to administrative agencies on the basis of standards more general than that involved here. At the least, the standard here was "sufficiently precise for an intelligent determination of the ultimate questions of fact by experts" (*Sunshine Coal Co.* v. *Adkins*, 310 U.S. 381, 400).

The eight factors itemized in Section 13(e) are merely evidentiary considerations which the Act directs the Board to take into account in determining whether an organization meets the Section 3(3) definition. When these considerations are thus correctly understood they are all rational and probative with respect to the decisive issue presented by the definition. And the fact that Congress directed the Board to "take into consideration" "the extent to which" the Section 13(e) factors are true or applicable does not render vague the ultimate standard of Section 3(3). This Court has frequently upheld lists of relevant evidence which Congress has directed administrative agencies to consider in making their determinations. *Opp Cotton Mills* v. *Administrator*, 312 U.S. 126; *Bowles* v. *Willingham*, 321 U.S. 503.

(d) Petitioner's claim that the Board's determination that a particular organization is a Communist-action group cannot constitutionally be conclusive in a criminal trial for failure to register is clearly premature since the case has not even reached the stage of preparing and filing the registration statement. But

even if the issue were not premature and even if petitioner were correct, this would merely mean that criminal defendants would have the opportunity to relitigate the Board's determination at that time.

In any event, the contention is without substance. The Board's order can be challenged in the manner Congress has provided—that is, applying for review in the court of appeals and ultimately in this Court. A defendant in a criminal trial would, in effect, be charged with failure to obey an administrative order (the Board's final order) since Congress has prescribed that certain consequences follow automatically from this order. The only issues for trial, therefore, would be whether there was a final order and whether the defendant has failed to obey. The Board's order need not be relitigated *de novo* any more than a draft classification can be retried in prosecutions for draft evasion (*Cox* v. *United States*, 332 U.S. 442), or a determination of the National Labor Relations Board can be relitigated in a contempt proceeding arising out of an enforcement order. Otherwise, if all enforcement of the administrative determinations were to be determined by the courts *de novo*, effective regulatory power would be transferred from the administrative agencies to the courts.

(e) The Communist Control Act of 1954 does not make it impossible for petitioner to know who its members are. Section 5 of that Act does not establish rigid "criteria" for determining membership in petitioner any more than Section 13(e) of the Act at bar establishes definitive "tests" for determining

whether an organization is a Communist-action group. The purpose of Section 5 is merely to list items of evidence to be considered in reaching the ultimate factual conclusion of knowing membership. Petitioner's attempt to depict Section 5 as a trap for the unwary disregards the nature of the listed items as nonexclusive evidentiary factors and ignores the further provision of Section 5 that the determination by "the jury" of the issue of knowing membership shall be "under instructions from the court." Moreover, the language of Section 5 shows that it has no application to, or connection with, petitioner's duty under this Act to file a registration statement listing its members, or to possible criminal proceedings against it or its officers for wilfully omitting the names of any members in such a statement.

(f) The validity of the provision making each day of failure to register a separate offense is not presented in this proceeding, since the penalty may never be applied to petitioner. In any event, the provision is valid. There can be no "astronomical" accumulation of penalties unless an organization which has been finally ordered to register chooses to incur them by continued deliberate noncompliance with a Board order which has been judicially sustained. It is settled that the extent of the permissible punishment imposable under an otherwise valid statute is a matter of exclusive legislative discretion.

B. *The sanction provisions.*—Immediately upon the registration of an organization under the Act, or when an order of the Board requiring an organization to register becomes final (after judicial review), certain

"sanctions," or legal disabilities, automatically occur.

1. Petitioner contends that the sanctions which result from a registration order make the Act an attempt to "outlaw" petitioner and therefore violate the freedoms protected by the First Amendment. If the validity of these sanctions is now properly before the Court, our position is that they are reasonable and valid, considered in the light of the evil at which the Act strikes.

(a) *Sanctions applicable to organizations as such.*—(i) When an organization is registered or has been finally ordered to register, it must label its mailed literature and identify its broadcasts as emanating from a "Communist organization." Such labeling imposes no censorship on any mailed matter or broadcast material; the content of either is immaterial. What the provisions do is, not to censor the "speech," but to identify the "speaker." If such revelation interferes with the purposes of an organization by destroying its anonymity and disclosing its true nature, it is because of the unpopularity of the organization in the free market of ideas.

The decisions of this Court teach that such disclosure and labeling requirements may be validly imposed in order to serve a proper purpose (see *supra*, pp. 18–19). The petitioner in this case is the Communist Party, which has been found, after a full hearing (including judicial review), to be the puppet of a foreign power, working to achieve the ends of that power. It is, thus, not just another political party. Among its other activities, it engages in widespread

propaganda on behalf of its ultimate objective of domination by the world Communist movement and the Soviet Union. Much of its propaganda is covert, and all of it attempts to sell the Party to the public as peaceful and lawfully inspired. Theoretically, if everyone had the time and talent to be able to make an independent evaluation of the truth or soundness of each political utterance with which he is propagandized, he would have no need to know from what source the propaganda came. But as a practical matter this independent determination is in most cases impossible, and in making judgments we are continually influenced by the source from which statements emanate. Nowhere is the need for disclosure of the true source of propaganda more pressing than in the case of a Communist-action organization. Such identification does not limit freedom of expression, but adds to the relevant facts in the market-place of competing ideas. In the light of the allegiance of American Communists to a foreign power and their ultimate goal, the extensive degree to which they use the technique of concealment, and the success that they have had in influencing public opinion by this technique, the requirement that the Communist Party identify its propaganda as emanating from a "Communist organization" is justified. When an agency of the world Communist movement poses for tactical purposes as a benign domestic organization and champion of constitutional liberties, while concealing its ultimate strategy of foisting a communistic dictatorship on the nation in a Czechoslovakia-type coup—as soon as its

ranks have been sufficiently strengthened by the victims of its propaganda—Congress can act to defeat the strategy by compelling the truthful identification of the source of the propaganda.

(ii) The Act's disallowance of deductions for tax purposes of contributions to any organization which has been finally ordered to register as a Communist organization and its denial to such an organization of tax-exemption under the Internal Revenue Code are reasonable and valid withdrawals by Congress of its legislative grace for proper reasons of policy.

(iii) The Act makes it unlawful for officers and employees of the United States and of defense facilities to contribute funds or services to organizations which have been finally ordered to register. Assuming that the effect of this prohibition on petitioner is not so remote, despite the indirectness of its impact, as to deprive it of standing to challenge it, this provision is a reasonable and valid measure in relation to the evil at which the Act is aimed. If Congress can validly forbid employees of the United States to engage in partisan politics (*United Public Workers* v. *Mitchell*, 330 U.S. 75), and if the Government has the power to safeguard itself by appropriate security and loyalty investigations of its employees, Congress can validly forbid them to contribute to the welfare of an organization having as a primary objective the destruction of their employer at the earliest feasible opportunity.

Similarly, if Congress can validly provide that members of a Communist-action organization shall be ineligible for defense-facility employment (see *infra*), it can also forbid the employees of such facilities to support such an organization with money contributions.

(b) *Sanctions applicable to individual members of organizations ordered to register.*—(i) The members of an organization finally ordered to register are barred from government and defense-facility employment, and from holding office in, or employment with, any labor organization or as employer-representatives in proceedings under the National Labor Relations Act.

The reasonableness and validity of the prohibition against government employment is clear. The prohibition applies only to those members who continue to remain such with knowledge or notice that the organization to which they belong either has voluntarily registered under the Act or has been finally ordered to do so.

The prohibition against defense-facility employment is on a par with that relating to government employment. The manifest purpose of the prohibition is to guard against sabotage and espionage in establishments vital to the national defense. Congress is not limited, in guarding the nation against these dangers, to exacting criminal penalties after they occur. It can adopt reasonable measures to prevent their occurring. We must assume that the Secretary of

Defense, under the power granted him by Section 5(b), will designate as "defense facilities" establishments that are vital to the national security. The Secretary's discretion is not "unfettered"; if it were abused, this would doubtless be a defense in a criminal prosecution or could be challenged in some other judicial proceeding.

The prohibition against holding office in, or employment by, labor organizations is a logical corollary of *American Communications Assn.* v. *Douds*, 339 U.S. 382, where the Court sustained the validity of the non-Communist affidavit provision of the amended National Labor Relations Act. If a union officer who cannot subscribe to a non-Communist affidavit can be forced out of his position of leadership in the union by the indirect method of depriving his union of rights it would otherwise enjoy before the Labor Board, there can be no infirmity in directly prohibiting him from being on a labor union staff as an officer or employee, so long as he retains his Communist ties. The prohibition against employer-representation is on the same footing, for management representatives, from their places on the other side of the bargaining table, can use their positions for political ends to the same extent as union officials.

(ii) Equally valid is the prohibition against the use of passports by members of organizations which have been finally ordered to register. The Government may decline to confer its diplomatic protection upon

members of an organization found to be dedicated to its overthrow by force. The passport sanction is also valid insofar as it prevents travel abroad by members of such an organization. The unity and cohesive force of the world Communist movement are promoted through personal contacts of its members both here and abroad. Congress has the power to seek to prevent such contacts in the manner encompassed by this provision.

(iii) Alien members of Communist-action organizations which by a final order have been directed to register are excludable and deportable from the United States, and are ineligible for naturalized citizenship. Petitioner has expressly conceded the validity of the exclusion and deportation sanctions. And there can be no doubt of the constitutionality of the naturalization sanction in view of the plenary power of Congress to impose conditions upon the conferring of citizenship by naturalization. The Act also provides that membership (within five years after naturalization) in a Communist-action organization shall, with respect to persons who obtain naturalization in the future, constitute a rebuttable presumption, in denaturalization proceedings, of lack of attachment to the principles of the Constitution at the time of naturalization. Since there is no question of retroactivity, or of the Government's revoking a grant of citizenship on grounds which the naturalized person could have had no reason to anticipate when he received it, this provision is likewise valid.

2. The member-sanctions do not deprive petitioner's members of due process, since they do not rest on innocent or unknowing memberships and associations of the past. They apply only to members who continue their membership after an organization registers or is finally ordered to register. *Wieman* v. *Updegraff*, 344 U.S. 183, is therefore inapplicable. Nor is there merit in petitioner's contention that, after an organization has registered as a Communist-action group, thereby admitting its character as defined in Section 3(3), or after it has been formally found to be such an organization by a Board finding which has been judicially reviewed and sustained, each member must be afforded an opportunity personally to rebut the characterization before any member-sanction can apply to him on account of his continued membership. The organization clearly represents its members in any proceedings as to the character of the organization.

3. The sanction provisions do not make of the Act a bill of attainder. For a legislative act to constitute a bill of attainder, it is necessary that there be *punishment* and that the conduct punished be *past* conduct. Whether a statute inflicts punishment depends on the intent of Congress, and it is clear that this Act was intended to check the world-wide Communist danger insofar as it was working through organizations in the United States and not to punish the members of these organizations. Furthermore, regardless whether the sanctions be deemed of a penal nature or not, the Act does not punish *past* conduct.

The "members" on whom the sanctions are imposed are not past or former members. *Bona fide* termination of membership by any person who is a member up to the time of registration or the time when an order to register becomes final precludes the sanctions' taking effect as to him.

## III

The court below correctly sustained the Board's factual findings that petitioner is a Communist-action organization as defined in the Act.

A. There is no occasion for a second judicial review of the Board's factual finding that petitioner is a Communist-action organization. A unanimous Board found, on the basis of the "overwhelming weight of the evidence," that petitioner is a Communist-action organization. It presented the grounds of this finding, and the subsidiary findings on which it rests, in an exhaustive report. After remand by this Court, the Board expunged from the record the testimony of questioned witnesses, but found after a thorough reconsideration of the remaining evidence "that the evidence establishes beyond doubt" that petitioner is a Communist-action organization. On a new remand by the court of appeals, the Board struck certain other evidence and re-evaluated the entire record. Again, the Board found that the evidence established "by a preponderance of the evidence that petitioner is a Communist-action organization." The court below, in discharge of its statutory obligation, determined that the Board's original conclusion was "supported

by the preponderance of the evidence" after a painstaking review of the entire record. In its two subsequent determinations, the court re-evaluated the evidence and affirmed the Board's findings, stating in its last opinion that the "findings are amply supported" and that "[t]he preponderance of all the evidence supports the conclusion of the Board."

In these circumstances, there is no occasion for this Court to subject the lengthy transcript to a second—indeed, a fourth—judicial review for the purpose of reappraising and re-evaluating the evidence. Since Congress charged the courts of appeals with primary responsibility for ascertaining that the findings of the Board are sufficiently supported, the Court need do no more than satisfy itself that the court below made a fair assessment of the record on the issue of sufficiency of the evidence. *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498; *National Labor Relations Board* v. *American Insurance Co.*, 343 U.S. 395. That the court below did so is evident from its opinion.

B. Petitioner makes no attempt to assay the significance of any of the proof it attacks from the standpoint of the sufficiency of the evidence as a whole. Its attack is concentrated on minutiae of the evidence, frequently lifted out of context. This fragmentary approach overlooks the fact that all relevant facts are cumulative in delineating a completed whole, and that an unmistakable picture can emerge from numerous fragments having little individual significance.

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Viewed from the standpoint of the record as a whole, petitioner's criticisms are but pin pricks at the evidence, often relating to matters having obviously minor bearing on the ultimate issue. And the fallacy of petitioner's method is shown by the fact that, by hacking away at the individual trees and ignoring the forest, petitioner has reached the astonishing conclusion that it is rationally impossible to conclude that the Communist Party of the United States is the pawn of the Soviet Union and exists to further the objectives of the world Communist movement.

1. The Board and the court below correctly construed and applied the evidentiary considerations enumerated in Section 13(e) of the Act. The Board's finding, *inter alia,* that petitioner's original policies were carried out according to directions from the leaders of the world Communist movement, and that petitioner is still pursuing the policies of the Soviet Union and world Communist movement, fully met the requirements of the "directives and policies" consideration.

As for the "non-deviation" consideration, the point is not that petitioner's views on every issue were false or unreasonable. The point is rather that the fact that a domestic organization, throughout its thirty years' history, has faithfully and without deviation mirrored the views of a foreign power on every significant aspect of world politics is surely evidence, to be weighed in the balance with all the other evidence, that the foreign power controls the domestic organization and dictates its policies.

The contention that the Board and the court below misconstrued and misapplied the "discipline" consideration is in reality nothing more than an attack on the sufficiency of the evidence supporting the Board's finding on this point. It illustrates petitioner's mistaken insistence, met with throughout its discussion of the evidence, that the evidence under each of the Section 13(e) categories be considered *in vacuo*, unconnected with and unilluminated by any of the other evidence of record.

The argument that the Board misapplied the "allegiance" consideration is based largely on petitioner's mistaken assumption that the Board's finding that petitioner advocates the violent overthrow of the United States Government was based primarily on the Marxist-Leninist writings considered by this Court in *Schneiderman* v. *United States*, 329 U.S. 118. In fact, the Board's force-and-violence finding was based upon the testimony of former members of petitioner, as well as upon authoritative writings not in evidence in the *Schneiderman* case.

2. The Board and the court below also correctly construed and applied the statutory requirements for a Communist-action organization in Section 3(3) of the Act. The language of the Act demonstrates that substantial direction, domination, or control by a foreign power does not mean the physical power to enforce compliance. Nor could Congress have intended such a strict standard since such physical power over an organization physically situated in the United States would

be almost impossible as long as the United States is a sovereign nation. Thus, both the Act itself and its purpose demonstrate that complete voluntary compliance is enough. The evidence not only shows such compliance but shows that the world Communist movement holds considerable coercive power over petitioner by the threat of expulsion of petitioner from the movement. And the evidence also shows that petitioner is totally dedicated to achieving the objectives of the world Communist movement, *i.e.*, Communist totalitarian dictatorship in the United States and throughout the world.

3. The Board's finding that petitioner is a Communist-action organization is based upon proof as to its current practices and activities as illuminated by its past history. The Board did not, as petitioner contends, rest its decision upon evidence of conduct discontinued before enactment of the Act. Petitioner's own witnesses testified that petitioner was the same sort of organization at the time of their testifying as it had always been. Petitioner's whole position in this case has been that it has not been, at least since 1940, an organization of the type the Act defines. The Government's evidence overwhelmingly established the contrary—that prior to 1940, petitioner was a mere section of the world Communist movement; that disaffiliation from the Communist International in 1940 was merely to avoid a federal statute and did not change petitioner's actual role in the world Communist movement; and that, since 1941, petitioner has continued as a Communist-action organization.

4. The Board's conclusion that there exists a world Communist movement having the characteristics described in Section 2 of the Act was not necessary to the validity of its order. Congress found, as a legislative fact in Section 2, that such a movement exists and Section 3(3), which defines a "Communist-action organization," requires no further finding by the Board. In any event, the Board's finding was supported by the preponderance of the evidence.

C. The action of the court below in striking one of the subsidiary findings of the Board did not require that the case be remanded to the Board for redetermination, particularly since the Board did not rely on or even mention this finding in making its ultimate determination. The court found that the Board's ultimate and decisive finding—that petitioner is a Communist-action organization as defined in the Act—was supported by the preponderance of the evidence. Under the circumstances, remand would have served no useful purpose. The court therefore correctly affirmed the Board's order. *National Labor Relations Board* v. *Newsport News Co.*, 308 U.S. 241.

## IV

Petitioner's claims relating to the production of statements given to the F.B.I. by witnesses of the Attorney General were abandoned in this Court when the case was first here. Petitioner cannot resurrect these claims after the remand. In any event, they have no merit.

A. At the hearing, petitioner moved for the production of statements made by the Attorney General's witness Budenz to the F.B.I. on the Starobin and Childs-Weiner matters. The Board denied the motion. But

after the *Jencks* decision, 353 U.S. 657, these statements were ordered produced. Since Budenz was at this time too sick for cross-examination to be reopened, the Board ordered Budenz' testimony on these two matters stricken.

Petitioner contends that all of Budenz' testimony should have been stricken. But the interference in petitioner's cross-examination on the two specific matters was not the "fault" of the Government since it was merely following substantial legal authority prior to *Jencks*. Moreover, petitioner suffered no material loss. First, a comparison of Budenz' statements shows no more than the usual discrepancies when a long and detailed story is told at widely separated intervals of time. Second, the Starobin and Childs-Weiner matters were separable from the other testimony on which petitioner had impeached Budenz as much as it could by extensive cross-examination. Third, there is considerable evidence that Budenz' other testimony was at least substantially correct. And last, but perhaps most important, petitioner made no effort to produce witnesses who were readily available to rebut either Budenz' testimony on these two matters or on his other testimony which also gave specific names, dates, and places. In these circumstances, the Board was perhaps not even required to strike Budenz' testimony on the Starobin and Childs-Weiner matters. But certainly it was acting within its proper broad discretion as an expert trier of fact in refusing to strike Budenz' entire testimony on the faint possibility that further cross-examination on the Starobin and Childs-Weiner matters might show actual perjury discrediting the other testimony as well.

B. Petitioner was not entitled to production of the

memoranda prepared by the Attorney General's witness Gitlow. The motion for production asked for all documents and memoranda Gitlow had given the F.B.I. Thus, it extended far beyond the documents which are producible either under the *Jencks* decision or statute. *Jencks* made clear that its holding requiring production of relevant documents made or approved by the witness did not extend to a "broad or blind *fishing expedition* among documents possessed by the Government on the chance that something impeaching might turn up." 353 U.S. at 667.

But even if the Board's denial of production were error, it was certainly harmless. All of the Gitlow memoranda related to the period before 1929. Undisputed documents establish that petitioner was a section of, and controlled by, the Communist International during this period. Petitioner virtually concedes this fact and concentrates almost its entire argument on claiming that its disaffiliation from the International in 1940 ended control by the Soviet Union and the world Communist movement. Thus, it is as clear as human prognostication can be that impeaching the credibility of Gitlow could not possibly change the Board's ultimate determination.

C. Petitioner's motions for the production of documents made for the first time after the remand by this Court came six years after the Board finished hearing testimony. These motions are therefore obviously out of time. And neither the Board nor the Government misled petitioner into failing to request production at the proper time.

## ARGUMENT*

Once again, petitioner levels a broad-scale attack against almost every provision and facet of the Subversive Activities Control Act, as if the Court were called upon at this time to pass upon the whole Act and its entire application. But the truth is, of course, that the Act is multi-faceted and only some of its aspects are now ripe for adjudication. Three types of organizations—"Communist-action," "Communist-front," and "Communist-infiltrated"—are dealt with in the Act. As to these organizations, there are three general classes of provisions—hearing and registration requirements, non-criminal sanctions, and criminal penalties. There are also comparable classes of provisions as to certain categories of individuals. In this case at this time, we have only one organization and only one of the three types—the Communist Party of the United States, found to be a Communist-action organization; no other class of organization and no individuals at all are before the Court. Moreover, we are dealing with the Communist Party only at the stage when it is availing itself of its statutory right to contest in the courts the Board's finding that it is a Communist-action organization and the Board's order that it register as such.

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*Since many of the issues involved here are identical with those raised when this case was originally before this Court (No. 48, Oct. Term, 1955), we have repeated substantial portions of the earlier brief submitted by respondent to the Court. Thus, this brief is a self-contained and complete description of respondent's present position before the Court, and reference need not be made to the brief filed at the 1955 Term.

These facts mold the frame in which the Court will view the case and in which we must present it. But before focussing directly on the various levels of controversy, we think that it will be helpful to sketch the historical background of the Act, and also to give a somewhat detailed analysis of the Act's provisions (although only part of these provisions are directly pertinent to this case).

## I

### INTRODUCTION: THE BACKGROUND AND PROVISIONS OF THE SUBVERSIVE ACTIVITIES CONTROL ACT

#### A. THE HISTORICAL BACKGROUND OF THE ACT

We give a brief review of the Act's historical setting in the hope that it will assist the Court in its task of weighing the merits of petitioner's arguments. Just as an examination of the problem or evil which evoked the passage of legislation is a sound guide to its purposes and meaning (*Holy Trinity Church* v. *United States*, 143 U.S. 457, 463–465; *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 489–493), so too a fair appreciation of the nature of the problem which led to the enactment of a statute is indispensable to proper evaluation of the soundness of challenges to its constitutionality. Cf. *American Communications Assn.* v. *Douds*, 339 U.S. 382, 388–389; *Dennis* v. *United States*, 341 U.S. 494, 562–566 (Mr. Justice Jackson, concurring). Consideration of the problems which called the legislation involved here into being will tend to show, we believe, the reasonableness of the basic scheme of the Act, particularly as applied to the petitioner, and thus to refute the contention that

it arbitrarily invades basic constitutional liberties. Rarely has there been a more intense study of methods of dealing with a particular evil than that which preceded and produced the Subversive Activities Control Act of 1950.[7]

Following World War I, the powerful totalitarian political movements of Communism, National Socialism, and Fascism developed in Russia, Germany, and Italy. The success of the so-called Fifth-Column groups in Europe during the 1930's indicated the vulnerability of republican forms of government to conspiracies guided from outside the country involved, ready to seize total power by illegal means as soon as the time became propitious. See Loewenstein, *Legislative Control of Political Extremism in European Democracies* (1938), 38 Colum. L. Rev. 591–622, 755–774. By 1940 it was clear that these highly organized and disciplined totalitarian movements, financed and directed from abroad and promoted domestically by secret dedicated action-groups, involved much greater danger to the democracies than had earlier individual exponents of political violence. The danger became one, not of ideas and philosophies, but of external aggression aided by local Trojan-Horse groups serving the aggressive aims of their foreign principals.

As early as 1930, investigations were conducted by Congressional committees into Communist propaganda and activities in the United States and considerable testimony directed to this issue was adduced

[7] There is a more detailed discussion of much of this material in the Government's brief in this Court in *Dennis* v. *United States*, Oct. Term, 1950, No. 336, pp. 174 *et seq.*

in various cities of the United States. See *Internal Security Manual,* Sen. Doc. No. 47, 83d Cong., 1st Sess. (1953), pp. 216–217. In 1934, the investigation was extended to Nazi propaganda activities. *Id.,* pp. 217-218. During the years 1930–1940, it was shown that the alien political philosophies of the right and left had created divided loyalties in this country. For example, William Z. Foster, the leader of the Communist Party of the United States, testified in 1931 that the "more advanced workers" in this country "look upon the Soviet Union as their country" (Hearings before a Special Committee to Investigate Communist Activities in the United States, H.R., 71st Cong., 2d Sess., part I, vol. 4, p. 384).

Also significant were the 1939 hearings before the House Committee on Un-American Activities, in which the testimony of such witnesses as Benjamin Gitlow and Earl Browder, as well as a mass of documentary evidence, tended to show the subservience of the American Communist Party to the Soviet Union (Hearings before a Special Committee on Un-American Activities, H.R., 76th Cong., 1st Sess., vol. 7, *passim*). Congress had before it the *Theses, Statutes, and Conditions of Admission to the Third (Communist) International,* adopted at the Second World Congress of the Communist International in 1920 (*id.,* vol. 7, pp. 4668–4671).[8] Among the "conditions"

[8] These *Theses, Statutes, and Conditions of Admission* were in evidence in the present proceeding (A.G. Ex. No. 8, R. 1318–1332). They are also set forth in *Blueprint for World Conquests as Outlined by the Communist International* (Human Events, 1946), pp. 33–72.

which a party aspiring to join the International was required to accept were: willingness to combine illegal with legal work to advance the objective of a world proletarian dictatorship (condition 3); willingness to infiltrate and carry on propaganda and agitation in military organizations (condition 4); renunciation of "social patriotism," and systematic demonstration to the working class of the necessity of a "revolutionary overthrow of capitalism" (condition 6), recognition of the necessity of "complete and absolute rupture with reformism and the policy of the 'centrists'" (condition 7); willingness to carry on "systematic and persistent Communist work in the labor unions" and to form "Communist nuclei" within unions to the end that they should be "[won] over * * * to Communism" (condition 9); willingness to "remove all unreliable elements" from "the personnel of their parliamentary factions" and to ensure the subjection of such personnel to the "Central Committee of the party" (condition 11); the maintenance of "iron discipline" on the basis of the "principle of democratic centralization" to the end that the "party centre" may enjoy "the confidence of the party membership" and be "endowed with complete power" over it (condition 12); willingness to "render every possible assistance to the Soviet Republics in their struggle against all counter-revolutionary forces" and to carry on "propaganda to induce the workers to refuse to transport any kind of military equipment intended for fighting against the Soviet Republics" (condition 14); recognition of the "binding" force of all resolutions of

congresses of the Communist International and of its Executive Committee on "all parties joining the Communist International" (condition 16); and exclusion from the party of all members who "reject in principle the conditions and theses" (condition 21).[9]

Congress was informed that these "conditions" governed the relationship between the American Communist Party and the International (Hearings before a Special Committee on Un-American Activities, H.R., 76th Cong., 1st Sess., vol. 7, pp. 4308–4311, 4667–4668). For example, in 1929, the Executive Committee of the International, under the personal leadership of Stalin and Molotov, decided upon and enforced the replacement of the Lovestone-Gitlow leadership of the American Party by that of Foster and Browder. When Lovestone and Gitlow defied the Executive Committee, Stalin made a speech reminding them of the fate of Trotsky and Zinoviev (*id.*, p. 4432),[10] and the Party's organ, the *Daily Worker*, stated editorially on June 1, 1929, that (*id.*, p. 4671)—

> * * * Comrades Lovestone and Gitlow in their declaration of May 14 refused to accept the address or to carry it out, and even went to the length of stating that they would actively oppose it. They are thus entering

[9] *Blueprint for World Conquest as Outlined by the Communist International* (Human Events, 1946), pp. 66–72; Hearings before a Special Committee on Un-American Activities, H.R., 76th Cong., 1st Sess., vol. 7, pp. 4669–4671.

[10] The full text of this speech is set forth in the Appendix to the Hearings before a Special Committee to Investigate Communist Activities in the United States, H.R., 71st Cong., 2d Sess., part I, pp. 876–882.

> upon a course leading toward an attempt to split the party, *a course in violation of the 21 conditions and the statutes of the Comintern.* [Emphasis added.]

Thus, by 1939, there was a mass of oral and documentary evidence collected by the House Committee on Un-American Activities over the previous nine years, from which it could be concluded that both the Communist International and the Communist Party of the United States were devoted to the establishment of a proletarian dictatorship by force and violence, and that the American Communist Party was completely controlled both as to policy and leadership by the Soviet Union through the Communist International. See *Internal Security Manual,* Sen. Doc. No. 47, 83d Cong., 1st Sess., pp. 216–219; see also H. Rep. No. 153, 74th Cong., 1st Sess. (1935), p. 21.

Congress endeavored to deal with this problem in several ways. In the portion of the Alien Registration Act of 1940, c. 439, 54 Stat. 670, known as the Smith Act—*i.e.,* Sections 2, 3, and 5 (now consolidated in 18 U.S.C. 2385)— it was made a criminal offense to advocate the overthrow of the Government by force and violence or to conspire so to advocate.[11] The problem of the dissemination of foreign propaganda was approached by the method of disclosure. In 1938, Congress enacted the Foreign Agents Registration Act, c. 327, 52 Stat. 631, 22 U.S.C. 611–621, requiring

[11] The constitutionality of this provision, as applied to a conspiracy charge against eleven of petitioner's national officers for the period from April 1, 1945, to July 20, 1948, was upheld in *Dennis* v *United States*, 341 U.S. 494.

the registration of any individual or organization acting as the domestic agent of a foreign principal and requiring information as to the identity of the principal and the terms of the contract. The committee reports on the bill which became that Act both stated as follows (H. Rep. No. 1381, 75th Cong., 1st Sess., pp. 1-2; S. Rep. No. 1783, 75th Cong., 3d Sess., pp. 1-2):

> Incontrovertible evidence has been submitted to prove that there are many persons in the United States representing foreign governments or foreign political groups, who are supplied by such foreign agencies with funds and other materials to foster un-American activities, and to influence the external and internal policies of this country, thereby violating both the letter and the spirit of international law, as well as the democratic basis of our own American institutions of government.
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> * * * * * *
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> This required registration will publicize the nature of subversive or other similar activities of such foreign propagandists, so that the American people may know those who are engaged in this country by foreign agencies to spread doctrines alien to our democratic form of government, or propaganda for the purpose of influencing American public opinion on a political question.
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> * * * * * *
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> We believe that the spotlight of pitiless publicity will serve as a deterrent to the spread of pernicious propaganda. We feel that our peo-

ple are entitled to know the sources of any such efforts, and the person or persons or agencies carrying on such work in the United States.

Various difficulties in the enforcement of the Foreign Agents Registration Act (see Report of the Institute of Living Law, 87 Cong. Rec., Appendix, pp. A4417–4419 (1941); Institute of Living Law, *Combating Totalitarian Propaganda: The Method of Exposure* (1943), 10 Univ. of Chi. L. Rev. 107) resulted in its amendment by the Act of April 29, 1942, c. 263, 56 Stat. 258, which strengthened the provisions and transferred the administration of the Act from the Secretary of State to the Attorney General. The Reports of the Attorney General to Congress on the Administration of the Foreign Agents Registration Act (which are required by 22 U.S.C. 621) detail the operation of that statute.

The purpose of Congress to expose the foreign origin of various propaganda activities was, however, not fully achieved, partly because of an increased tendency to bring information services under the aegis of diplomatic immunity (see Report of the Attorney General on the Administration of the Foreign Agents Registration Act, 1945–1949, p. 8; 1950 Report, pp. 5–6; 1951 Report, pp. 6–7), and partly because of controversy as to the scope of the "agency" covered by the statute. See *Viereck* v. *United States*, 318 U.S. 236, 242; *United States* v. *German American Vocational League*, 153 F. 2d 860, 864 (C.A. 3), certiorari denied, 328 U.S. 833; *United States* v. *Peace Information Center*, 97 F. Supp. 255, 258–259

(D. D.C.). The necessity of proving the fact of agency within the context of a criminal trial made difficult the enforcement of the Act against organizations which threw a "smoke screen" around their operations and obscured the sources and nature of their foreign control.

On October 17, 1940, Congress passed the so-called Voorhis Act, c. 897, 54 Stat. 1201 (now 18 U.S.C. 2386), requiring the registration, *inter alia,* of any organization "subject to foreign control which engages in political activity." The phrase "subject to foreign control" was defined in Section 1 of the Act as follows:

> (e) An organization shall be deemed "subject to foreign control" if (1) it solicits or accepts financial contributions, loans, or support of any kind, directly or indirectly, from, or is affiliated directly or indirectly with, a foreign government or a political subdivision thereof, or an agent, agency, or instrumentality of a foreign government or political subdivision thereof, or a political party in a foreign country, or an international political organization, or (2) its policies, or any of them, are determined by or at the suggestion of, or in collaboration with, a foreign government or political subdivision thereof, or an agent, agency, or instrumentality of a foreign government or a political subdivision thereof, or a political party in a foreign country, or an international political organization.

The House Committee on the Judiciary, in its report on the bill which became the Voorhis Act, said with

respect to the purposes of the bill (H. Rep. No. 2582, 76th Cong., 3d Sess., p. 1):

> Freedom of political expression is a fundamental principle of democracy. A serious problem arises, however, where political organizations exist in a democracy which are substantially controlled or directed by a foreign power and seek to pursue a policy in a democracy like the United States for the benefit of that foreign power.
>
> * * * * *
>
> The principle upon which this bill is based is that there is no place in a democracy for undercover political organizations. Without in any way interfering with freedom of political activity, the passage of this legislation would mean that it would be unlawful for any political activities, inimical to the constitutional government, to be carried on, unless the full facts concerning such activities are made known.

It soon became apparent that there were also difficulties in the enforcement of the Voorhis Act. See Institute of Living Law, *Combating Totalitarian Propaganda: The Method of Exposure* (1943), 10 Univ. of Chi. L. Rev. 107, 122–133. Since religious, charitable, scientific, literary, and educational organizations were excluded from the Act's coverage, propaganda organizations could seek to avoid registration by styling themselves under one of the excluded categories. There was no express provision making the officers guilty if a corporation or association failed to register. In the case of a corporation or unincorporated association without funds for the payment of

fines, there were no appropriate sanctions to enforce compliance. While it was originally anticipated that both the Communist Party and the German-American Bund would have to register under the Act (H. Rep. No. 2582, 76th Cong., 3d Sess., p. 2), the restricted meanings given to the terms "subject to foreign control" and "political activity" by the Act itself made avoidance of registration possible through the device of a claimed divorcement. For example, the Communist Party, at its 1940 convention, adopted a resolution which provided, *inter alia* (C.P. Ex. 13, p. 15):

> That the Communist Party of the U.S.A., in Convention assembled, does hereby cancel and dissolve its organizational affiliation to the Communist International, as well as any and all other bodies of any kind outside the boundaries of the United States of America, for the specific purpose of removing itself from the terms of the so-called Voorhis Act, which originated in the House of Representatives as H.R. 10094, which has been enacted and goes into effect in January 1941, which law would otherwise tend to destroy, and would destroy, the position of the Communist Party as a legal and open political party of the American working class * * *.

This disaffiliation and its stated purpose are not disputed by petitioner. Its spurious character was demonstrated by the testimony in this case. See Modified Report of the Board at R. 2510, 2512–2515.

In addition, the Voorhis Act provided no adequate administrative machinery to search out the true facts regarding control by foreign dictatorships and the

real objectives of domestic organizations believed, with reason, to be subversive but which veiled their true ends behind a facade of respectability. That Act was addressed only to the formal, overt aspects of a particular group, and failed to reach the true but secret purposes which lay beneath the surface and which constituted a real threat to the security of the United States. See Institute of Living Law, *Combating Totalitarian Propaganda: The Method of Suppression* (1942), 37 Ill. [Northwestern Univ.] L. Rev. 193, 204–205; Cohen and Fuchs, *Communism's Challenge and the Constitution* (1948), 34 Corn. L. Q. 182, 201; Moore, *The Communist Party of the USA: An Analysis of a Social Movement* (1945), 39 Am. Pol. Sci. Rev. 31, 36–37.

After the cessation of hostilities in World War II, events occurred and facts were uncovered which tended to show more clearly the nature and dimensions of the danger. Communist regimes were established in several countries other than the Soviet Union, and elsewhere Communist parties attained considerable strength. The methods by which these regimes seized power—for example, in Czechoslovakia—were not unknown or unnoted in this country.[12] Moreover, there came to light direct evidence of espionage. The revelations of Igor Gouzenko, a clerk on the staff of Colonel Zabotin, Soviet Military Attaché in Canada, led to the establishment of a Royal Commission in

[12] Some details of this history are set forth in the Government's brief in *Dennis* v. *United States*, No. 336, Oct. Term, 1950, pp. 199–203.

Canada to investigate espionage activities being conducted through that office. After hearing the testimony of many witnesses and considering a mass of documentary materials, the Commission concluded in a thorough report that the Soviet Union, acting through Canadian Communists, was attempting to infiltrate every sensitive agency of the Canadian government and its defense establishments and had to a great extent succeeded. *Report of the Royal Commission to Investigate the Facts Relating to and the Circumstances Surrounding the Communication by Public Officials and Other Persons in Positions of Trust of Secret and Confidential Information to Agents of a Foreign Power* (1946). The Report revealed that local agents, trained in Fifth-Column methods, passed information to Soviet officers within the Embassy, who were frequently members of the N.K.V.D. (Soviet secret police) in direct communication with Moscow (*id.*, pp. 11–13). It was found from documents emanating from the Soviet Embassy that the Communist International, or Comintern, the dissolution of which had been announced in Moscow in 1943, continued to exist and to be active in espionage work on this continent (*id.*, pp. 37–41). The Report quoted a statement by Gouzenko that (*id.*, p. 37)—

> The announcement of the dissolution of the Comintern was probably the greatest farce of the Communists in recent years. Only the name was liquidated, with the object of reassuring public opinion in the democratic countries. Actually the Comintern exists and continues its work * * *.

"The documents which Gouzenko brought with him," the Royal Commission commented, "corroborate this testimony" (*ibid.*).

The Commission found that the main recruiting ground for espionage agents was the illegally constituted Communist Party of Canada. The Communist cells, which posed as study groups, were the contact points for the agents (*id.*, pp. 44–48, 69–83). Often a particular Communist agent would be selected for Colonel Zabotin's group on orders directly from Moscow (*id.*, pp. 44–48). It was shown by documentary evidence that the national organizer for the Communist Party of Canada was instructed in 1945 to recruit espionage agents in the defense establishments of the Canadian government (*id.*, pp. 48–49, 97). Money to pay for espionage services was paid to some of the Canadian agents by the Soviet Embassy (*id.*, pp. 59–68).[18]

In England, the scientist Klaus Fuchs, a Communist, confessed to espionage of the gravest character

[18] Legal proceedings against some of the persons mentioned in the Report of the Royal Commission are reflected in *Rose v. The King*, 3 [1947] D.L.R. 618, 88 Can. Cr. Cas. 114; *Boyer v. The King*, 94 Can. Cr. Cas. 195 (1948); *Rex* v. *Mazerall*, 4 [1946] D.L.R. 791, [1946] Ont. Rep. 762; *Rex* v. *Lunan*, 3 [1947] D.L.R. 710, [1947] Ont. Rep. 201; *Rex* v. *Harris*, [1947] Ont. Rep. 461; *Rex* v. *Smith*, [1947] Ont. Rep. 378; *Rex v. Gerson*, [1947] Ont. Rep. 415.

against the United Kingdom and the United States. See the New York Times, February 11, 1950, p. 2.[14]

Investigations in the United States by Congressional agencies led to similar conclusions. See *The Shameful Years: Thirty Years of Soviet Espionage in the United States,* H. Rep. No. 1229, 82d Cong., 2d Sess. It was found that the Soviet Union established organizations in the United States ostensibly for commercial purposes, but actually to act as a funnel for intelligence work (*id.,* pp. 5–7, 15). Testimony by former Communist agents showed that Communist espionage groups had successfully infiltrated certain strategic areas of the Government and maintained liaison with Soviet Embassy officials. See *Interlocking Subversion in Government Departments* (Report of the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws to the Senate Committee on the Judiciary, 83d Cong., 1st Sess., dated July 30, 1953); see also *United States* v. *Hiss,* 185 F. 2d 822, 829 (C.A. 2), certiorari denied, 340 U.S. 948. Espionage agents

[14] Since the passage of the Subversive Activities Control Act, in September 1950, the world has become acquainted through the defection of Petrov with Soviet espionage in Australia (see New York Times, September 15, 1955, pp. 1, 14, 15); with the case of McLean and Burgess, the British diplomats, who fled to the Soviet Union; with subsequent defections from this country; and with Soviet espionage here.

were believed to have obtained highly confidential data regarding nuclear experiments in progress at the radiation laboratories of the University of California, and regarding atomic energy experiments in a laboratory at Columbia University at an early stage. *The Shameful Years, etc., op. cit, supra,* pp. 31, 35. Later, after the passage of the Subversive Activities Control Act, atomic and radar information was proved to have been passed to the Soviet Union by an international group. See *United States* v. *Rosenberg,* 195 F. 2d 583, 589, 598–601 (C.A. 2), certiorari denied, 345 U.S. 965; see also *Abel* v. *United States,* 362 U.S. 217.

In 1949, after a protracted trial, Eugene Dennis and ten other leaders of the Communist Party were found guilty of violating the Smith Act, and the evidence produced at the trial furnished further proof of the attitudes and actions of the Party's top ranks, and their relationship to the Soviet Union. The convictions were affirmed, with an exhaustive opinion by Judge Learned Hand, on August 1, 1950, 183 F. 2d 201 (C.A. 2), slightly less than two months before the final enactment of the Act involved here. This Court later affirmed the Second Circuit, *Dennis* v. *United States,* 341 U.S. 494, without finding it necessary to review the sufficiency of the evidence.

Armed warfare began in Korea in June 1950.

Thus, Congress had reason to believe, in September 1950, that the dissolution of the Communist International in 1943 had been merely a subterfuge and that there remained in existence a world Communist movement which endangered the security of the United

States.[15] This was the problem with which Congress undertook to deal in the Subversive Activities Control Act of 1950.

### B. THE IMMEDIATE EVOLUTION OF THE ACT

The Subversive Activities Control Act was the final distillate, after more than two years of study, of a number of different bills. Efforts were made to remove objectionable features from early drafts and to define with precision the terms employed without leaving the remedial legislation vulnerable to the kind of calculated avoidance that had been the prime weakness of previous registration statutes.

The so-called "Mundt-Nixon" bill (H.R. 5852, 80th Cong., 2d Sess.) was introduced in the House and referred to the Committee on Un-American Activities on March 15, 1948 (94 Cong. Rec. 2893). As amended and reported out, Section 8 of the bill provided for registration with the Attorney General by "Communist political organizations" and "Communist-front organizations." The Attorney General was authorized under Section 13, either on his own initiative or at the request of either House of Congress, to make an investigation and conduct hearings to ascertain whether an organization was required to register.

In its report on the bill, the Committee on Un-

[15] See, in addition to the materials referred to in the text, *The strategy and Tactics of World Communism* (Report of the House Foreign Affairs Committee's Subcommittee No. 5 on National and International Movements), H. Doc. No. 619, 80th Cong., 2d Sess. (1948), pp. 3–4.

American Activities cited the fact that the Foreign Agents Registration Act of 1938 and the Voorhis Act of 1940, while "directed against both Nazis and Communists," had "proved ineffective against the latter, due in part to the skill and deceit which the Communists have used in concealing their foreign ties" (H. Rep. No. 1844, 80th Cong., 2d Sess., p. 5). It was also stated that, while the Alien Registration Act of 1940—*i.e.*, the Smith Act—made it a crime to advocate the overthrow of the Government of the United States by force and violence, and "[w]hile force and violence is without doubt a basic principle to which all Communist Party members subscribe, the present line of the Party, in order to evade existing legislation, is to avoid wherever possible the open advocacy of force and violence" (*ibid.*). The report also indicated that ten years' investigation by the Committee had established (*id.*, p. 2)—

> (1) That the Communist movement in the United States is foreign-controlled; (2) that its ultimate objective with respect to the United States is to overthrow our free American institutions in favor of a Communist totalitarian dictatorship to be controlled from abroad; (3) that its activities are carried on by secret and conspiratorial methods; and (4) that its activities, both because of the alarming march of Communist forces abroad and because of the scope and nature of Communist activities here in the United States, constitute an immediate and powerful threat to the security of the United States and to the American way of life.

The Senate Judiciary Committee, to which the House bill was referred, sought the advice of several prominent lawyers and the then Attorney General as to the constitutionality of the bill (see 94 Cong. Rec. 9028). The legal memoranda received in response to this request are set out at pp. 415–428 of Hearings before the Committee on the Judiciary, Senate, 80th Cong., 2d Sess., on H.R. 5852; see also *id.*, pp. 428–488.[15] The principal objection of those who thought the bill had constitutional defects was that the bill used such terms as "Communist political organization" and "Communist-front organization" without adequately defining those terms, and therefore furnished the Attorney General with no definite legislative guide in determining whether an organization was required to register.

A new version of the bill was prepared (see 94 Cong. Rec. 9028, 9029–9032). It more specifically defined in its Section 3 the terms "Communist political organization" and "Communist-front organization," and set forth in Section 7 the duty of such organizations to register with the Attorney General and to file annual reports. In place of the provision for an administrative determination by the Attorney General, the new bill (Sections 12, 13) provided for a Subversive Activities Board which was to make the determination as to whether a given organization was required to register, with further provision for judicial review of its determinations.

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[15] See also the analysis of the bill in Cohen and Fuchs, *Communism's Challenge and the Constitution* (1948–1949), 34 Corn. L. Q. 182–219, 352–375.

The redrafted bill—known as the "Mundt-Ferguson-Johnston" bill—was introduced in the First Session of the 81st Congress as S. 2311.[17] The opinions of various prominent attorneys were again solicited and the consensus appeared to be that in respects here relevant the bill met the constitutional objections theretofore raised and at the same time avoided the weaknesses of prior legislation (S. Rep. No. 1358, 81st Cong., 2d Sess., pp. 7, 16–17).

The Internal Security Act, of which the Subversive Activities Control Act is a constituent part (Title I), was passed on September 23, 1950, over the President's veto. Both the House and Senate committee reports reemphasized the pressing need for bringing Communist organizations out in the open through the medium of registration requirements (H. Rep. No. 2980, 81st Cong., 2d Sess., on H.R. 9490; S. Rep. No. 2369, 81st Cong., 2d Sess., on S. 4037; S. Rep No. 1358, 81st Cong., 2d Sess., on S. 2311). The House committee report reiterated the fact that prior legislation directed to this end had been ineffectual against the Communist Party itself, and cited the fact that 30 of the 70 major countries of the world had outlawed the Communist Party (H. Rep. No. 2980, 81st Cong., 2d Sess., p. 2). The report further noted that the Committee had rejected proposals to outlaw the Communist Party or to make membership therein illegal *per se,* and emphasized that the "Communist

[17] S. 2311 evolved after extensive hearings before a subcommittee of the Senate Judiciary Committee from S. 1194 and S. 1196, which were originally introduced in the 81st Congress.

organization of the United States" was not made guilty of any offense by reason of the enactment of the Act (*id.*, p. 5).

### C. THE STRUCTURE AND PROVISIONS OF THE ACT

The Subversive Activities Control Act is Title I of the Internal Security Act of 1950, c. 1024, 64 Stat. 987, 50 U.S.C. 781–798. It has been twice [18] amended—once, in a relatively minor detail (see *infra*, p. 70), by the Act of July 29, 1954, c. 646, 68 Stat. 586, and again, in a more substantial manner, by the Communist Control Act of August 24, 1954, c. 886, Sections 6–11, 68 Stat. 775, 777–780. In view of the length of the Act and the complex interlocking of its numerous sections and subsections, a summarization of its principal provisions may be helpful. Rather than a mere section-by-section summary, the effort will be to present an over-all view showing the structure of the Act, with emphasis on the essentials of the registration scheme and the nature of the so-called "sanctions"—the legal consequences which attach to an organization's act of registering (or being ordered to register)—both as they affect the organization itself, considered as an entity, and as they affect individual members of the organization and others.

[18] Exclusive of a 1952 amendment increasing the salaries of Board members from $12,500 to $15,000 per annum (Act of July 12, 1952, c. 697, 66 Stat. 590), and a 1955 amendment relating to tenure of Board members (Subversive Activities Control Board Tenure Act, 69 Stat. 539).

*1. The congressional findings as to the necessity for the legislation*

Section 2 sets forth in fifteen numbered paragraphs certain findings—based on "evidence adduced before various committees of the Senate and House of Representatives"—which convinced Congress of the necessity for the legislation. Congress found, for example, that "[t]here exists a world Communist movement" consisting of a "world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization" (Section 2(1)). The "direction and control" of this movement was found to be "vested in and exercised by the Communist dictatorship of a foreign country," not named in the Act (Section 2(4)). This foreign Communist dictatorship, it was further found, establishes "action organizations" in various countries, these organizations being part of a world-wide Communist organization and controlled by the foreign dictatorship (Section 2(5)). These "Communist-action organizations" seek to bring about "the overthrow of existing governments by any available means, including force if necessary" and to set up in their stead local Communist dictatorships subserv ent to the parent dictatorship (Section 2(6)). These Communist organizations "are organized on a secret, conspiratorial basis" and operate to a substan-

tial extent through organizations known as "Communist fronts," which are maintained and used so as to conceal their true character and membership (Section 2(7)). Finally, Congress found (Section 2 (15))—

> The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such preparations by Communist organizations in other countries have aided in supplanting existing governments. The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide conspiracy and design to prevent it from accomplishing its purpose in the United States.

### *2. "Communist-action" and "Communist-front" organizations*

*"Communist-action organization."*—The Act defines a "Communist-action organization" as "any organization in the United States" other than one diplomatically accredited which "is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2" *and* which "operates primarily to advance the objectives" of that movement "as referred to in section 2" (Section 3(3)).

*"Communist-front organization."*—A "Communist-front organization" is defined as "any organization in the United States" which is "substantially directed, dominated, or controlled by a Communist-action organization" *and* "is primarily operated for the purpose of giving aid and support to a Communist-action organization, a Communist foreign government, or the world Communist movement" (Section 3(4)).

### *3. The registration scheme*

The heart of the Act—the organizational registration requirement—is contained in Section 7.

*The duty of Communist-action and Communist-front organizations to register with the Attorney General.*—Each Communist-action organization (Section 7(a)) and each Communist-front organization (Section 7(b)) is required to "register with the Attorney General on a form prescribed by him by regulations" as the one or the other type of organization. Regis-

tration is to be effected within thirty days after enactment of the Act (Section 7(c)(1)), or, in the case of an organization which becomes registerable after the Act's passage, within thirty days after becoming registerable (Section 7(c)(2)). In the case of an organization which does not voluntarily register and which is subsequently ordered to register by the Subversive Activities Control Board, registration must be effected within thirty days after the Board's order becomes final [19] (Section 7(c)(3)).

*The registration statement.*—The registration process includes the submission of a registration statement, to be prepared in accordance with regulations, containing certain specified information (Section 7(d)). The information is to include (1) the name and address of the organization, (2) the name, address, title, and duties of each officer of the organization, including each person who has been an officer at any time during the preceding year, (3) an accounting of all funds received and spent by the organization during the preceding year, including the sources of the funds and the purposes of the expenditures, (4) (applicable to action organizations only) the name and address of each member of the organization, including each person who has been a member at any time during the preceding year, (5) any aliases that may ever have been used by any officer or member required to be

[19] The process leading to an order by the Board to register is provided for in Section 13 (see *infra*, pp. 71–73). The conditions under which a Board order becomes final are set forth in Section 14(b) (see *infra*, p. 77).

listed, and (6)[20] a list of all printing presses and other mechanical devices used in printing in the possession or control of the organization, its officers, or members.

*Annual reports.*—Annual reports are required to be submitted to keep the initial registration statement up to date (Section 7(e)).

*Records required to be kept.*—Accurate financial records are required to be kept by all registered organizations (Section 7(f)(1)). In addition, action organizations are required to keep accurate membership lists (Section 7(f)(2)).

*Remedies open to persons claiming to be wrongly listed.*—Section 7(g) provides certain remedies for persons who are listed by reporting organizations as being officers or members and who deny that they are such. The Attorney General is required to notify all individuals whom reporting organizations list as officers or members that they have been so listed. Any listed individual who denies that he is an officer or member may request the Attorney General to strike his name from the statement. In that event, the Attorney General is required to investigate the matter, and if he is satisfied that the denial is correct, he is to strike the individual's name. If he is not satisfied that the denial is correct and declines to strike the name, or if he fails to strike it within five months after receiving the request, the individual may petition the Board pursuant to Section 13(b) for an order requiring the Attorney General to strike his name.

[20] Added by the Act of July 29, 1954, c. 646, 68 Stat. 586.

*Publication to constitute notice.*—Upon the registration of an organization, the Attorney General is required to publish in the Federal Register the fact that the organization has registered as a Communist-action or Communist-front organization as the case may be (Section 9(d)). Such publication, it is provided, "shall constitute notice to all members of such organization that such organization has so registered" (*ibid.*).

*Keeping of registers.*—The Attorney General is required to keep registers of all organizations which register, consisting of the names and addresses of the organizations and their registration statements and annual reports (Section 9(a)). The registers are to be open to public inspection, except that the name of any person listed by an organization as being an officer or member who denies his status as such may not be made public pending determination by the Attorney General of the correctness of the listing (Section 9(b)).

### 4. *Proceedings before the Board leading to orders requiring organizations to register*

Section 13 of the Act provides for quasi-judicial proceedings before the Subversive Activities Control Board leading to orders requiring, or refusing to require, organizations claimed by the Attorney General to be action or front groups to register with him as such. The Board itself is established and its general powers and functions defined in Section 12.

*The petition by the Attorney General.*—Whenever the Attorney General has reason to believe that any

organization which has not registered under Section 7(a) as an action organization or under Section 7(b) as a front organization "is in fact an organization of a kind required to be registered under such subsection," he is required to file with the Board and serve upon the organization a petition for an order requiring the organization to register (Section 13(a)).

*Hearings before the Board.*—Upon the filing of such a petition, the Board (or any member or a designated examiner) holds a hearing to inquire into the facts regarding the organization's registerability (Section 13(c)). The administration of oaths and the issuance of subpoenas are provided for (*ibid.*). Hearings are public, and each party is entitled to present its case with the assistance of counsel, to offer oral or documentary evidence, and to cross-examine opposing witnesses (Section 13(d)).

*Types of evidence required to be considered.*—Section 13(e) sets forth in eight numbered paragraphs certain types of evidence which the Board is required to consider in determining whether an organization is a Communist-action organization under Section 3(3). For example, the Board is to take into consideration—

> (1) the extent to which its [the organization's] policies are carried out and its activities performed, pursuant to directives or to effectuate the policies of the foreign government or foreign organization in which is vested, or under the domination or control of which is exercised, the direction and control of the world Communist movement referred to in section
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> * * *

Similarly, Section 13(f) sets forth evidential factors required to be taken into consideration in determining whether an organization is a front group under Section 3(4).

*Reports and orders.*—If the Board determines that the organization is a Communist-action or Communist-front organization, it must make a report stating its findings of fact and issue an order requiring the organization to register (Section 13(g)(1)). If it determines that the organization is not such a group, it so reports and issues an order denying the Attorney General's petition (Section 13(h)(1)).

*Publication to constitute notice.*—When an order of the Board requiring registration of a Communist-action organization becomes final (see *infra*, p. 77), that fact must be published in the Federal Register and such publication is declared to "constitute notice to all members of such organization that such order has become final" (Section 13(k)).

### *5. The duty of individuals to register under certain circumstances*

The Act also imposes upon individuals a duty to register under certain circumstances.

#### *(a) Officers required to effect an organization's registration*

If a Communist-action or Communist-front organization should fail to register or to file a registration statement or annual report as required by Section 7, it is the duty of the executive officer and of the secretary of the organization (or the individuals performing the usual duties of such officers), and of such

other officers as the Attorney General may by regulations prescribe,[21] to register for the organization or to file the registration statement or annual report, as the case may be (Section 7(h)).

*(b) Personal registration by members of Communist-action organizations*

*Conditions under which required.*—The Act specifies two conditions under which members of a Communist-action organization are required to register personally with the Attorney General. First, if there is in effect a final order of the Board requiring the action organization to register and more than thirty days elapse without compliance, it becomes the duty of each member of the organization to register personally (Section 8(a)). Secondly, if a Communist-action organization registers but fails to include the names of all its members on the membership list it files, each member not on the list who knows the organization to be registered and to have omitted his name must himself register within sixty days after obtaining such knowledge (Section 8(b)). In either case the individual is required to file a registration statement containing such

[21] Pursuant to this authority, the Attorney General has designated the following additional officers as sharing with those named in the Act the responsibility for effecting the registration of an organization which is required to register but fails to do so: (a) the president, chairman, or other person who is chief officer; (b) the vice-president, vice-chairman, or person performing the functions of either; (c) the treasurer; and (d) members of the governing board, council, or body. 28 C.F.R. § 11.205.

information as the Attorney General may by regulations prescribe (Section 8(c)).

*Proceedings before the Board.*—If an individual who the Attorney General believes is required to register under Section 8 does not in fact register, the Attorney General may petition the Board (as in the case of an organization) for an order requiring the individual to register (Section 13(a)).

*Hearings.*—The Attorney General's petition for an order to require an individual to register is heard by the Board in the same manner as a petition for an order requiring an organization to register (see *supra*, p. 72) (Section 13(c) and (d)).

*Reports and orders.*—In each instance the Board must make a report stating its findings and issue an order either requiring the individual to register (Section 13(g)(2)) or denying the Attorney General's petition (Section 13(h)(2)).

*6. Fact of registration not admissible in any criminal prosecution and membership not to constitute per se a violation of any criminal statute*

The fact of the registration of any person as an officer or member of any Communist-action or Communist-front organization may not be received in evidence against such person in any prosecution for any alleged violation of any criminal statute (Section 4(f)). In addition, neither the holding of office nor membership in any Communist organization by any person shall constitute *per se* a violation of any criminal statute (*ibid.*).

### 7. *Cancellation of registration*

The Act establishes procedures whereby an individual or an organization which has once registered—whether with or without an order of the Board commanding him or it to do so—may procure the cancellation of his or its registration in the event of a change in the circumstances which originally required registration.

*Application to the Attorney General.*—Any organization registered under Section 7 as an action or front group, and any individual registered under Section 8, may, not oftener than once in each calendar year, make application to the Attorney General for the cancellation of such registration (Section 13(b)).

*Petition to the Board.*—If the Attorney General denies the application, the organization or individual concerned may, within sixty days after such denial, file with the Board and serve upon the Attorney General a petition for an order requiring the cancellation of registration (Section 13(b)).

*Hearings.*—The petition is heard by the Board in the same manner as a petition by the Attorney General requesting that an organization or individual be directed to register (Section 13(c) and (d)).

*Reports and orders.*—In each case the Board must make a report stating its findings and issue an order granting (Section 13(i)) or denying (Section 13 (j)) the petition.

*8. Judicial review and finality of Board orders*

The Act provides that any party aggrieved by any order of the Board be given full opportunity for judicial review either in the United States Court of Appeals for the District of Columbia Circuit or in the circuit of the petitioning party's residence, with the possibility of further discretionary review by this Court on writ of certiorari (Section 14(a)). On such review the Board's findings of fact, if supported by the preponderance of the evidence, are conclusive (*ibid*).

*Exhaustion of judicial review a prerequisite to an order of the Board becoming final.*—An order of the Board does not become final, *i.e.*, enforceable, until full opportunity for judicial review has been exhausted or until review is foreclosed by failure to make timely application therefor (Section 14(b)).

*9. The so-called "sanctions," or legal consequences, of an organization's registration or of a final order to register*

When an organization registers under Section 7, or when an order of the Board under Section 13 requiring an organization to register becomes final under Section 14(b), the Act provides for the immediate occurrence of certain legal consequences—some affecting the organization as such, others affecting members of the organization. These consequences are, generally speaking, in the nature of legal disabilities; they have

come to be referred to in these proceedings as "sanctions" (see R. 2082), though this term is not used in the Act. In addition, upon the registration of an organization or when an order directing it to register becomes final, certain limitations are imposed upon the conduct of officers and employees of the United States and of "defense facilities," as defined in the Act, with respect to their relations with the organization and its members. These various legal consequences may be summarized and classified as follows:

*(a) Consequences to the organization as such*

*The "labeling" requirements.*—When an organization is registered or has been finally ordered to register, any publication of the organization transmitted by mail or in interstate or foreign commerce and intended to be circulated among two or more persons must bear on its face and on any wrapper in which it is contained the printed statement "Disseminated by [name of organization], a Communist organization" (Section 10(1)). Similarly, radio and television broadcasts sponsored by the group must be identified as being "sponsored by [name of organization], a Communist organization" (Section 10(2)). Violation of these provisions by the organization or by any person acting on its behalf is made a punishable offense (Sections 10, 15(c)).

*Denial of tax benefits.*—Persons making contributions to any organization which is registered or has been finally ordered to register may not deduct the amount of their contributions from their gross taxable income notwithstanding any other provisions of

law (Section 11(a)), and no such organization may claim any tax-exemption privilege specified in Section 101 of the Internal Revenue Code (Section 11(b)).

*(b) Consequences to members of the organization*

*Employment restrictions.*—Section 5(a)(1) provides that members of an organization having knowledge or notice that the organization is registered or has been finally ordered to register are prohibited from (A) concealing or failing to disclose their membership in seeking, accepting, or holding any nonelective federal employment, (B) holding such employment, (C) concealing or failing to disclose their membership in seeking, accepting, or holding employment in any defense facility,[22] (D) working in any defense facility (this clause is applicable only to members of action organizations), or (E)[23] holding office in or being employed by any "labor organiza-

[22] A "defense facility" is defined in Section 3(7) as any plant, factory, airport, vessel, pier, etc. "designated and proclaimed by the Secretary of Defense pursuant to section 5(b)." Section 5(b) authorizes the Secretary of Defense to designate and proclaim, and from time to time revise, a list of facilities with respect to the operation of which he finds that "the security of the United States requires the application of the provisions of" Section 5(a). Section 5(b) further provides for the publication of the list and revisions thereof in the Federal Register and the posting of notices of such designation in conspicuous places on the premises of listed facilities.

[23] Added by the Communist Control Act of 1954, Section 6, 68 Stat. 777.

tion" as defined in the National Labor Relations Act[24] or representing any employer in proceedings under that Act.

*Passports.*—Members of an organization having knowledge or notice that the organization is registered or has been finally ordered to register are prohibited from applying for, seeking to renew, using, or attempting to use any passport issued under the authority of the United States (Section 6(a)).

*Provisions applicable to aliens.*—Alien members of or aliens affiliated with organizations which are registered or have been finally ordered to register are excluded from admission into the United States, are deportable, and are ineligible for naturalization.[25] The joining of or affiliating with an organization so registered or required to register, within five years after naturalization, if naturalization occurs after the effec-

[24] *I.e.*, "any organization * * * in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 29 U.S.C. 152 (5).

[25] These provisions were originally contained in Sections 22 and 25 of the Subversive Activities Control Act, which amended the immigration and naturalization laws. They are now contained in the Immigration and Nationality Act of June 27, 1952, c. 477, 66 Stat. 163, Sections 212(a)(28)(E) (exclusion), 241(a)(6)(E) (deportation), and 313(a)(2) (G) and (H) (ineligibility for naturalization). If the alien can establish that he did not know the organization in question to be a Communist organization when he joined it and did not acquire such knowledge prior to the time it registered or was required to register, the provisions are by their terms inapplicable (except that members of action organizations are declared ineligible for naturalization without such qualifying language).

tive date of the Immigration and Nationality Act of 1952, is declared to constitute *prima facie* evidence, warranting revocation of citizenship in a denaturalization proceeding if not rebutted, of lack of attachment to the principles of the Constitution and of the quality of being well disposed to the good order and happiness of the United States at the time of naturalization.[26]

(c) *Consequences to government and defense-facility employees in their relations with the organization and its members*

*Contributions to registered organizations forbidden.*—When an organization is registered or has been finally ordered to register, officers and employees of the United States and of defense facilities,[27] having knowledge or notice of that fact, are prohibited from contributing funds or services to such group (Section 5(a)(2)(A)).

*Counseling violation of employment provisions.*—Section 5(a)(2)(B) makes it a punishable offense for an officer or employee of the United States or of any defense facility, with knowledge or notice that an organization is registered or has been finally ordered to register, to advise or counsel any person whom he knows to be a member of such organization to perform or omit the performance of any act the performance or omission of which would constitute a violation of the employment provisions of Section 5(a)(1) (see *supra*, pp. 79–80).

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[26] As amended and carried forward in Section 340(c) of the Immigration and Nationality Act of June 27, 1952, c. 477, 66 Stat. 163, 261.

[27] See *supra*, p. 79, fn. 22, for the definition of "defense facility."

*Issuance of passports.*—When an organization is registered or has been finally ordered to register as a Communist-*action* organization, officers and employees of the United States are prohibited from issuing passports to or renewing the passports of any individual who they know or have reason to believe is a member of such organization (Section 6(b)).

*10. Criminal penalties*

*Organizations.*—Any organization which has been directed by a final order of the Board to register and which fails to do so within the time allowed, or which fails to file a required registration statement or annual report or to keep records as required, is punishable for each such offense by a fine of not more than $10,000 (Section 15(a)(1)). Each day of failure to register is a separate offense (Section 15(a)). Each violation of the labeling provisions of Section 10 (see *supra,* p. 78) is similarly punishable (Section 15(c)).

*Individuals.*—Each individual officer having a duty under Section 7(h) to register or to file a registration statement or annual report on behalf of an organization which has been finally ordered to register (see *supra,* pp. 73–74) is punishable for each failure to fulfill such duty by a fine of not more than $10,000, or imprisonment for not more than five years, or both (Section 15(a)(2)). Each individual having a duty to register personally under Section 8 (see *supra,* pp. 74–75) is similarly punishable,

provided there is in effect with respect to him a final order of the Board requiring him to do so (Section 15(a)(2)). In either case, each day of failure to register is a separate offense (Section 15(a)). The willful making of a false statement or the willful omission of a fact required to be stated is similarly punishable (Section 15(b)). Each false statement or willful omission constitutes a separate offense (Section 15(b)(1)), and each listing of the name or address of any one individual is to be deemed a separate statement (Section 15(b)(2)).

Any individual who violates any of the employment provisions or the contributions prohibition of Section 5 (see *supra*, pp. 79–80, 81), the passport provisions of Section 6 (see *supra*, pp. 80, 82), or the labeling provisions of Section 10 (see *supra*, p. 78) is similarly punishable for each such offense by a fine of not more than $10,000, or imprisonment for not more than five years, or both (Section 15(c)).

*Act not to affect previously existing criminal statutes.*—The Act provides that its provisions are to be construed as being "in addition to and not in modification of existing criminal statutes" (Section 17).

*11. Communist-infiltrated organizations*

The Act as originally passed defined and dealt with but two types of "Communist organization" (Section 3(5))—the Communist-action organization (Section 3(3)) and the Communist-front organization (Section 3(4)). The Communist Control Act of 1954, c. 886,

Sections 7–11, 68 Stat. 775, 777–780, amended the Act so as to define a third category of Communist organization, *viz.*, the "Communist-infiltrated organization," and to enact various restrictive measures with respect to such groups.

Communist-infiltrated organizations are not subject to the registration requirements of the Act. They are, however, subject to Board orders "determining" them to be Communist-infiltrated, which orders, when they become final, entail for such groups some of the same legal consequences which attach to action and front groups when registered or directed to register by a final Board order. "Infiltrated" organizations are defined in Section 3(4A). Proceedings leading to a Board order determining an organization to be Communist-infiltrated are provided for in Section 13A. Such orders are reviewable in the same manner as other orders of the Board (Section 13). The legal consequences which flow from a final Board order determining a group to be infiltrated are set forth in Sections 10, 11, 13A(h), and 13A(j).

*12. Separability clause*

The Act contains the customary separability clause providing that, if any of its provisions or the application thereof to any person or circumstances is held invalid, the remaining provisions, or the application to other persons or circumstances of any provisions held invalid as to some, shall not be affected thereby (Section 32).

## II

### THE SUBVERSIVE ACTIVITIES CONTROL ACT IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED TO PETITIONER

As we have already pointed out (*supra*, p. 44), what is immediately before the Court is (a) the Board's finding that the Communist Party of the United States is a Communist-action organization under the Act, and (b) the Board's order that the party register as such. The court below held in its original opinion that the Act is an "integrated unit" (R. 2081–2084), and that even at this stage the registration requirements cannot be considered separately from certain of the statutory sanctions "which depend upon or flow from registration of the organization" (R. 2083). We submit, however, that the Court would be justified in declining to pass upon the sanctions (or some of them) until they actually come into play, for the registration provisions—which are directly involved in this proceeding—have a purpose and vitality independent of any sanction.[28] "Since all contingencies of attempted enforcement cannot be envisioned in advance of [a statute's] applications, courts have in the main found it wiser to delay passing upon the constitutionality of all the separate phases of a comprehensive statute until faced with cases involving particular provisions as specifically applied to persons who claim to be injured. Passing upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions is analogous to rendering an ad-

[28] See *infra*, pp. 120–121.

visory opinion upon a statute or a declaratory judgment upon a hypothetical case." *Watson* v. *Buck*, 313 U.S. 387, 402. See also *United States* v. *Rumely*, 345 U.S. 41, 48. In any event, the Act's separability clause (see *supra*, p. 84) makes it clear that the registration provisions would survive even if one or more of the sanctions should be held invalid. Indeed, even if certain of the registration requirements (such as the provision for a membership list) may be thought to be invalid, the remaining registration requirements would survive. Cf. *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U.S. 419; *McElroy* v. *Guagliardo*, 361 U.S. 281, 283.

For these reasons, we shall first consider petitioner's contentions that the hearing and registration provisions are invalid as violative of the free-speech, self-incrimination, and due-process clauses of the Constitution (*infra*, pp. 87–170). We shall then separately reply to the arguments that the sanctions, which become operative when an order of the Board directing an organization to register becomes final, are invalid on various constitutional grounds (*infra*, pp. 170–212). In both aspects, we shall consider the Act's provisions only in so far as they apply to the Communist-action type of group; petitioner has been ordered to register as such a group, and no Communist-front organization—the other type subject to the registration provisions—is before the Court. See *United Public Workers* v. *Mitchell*, 330 U.S. 75, 89–90; *Watson* v. *Buck*, *supra*, 313 U.S. at 402; *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, *supra*, 303 U.S. at 433–439, 443; *Peters* v. *Hobby*, 349 U.S. 331, 338.

A. THE HEARING AND REGISTRATION PROVISIONS ARE VALID

*1. The First Amendment does not prohibit Congress from requiring registration of, and disclosure of information by, domestic organizations dominated by foreign agencies whose purpose it is to establish a Communist dictatorship in this country*

The heart of the Act is the requirement that Communist-action organizations register with the Attorney General, disclose the names of their officers and members, and give financial accountings (see *supra*, pp. 68–70). A Communist-action organization is defined as any organization in the United States, other than one diplomatically accredited, which is substantially dominated or controlled by "the foreign government or foreign organization controlling the world Communist movement" *and* which "operates primarily to advance the objectives" of that movement. The "world Communist movement" referred to is that "world-wide revolutionary movement" which Congress in Section 2 found to exist, "whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization." After the fullest hearing, the Communist Party has been found to be such a group. Congress has the power to require it to register and disclose information. There is no violation of the First

Amendment either in the statute on its face or in its application to petitioner.

(a) *Free speech and press may be indirectly restrained in proper circumstances*

There is, of course, no better settled principle of constitutional law than that the freedoms guaranteed by the First Amendment are not absolute. *E.g. Schenck* v. *United States,* 249 U.S. 47, 52; *Dennis* v. *United States,* 341 U.S. 494, 508. Even direct limitations on the freedoms otherwise protected by that Amendment may be permissible where clearly necessary to the effectuation by Congress of an end within its power to bring about. *Schenck* v. *United States, supra,* 249 U.S. at 52; *Dennis* v. *United States, supra,* 341 U.S. at 509–510. *A fortiori,* indirect limitations come within the rule. *American Communications Assn.* v. *Douds,* 339 U.S. 382, 402–404.

The law is filled with examples of statutes which place indirect restraints on freedom of speech or of the press, but which are nevertheless valid because the statute's objective lies within the power of Congress to bring about, and the restraint is a necessary and appropriate concomitant of the exercise of the power. The Hatch Act validly forbids officers and employees in the executive branch of the Federal Government from taking an active part in political campaigns (Act of August 2, 1939, c. 410, Section 9, 53 Stat. 1148; 5 U.S.C. 118i), notwithstanding the obvious restraints imposed by this prohibition on such officers' and employees' freedom of speech and political expression. *United Public Workers* v. *Mitchell,* 330 U.S. 75, 94–

104. The Federal Regulation of Lobbying Act (Act of August 2, 1946, c. 753, Title III, Sections 305, 307–308, 60 Stat. 840–842; 2 U.S.C. 264, 266–267) validly requires all "those who for hire attempt to influence legislation or who collect or spend funds for that purpose" to spread on the record pertinent information as to "who is being hired, who is putting up the money, and how much," notwithstanding the incidental inhibitory effect of this requirement on the exercise of First Amendment freedoms. *United States* v. *Harriss*, 347 U.S. 612, 625–626. The Federal Corrupt Practices Act validly requires all political committees which accept contributions or make expenditures for the purpose of influencing national elections to keep exact accounts of all such contributions and to report publicly the names and addresses of all contributors as well as of persons to whom such expenditures are made (Act of February 28, 1925, c. 368, Title III, Sections 302–305, 43 Stat. 1070–1072; 2 U.S.C. 241–244), though here, too, the requirement unquestionably imposes indirect restraints upon freedom of political expression. *Burroughs* v. *United States*, 290 U.S. 534.

The unfair-labor-practice provisions of the National Labor Relations Act have led to certain valid restraints on free speech. *National Labor Relations Board* v. *Virginia Elec. & Power Co.*, 314 U.S. 469; *National Labor Relations Board* v. *Falk Corp.*, 308 U.S. 453. Newspaper companies are subject to regulation in the public interest, notwithstanding possible incidental restrictive effects on their freedom to pub-

lish. *Associated Press* v. *National Labor Relations Board*, 301 U.S. 103, 130–133; *Associated Press* v. *United States*, 326 U.S. 1, 19–20; *Mabee* v. *White Plains Publishing Co.*, 327 U.S. 178, 184; *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 192–193; *Lorain Journal* v. *United States*, 342 U.S. 143, 155–156. Radio broadcasting stations engaging in certain practices can be denied licenses without unlawfully entrenching on First Amendment rights, despite the indirect restraint on freedom of speech which may result from such denials. *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226–227.

Likewise, the Foreign Agents Registration Act validly requires agents of foreign principals to register with the Attorney General and to submit a mass of detailed information relating to the agency relationship (Act of June 8, 1938, c. 327, 52 Stat. 631–633; 22 U.S.C. 611 *ff.*). *United States* v. *Peace Information Center*, 97 F. Supp. 225, 261–263 (D. D.C.); see also *Viereck* v. *United States*, 318 U.S. 236, 241, where the constitutionality of the Act was assumed. The National Labor Relations Act, as amended by the Labor Management Relations Act of 1947, validly denies the benefits of that Act to labor organizations unless each officer takes an oath that he is not a member of the Communist Party (Act of July 5, 1935, c. 372, Section 9(h), as amended by the Act of June 23, 1947, c. 120, Section 101, 61 Stat. 146; ~~29 U.S.C. 159(h)~~). *American Communications Assn.* v. *Douds*, 339 U.S. 382, 389–412. The postal laws validly require the publishers of newspapers and magazines, as a condition

of their use of second-class mail facilities, publicly to disclose the names of the owners of these publications and to mark with the word "advertisement" all contents the insertion of which has been paid for (Act of August 24, 1912, c. 389, Section 2, 37 Stat. 553; now 39 U.S.C. 233, 234). *Lewis Publishing Co.* v. *Morgan*, 229 U.S. 288.

The Court has also upheld the provisions of a state statute requiring that associations, having an oath-bound membership, file with a state official sworn copies of their constitutions, oaths of membership, and the names of all officers and members. *Bryant* v. *Zimmerman*, 278 U.S. 63, 72–73. Recently, in *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, an order of a state court for production of the names and addresses of all members and agents of the N.A.A.C.P. was held to be unconstitutional. See also *Bates* v. *City of Little Rock*, 361 U.S. 516. But the Court based its determination on the ground that "we are unable to perceive that the disclosure of * * * petitioner's rank-and-file members has a substantial bearing" on any interest of the state. 357 U.S. at 464. Significantly, the Court declared that *Bryant* v. *Zimmerman* "involved markedly different considerations in terms of the interest of the State in obtaining disclosure. * * * In its opinion [in *Bryant*], the Court took care to emphasize the nature of the organization [the Ku Klux Klan] which New York sought to regulate. The decision was based on the particular character of the Klan's activities, involving acts of unlawful intimidation and violence, * * * of which the Court itself took judicial notice."

See also *Barenblatt* v. *United States*, 360 U.S. 109, 125–134.

In all these and similar cases, the question was not whether some indirect, incidental restraint on complete freedom of speech or of the press might result from the enforcement of the law enacted by the legislature. That there would be some such restraint was apparent. The question was whether the objective of the legislature was one within its power to seek to effect, and, if so, whether the incidental restraint was appropriate and reasonable under all the circumstances, including the end sought to be achieved by the law, as well as the nature, impact, and scope of the restraint. As this Court described the problem in an analagous context in *American Communications Assn.* v. *Douds*, *supra*, 339 U.S. at 400:

> * * * In essence, the problem is one of weighing the probable effects of the statute upon the free exercise of the right of speech and assembly against the congressional determination that political strikes are evils of conduct which cause substantial harm to interstate commerce and that Communists and others identified by § 9(h) pose continuing threats to that public interest when in positions of union leadership. We must, therefore, undertake the "delicate and difficult task * * * to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."

(b) *The evil at which the Act strikes is one of the gravest that could befall the nation*

The evil aimed at by the Hatch Act was the bad effect on government service of "political activity by government employees." *United Public Workers* v. *Mitchell, supra,* 330 U.S. at 95. The Regulation of Lobbying Act was aimed at the danger that "the voice of the people" might go unheard by Congress due to being "drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal." *United States* v. *Harriss, supra,* 347 U.S. at 625. The harm sought to be eliminated by the Corrupt Practices Act was "the corrupt use of money to affect elections." *Burroughs* v. *United States, supra,* 290 U.S. at 548. The injury at which the Foreign Agents Registration Act was directed was the "spreading [of] foreign propaganda" in this country by unidentified agents of foreign principals. *Viereck* v. *United States, supra,* 318 U.S. at 241. The evil aimed at by the non-Communist affidavit clause of the amended National Labor Relations Act was the obstruction of commerce due to "political strikes." *American Communications Assn.* v. *Douds, supra,* 339 U.S. at 387–389. In all these cases, the fact that incidental and indirect restraints upon "First Amendment freedoms" resulted from the steps taken by Congress to combat those evils was held not to invalidate the legislative remedy adopted. However, the evils at which those statutes were directed, grave

as they were, were relatively trivial compared to the evil at which this Act attempts to strike.

That evil is nothing other than the threatened destruction, through force, violence, and deceit, of our constitutional form of government, the loss of our national independence and of our cherished liberties, and the passing of the nation under the domination of a ruthless foreign dictatorship (Section 2). The world Communist movement, including its domestic manifestations, declared Congress in summing up the purposes of the Act, presents "a clear and present danger to the security of the United States and to the existence of free American institutions, and make[s] it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States" (Section 2(15)).

It is obviously a matter of the gravest concern that these exists in this country such a highly organized conspiratorial group controlled and dominated by a foreign country or foreign organization, the principal efforts of which are directed to furthering the interests of that foreign country or organization to the detriment of the United States. "Antipathy to domination or control by a foreign government," as the court below observed (R. 2085), "or even to interference on the part of a foreign government, is a basic

policy in this nation. It was one of the compelling reasons for the making of the Constitution in replacement of the Confederation."

As we have seen (pp. 46–65), Congress has for thirty years regarded the threat to the United States represented by the Communist movement as a legitimate subject of congressional inquiry and legislation. See also *Internal Security Manual*, S. Doc. No. 47, 83d Cong., 1st Sess., pp. 216–218, where the many hearings held by committees of Congress investigating subversive activities from 1930 to 1953 are synopsized. The general power of Congress not only to conduct inquiries in this area, but to legislate on the basis of the information thus obtained, has been repeatedly recognized by this Court as well as others. *E.g., Barenblatt* v. *United States*, 360 U.S. 109; *Galvan* v. *Press*, 347 U.S. 522, 529; *Carlson* v. *Landon*, 342 U.S. 524, 534–536; *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 590; *Dennis* v. *United States*, 341 U.S. 494; *American Communications Assn.* v. *Douds*, 339 U.S. 382, 387–389; *Lawson* v. *United States*, 176 F. 2d 49, 51–52 (C.A.D.C.), certiorari denied, 339 U.S. 934; *Barsky* v. *United States*, 167 F. 2d 241, 244–247 (C.A.D.C.), certiorari denied, 334 U.S. 843; *United States* v. *Josephson*, 165 F. 2d 82, 88–92 (C.A. 2), certiorari denied, 333 U.S. 838. Indeed, the federal courts, including this Court, have repeatedly recognized the peculiar and dangerous nature of the Communist conspiracy in this country and the world. In particular, the Court has emphasized that the Communist Party is actively engaged in the world-wide

Communist attempt to overthrow the Government of the United States. Therefore, the Court has repeatedly refused to treat it as an ordinary political party in considering the constitutionality of statutes or legislative investigations under the First Amendment.

Mr. Justice Jackson in the portion of his opinion concurring with the majority in *American Communications Assn.* v. *Douds,* 339 U.S. 382, 423, carefully distinguished the Communist Party "from any other substantial party we have known, and hence [it] may constitutionally be treated as something different in law." He found that Congress, on the basis of material before it, could rationally have concluded that "The goal of the Communist Party is to seize powers of government by and for a minority rather than to acquire power through the vote of a free electorate"; "The Communist Party alone among American parties past or present is dominated and controlled by a foreign government"; "Violent and undemocratic means are the calculated and indispensable methods to attain the Communist Party's goal"; and "Every member of the Communist Party is an agent to execute the Communist program" (*id.,* pp. 425, 427, 429, 431). See also Mr. Justice Jackson concurring in *Dennis* v. *United States,* 341 U.S. 494, 563–566.

In affirming the Smith Act convictions of the principal leaders of the Communist Party, Judge Learned Hand stated in *United States* v. *Dennis,* 183 F. 2d 201, 212–213 (C.A. 2), affirmed, 341 U.S. 494:

> One may reasonably think it wiser in the long run to let an unhappy, bitter outcast vent his

> venom before any crowds he can muster and in any terms he wishes, be they as ferocious as he will; one may trust that his patent impotence will be a foil to anything he may propose. * * * Here we are faced with something very different. The American Communist Party * * * is a highly articulated, well contrived, far spread organization, numbering thousands of adherents, rigidly and ruthlessly disciplined, many of whom are infused with a passionate Utopian faith that is to redeem mankind. * * * The violent capture of all existing governments is one article of the creed of that faith, which abjures the possibility of success by lawful means. * * * The question before us, and the only one, is how long a government, having discovered such a conspiracy, must wait.

Then, after reviewing the great world-wide Communist danger at the time of the indictment in 1948, Judge Hand went on (*id.*, p. 213):

> We do not understand how we could ask for a more probable danger, unless we must wait till the actual eve of hostilities. * * * [W]e shall be silly dupes if we forget that again and again in the past thirty years, just such preparations in other countries have aided to supplant existing governments, when the time was ripe. Nothing short of a revived doctrine of *laissez faire*, which would have amazed even the Manchester School at its apogee, can fail to realize that such a conspiracy creates a danger of the utmost gravity and of enough probability to justify its suppression.

Mr. Justice Frankfurter, speaking for the Court in *Galvan v. Press*, 347 U.S. 522, 529, stated:

> On the basis of extensive investigation Congress [found] in § 2(1) of the [Internal Security] Act that the "Communist movement * * * is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship" and made present or former membership in the Communist Party, in and of itself, a ground for deportation. Certainly, we cannot say that this classification by Congress is so baseless as to be violative of due process and therefore beyond the power of Congress.

See also *Carlson v. Landon*, 342 U.S. 524, 535–537; *Harisiades v. Shaughnessy*, 342 U.S. 580, 590. Subsequently, in concurring in *Sweezy v. New Hampshire*, 354 U.S. 234, Mr. Justice Frankfurter (joined by Mr. Justice Harlan) indicated that a fundamental distinction existed between investigation by a Congressional committee of a witness' political beliefs and into his connection with the Communist Party. "Whatever, on the basis of massive proof and in the light of history, of which this Court may well take judicial notice, be the justification for not regarding the Communist Party as a conventional political party, no such justification has been afforded in regard to the Progressive Party" (*id.*, p. 266).

The earlier history of this Court's attitude toward the Communist Party and the attempts of Congress

to deal with it is described at length in *Barenblatt* v. *United States*, 360 U.S. 109, in which the Court upheld the authority of a congressional committee to inquire whether a witness belonged to the Communist Party. Speaking for the Court, Mr. Justice Harlan said (*id.*, pp. 127–129):

> *That Congress has wide power to legislate in the field of Communist activity in this Country, and to conduct appropriate investigations in aid thereof, is hardly debatable. The existence of such power has never been questioned by this Court* * * *. In the last analysis this power rests on the right of self-preservation, "the ultimate value of any society," *Dennis* v. *United States* * * *. Justification for its exercise in turn rests on the long and accepted view that the tenets of the Communist Party include the ultimate overthrow of the Government of the United States by force and violence, a view which has been given formal expression by Congress [citing Section 2 of the Subversive Activities Control Act].
>
> *On these premises, this Court in its constitutional adjudications has consistently refused to view the Communist Party as an ordinary political party, and has upheld federal legislation aimed at the Communist problem which in a different context would certainly have raised constitutional issues of the gravest character.* * * * To suggest that because the Communist Party may also sponsor peaceable political reforms the constitutional issues before us should now be judged as if that Party was just an ordinary political party from the standpoint of national security, is to ask this Court to blind itself to world affairs which have deter-

mined the whole course of our national policy since the close of World War II * * *. [Emphasis added.][29]

(c) *In the light of the evil, the registration requirement does not invalidly restrict free speech, press, or association*

In the survey we have given of the cases in which the Court upheld legislation touching upon the constitutionally protected areas of political association and expression of ideas (*supra*, pp. 88–92, 99–100), "disclosure" cases are prominent. *United States* v. *Harriss*, 347 U.S. 612, 625 (Registration of Lobbying Act); *Burroughs* v. *United States*, 290 U.S. 534 (Federal Corrupt Practices Act); *Lewis Publishing Co.* v. *Morgan*, 229 U.S. 288 (ownership-disclosure requirements of the postal laws); *Bryant* v. *Zimmerman*, 278 U.S. 63 (New York Anti-Klu-Klux-Klan statute); cf. *Viereck* v. *United States*, 318 U.S. 236 (Foreign Agents Registration Act).

The basic rationale underlying all these decisions is that it is in the interest of both free speech and free association that Congress and the public be adequately and correctly informed, at least where the dangers stemming from non-disclosure are serious. As Mr. Justice Black, with whom Mr. Justice Douglas concurred, stated with respect to the Foreign Agents Reg-

[29] The Court distinguished the *Sweezy* case on the ground that there the witness had not been shown to be connected with the Communist Party. Inquiry into a witness' connection with the Progressive Party and the content of a lecture "is a very different thing from inquiring into the extent to which the Communist Party has succeeded in infiltrating into our universities, or elsewhere, persons and groups committed to furthering the objective of overthrow." 360 U.S. 129.

istration Act in his dissenting opinion in *Viereck* v. *United States*, 318 U.S. 236, 251: [30]

> Resting on the fundamental constitutional principle that our people, adequately informed, may be trusted to distinguish between the true and false, the bill is intended to label information of foreign origin so that hearers and readers may not be deceived by the belief that the information comes from a disinterested source. Such legislation implements rather than detracts from the prized freedoms guaranteed by the First Amendment.

See also *United States* v. *Peace Information Center*, 97 F. Supp. 255 (D. D.C.). Similarly, in *Harriss* the Court pointed out (347 U.S. at 625–626) the importance of disclosure of facts where a serious evil grows out of secrecy or nondisclosure.[31]

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[30] The constitutionality of the Foreign Agents Registration Act was not challenged in the *Viereck* case, either in the court of appeals. (*Viereck* v. *United States*, 130 F. 2d 945 (C.A. D.C.), reversed, 318 U.S. 236; *Viereck* v. *United States*, 139 F. 2d 847 (affirming conviction following retrial), certiorari denied, 321 U.S. 794), or in this Court. This Court's reversal of Viereck's first conviction was based on grounds not material here.

[31] In addition to judicial approval, the principle of registration and disclosure has been widely recognized by legal writers as a constitutional and desirable remedy against potential abuses of political freedoms. See, *e.g.*, *To Secure These Rights*, Report of the President's Committee on Civil Rights (1947), p. 164; Smith, *Democratic Control of Propaganda Through Registration and Disclosure*, 6 Pub. Opin. Quart. 27 (1942); Institute of Living Law, *Combating Totalitarian Propaganda: The Method of Suppression*, 37 Ill. (Northwestern Univ.) L. Rev. 193, 213; Ernst and Katz, *Speech: Public and Private*, 53 Colum. L. Rev. 620, 626; Nutting, *Freedom of Silence: Constitutional Protection Against Governmental Intrusions in Political Affairs*, 47 Mich. L. Rev. 181, 204–213.

In light of our knowledge of the world Communist movement and of the evil to be faced (*supra*, pp. 46–65, 94–100), there would seem to be little doubt that this device of registration and disclosure can properly be applied to the Communist Party, now that it has been found, after full hearing, to be directed and controlled by the Soviet Union and to be operating primarily to advance the objectives of the world Communist movement. See Sutherland, *Freedom and Internal Security* (1951), 64 Harv. L. Rev. 383, 406–407. Congress, on the basis of extensive investigations over a period of many years (*supra*, pp. 50–54, 62), had concluded that much of the danger from Communist activity in the United States is the result of its secrecy. Registration, which means in effect disclosure, was, therefore, an obviously reasonable method of coping with this grave problem. If the leaders of the Communist Party may be imprisoned for conspiring to advocate the overthrow of the Government by force and violence (*Dennis* v. *United States*, 341 U.S. 494), certainly the Party itself may be compelled to register and disclose its officers, members, funds, and operations. Whatever diminution of the Party's influence or effectiveness results from this publicity—including a possible falling-off in its "peaceful" and "non-seditious" activities—is a valid consequence of the Government's and the public's right to be informed about this particular organization's activities and connections. Its seditious connection with the Soviet Union plainly warrants the kind of disclosure Congress has required. See also

*infra*, pp. 172–184, for further discussion in connection with the "labeling" sanction.[32]

Petitioner, however, contends (Br. 30–33) that the Act suppresses organizations which advocate peaceful change in the American form of government. In actuality, the Act (Section 3(3)) requires the Board, in order to determine an organization to be a "Communist-action organization," to find that the organization "is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 * * *, and * * * operates primarily to advance the objectives of such world Communist movement as referred to in Section 2." Section 2 describes the purpose of the World Communist movement as, "by treachery, deceit, infiltration * * * espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship * * * throughout the world" (Section 2(1)). On the basis of overwhelming evidence (see *infra*, pp. 233–263), the Board concluded that petitioner came within this definition of a "Communist-action organization" (R. 2644).

Thus, contrary to petitioner's contention, it is clear that this Act does not attempt to suppress, regulate, or even require disclosure from organizations whose purpose is merely peaceful change in our form of government or which merely intend to advocate unlawful

[32] While Section 8, requiring individuals to register in certain circumstances, is not at issue in this case (see *infra*, pp. 126–127), the same considerations support the constitutionality of this provision as the requirement for organizations to register.

means sometime in the future (see Pet. Br. 31). Rather, it requires disclosure from organizations, like petitioner, whose *present activity* is for the purpose of advancing the objectives of the world Communist movement, including as probably its most important goal the overthrow of the Government of the United States by illegal means. While much or even all of such organizations' activities may be peaceful and not in violation of any criminal law at a particular time, we submit that Congress has the constitutional power to require disclosure from such organizations which are actively working for overthrow of the Government and which, together with the world Communist movement as a whole, produce a grave danger that their purpose will be achieved. And even if some of the disclosure requirements of the registration provisions (such as the demand for membership list) may be thought to be invalid, the separability clause of the Act would sustain the membership registration provisions.

Petitioner relies on *Yates* v. *United States*, 354 U.S. 298 (Br. 31, 32) in contending that the Act is invalid because it fails to require a finding of present incitement to forcible action.[33] It relies on *De Jonge* v. *Oregon*, 299 U.S. 353, and *Herndon* v. *Lowry*, 301 U.S. 242 (Br. 34, 35), in claiming that, even when an organization is engaged in such illegal activity, its right to engage in legal activity, such as peaceable assembly and advocacy, cannot be abridged. These criminal cases, however, are plainly inapposite. First, the re-

[33] *Yates* required such a finding under the Smith Act on the basis of statutory construction in order to avoid a serious constitutional issue. This Court made clear that it was not deciding the constitutional issue. 354 U.S. at 319.

istration provisions of the Subversive Activities Control Act impose no criminal punishment for any action—let alone for speech or advocacy—except for refusing to comply with a final order to register. Thus, the Act involves the less serious "restraint" of registration and disclosure (see *supra,* pp. 93–94). Secondly, the criminal cases which petitioner cites involved prosecutions directly based on speech or assembly which the First Amendment directly protects. In contrast, this Act requires registration of an organization when it is both under foreign Communist domination and the activities are intended to serve the purposes of the world Communist movement including overthrow of the Government of the United States. While such activities may incidentally include speech protected by the First Amendment, this speech is not the basis for requiring the organization to register. Thus, unlike in the criminal cases, whatever restraint does result from the requirement of registration is the indirect result of a statute directed toward a broader and dangerous problem. And as we have shown (pp. 88–92), this Court has constantly applied a very different standard to legislation claimed to impose such an indirect restraint on speech.

These distinctions between criminal prosecutions and the considerably lesser and more indirect restraint of registration and disclosure doubtless explain why the clear and present danger test has never been considered applicable to the latter type of case. Thus, none of the disclosure and registration cases decided by this Court which are cited above (p. 100) even mentions this standard. But even if it were in fact applicable, it is clear that petitoner—hav-

i' been found to be controlled by the Soviet Union and to be operating primarily to advance the objectives of the world Communist movement including the establishment of totalitarian dictatorships throughout the world—constitutes a clear and present danger. Indeed, Congress found such a clear and present danger in 1950 on the basis of its own extensive investigation (Section 2(15)). This determination can hardly be considered unreasonable since Judge Learned Hand likewise found a clear and present danger resulting from the Communist conspiracy in the United States as of 1948 (*United States* v. *Dennis*, 183 F. 2d 201 (C.A. 2), affirmed, 341 U.S. 494) and this Court has itself repeatedly emphasized the great danger (see *supra*, pp. 96–100). As the court of appeals held, "The activities of a world Communist movement such as that described in this statute and of organizations in this country devoted to its objectives constitute a clear and present danger within any definition of the point at which freedom of speech gives way to the requirements of government security" (R. 2088–2089).

*Thomas* v. *Collins*, 323 U.S. 516, on which petitioner also relies (Br. 40, 41), dealt with the wholly different problem of a state requirement that individuals register as a condition of exercising their normal right to make lawful public speeches enlisting support for a lawful and peaceful movement. The Court made clear that the vice of the statute was that the requirement was imposed directly on speech rather than on activities which might incidentally include speech (323 U.S. at 540):

> Once the speaker goes further, however, and engages in conduct which amounts to more than the right of free discussion comprehends, as when he undertakes the collection of funds or securing subscriptions, he enters a realm where a reasonable registration or identification requirement may be imposed.

Moreover in *Thomas* v. *Collins,* there was no problem of sedition, subversion, or of a domestic organization controlled by a foreign dictatorship and dedicated to forcible overthrow of this Government. See Sutherland, *Freedom and Internal Security* (1951), 64 Harv. L. Rev. 383, 403–404.

2. *Neither the registration provisions of the Act nor the Board's order violates the Fifth Amendment's prohibition against compulsory self-incrimination*

Petitioner also urges (Br. 44–50) that the registration provisions of the Act, as well as the order under review directing it to register, violate the Fifth Amendment's prohibition against compulsory self-incrimination by forcing the officer of petitioner who signs the registration statement to "admit his membership in the Communist Party and an 'intimate knowledge of its workings' " (Br. 44).

(a) *The present case is not a proper vehicle for the litigation of the self-incrimination issues*

Assuming *arguendo* that the officer or officers who will eventually have the duty to effect the registration of petitioner will be personally privileged to decline to do so, or at least to assert and litigate a claim of privilege, that fact does not render either

the registration provisions of the Act or the registration order invalid. At the present time, the self-incrimination issue is entirely hypothetical since no officers have been called upon to register.

*(i) The privilege against self-incrimination applies only to natural individuals, of whom there is none before the Court at this time*

It is settled that the privilege against self-incrimination "is essentially a personal one, applying only to natural individuals." *United States* v. *White*, 322 U.S. 694, 698. It may be invoked neither by a corporation (*Wilson* v. *United States*, 221 U.S. 361; *Essgee Co.* v. *United States*, 262 U.S. 151, 155–156; *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 205; *Curcio* v. *United States*, 354 U.S. 118, 122) nor by an unincorporated organization or association such as petitioner. *United States* v. *White*, *supra*, 322 U.S. at 699. The order under review is directed against petitioner alone, not against any natural individual, and petitioner alone is before the Court at this time. While it is true that artificial entities such as corporations and unincorporated associations can act only through individuals, sight must not be lost of the simple fact that only natural individuals are protected by the privilege and no such individual is a party to this case.

*(ii) The privilege against self-incrimination must be explicitly claimed and no such claim has thus far been made*

The privilege against self-incrimination is a privilege which must be personally and explicitly claimed. *Quinn* v. *United States*, 349 U.S. 155, 162;

*Emspak* v. *United States*, 349 U.S. 190, 194; *Rogers* v. *United States*, 340 U.S. 367, 370; *Smith* v. *United States*, 337 U.S. 137, 150; *United States* v. *Monia*, 317 U.S. 424, 427; *United States* v. *Murdock*, 284 U.S. 141, 148; *Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 113. "A witness' privilege against self-incrimination," as Judge Bazelon himself stated in an opinion rendered prior to his dissent below, at an earlier stage of this case (see *supra*, p. 5), "must be claimed personally, at the time the alleged incriminating questions are propounded, not before they are asked at all" (*Communist Party of the United States* v. *McGrath*, 96 F. Supp. 47, 52 (D. D.C.) (concurring opinion), stay denied, 340 U.S. 950). It is "merely an *option of refusal*, not a prohibition of inquiry." 8 Wigmore, *Evidence* (3d ed., 1940), § 2268.

There has been no claim of privilege thus far, and, as the court below observed (R. 2096–2097), there may never be one. Since this Court does not anticipate constitutional issues (*Peters* v. *Hobby*, 349 U.S. 331, 338), petitioner's attempt to litigate the self-incrimination issue in this case, before it is raised, would clearly seem to be premature. Cf. *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U.S. 419, 443. The question of the availability of the privilege to an officer or officers of petitioner will not arise until the order of the Board becomes final and the duty to bring about petitioner's registration comes into being. If at that time a privilege is claimed, it can then be litigated.

Petitioner argues (Br. 44–45, 48–49), however, that the principle requiring that the privilege be claimed to be enjoyed is inapplicable in a proceeding of this type because the Act gives the organization's officers no opportunity to claim the privilege. This contention is untenable. The Act provides a thirty-day period after a registration order becomes final within which to effect registration (Section 7(c)(3)) before criminal liability under Section 15(a) for failure to register is incurred. We believe that that is the period during which an officer of petitioner having the duty to effect petitioner's registration, who desires to claim the privilege, should do so. As for the tribunal before which the claim should be made, we believe that *United States* v. *Sullivan*, 274 U.S. 259, provides the answer. In that case the Court held that a taxpayer should make his claim of privilege respecting his sources of income in the tax return itself if necessary. So here, by analogy, the privilege could be claimed on the registration form required to be filed with the Attorney General. See also *infra*, pp. 121–125.

In claiming that the privilege need not be asserted under these circumstances, petitioner (Br. 48–49) and the dissenting judge below (R. 2161–2162) relied on *Boyd* v. *United States*, 116 U.S. 616, as authority. That decision, however, invalidated a statute which presented to a suspected violator of the revenue laws the alternative of either (1) producing his private books and records in refutation of charges alleged by the Government to be based on what those books and records would show or (2) suffering the charges

to be taken as confessed."[34] The statute did not contemplate that the suspected violator could be excused from producing his books and records by a claim of the privilege against self-incrimination.

In the context of such a statute, a claim of privilege would have been quite meaningless. For this reason it is not surprising that nowhere in this Court's opinion is there any discussion of the necessity that the privilege against self-incrimination be specifically claimed as a prerequisite to its judicial consideration—the feature of self-incrimination cases so prominently mentioned in all the later cases (see *supra*, pp. 108–109). The statute was held void as *necessarily* conflicting with the privilege. In the case at bar, on the other hand, there is no reason to believe that a valid claim of privilege will or must be rejected, and certainly this Act, unlike the statute in *Boyd*, does not deny the privilege to a person who could validly

[34] The statute provided in pertinent part as follows: "In all suits and proceedings other than criminal arising under any of the revenue laws of the United States, the attorney representing the government, whenever in his belief any business book, invoice, or paper belonging to, or under the control of, the defendant or claimant, will tend to prove any allegation made by the United States, may make a written motion, particularly describing such book, invoice, or paper, and setting forth the allegation which he expects to prove; and thereupon the court * * * may, at its discretion, issue a notice to the defendant or claimant to produce such book, invoice, or paper in court * * *; and if the defendant or claimant shall fail or refuse to produce such book, invoice, or paper in obedience to such notice, the allegations stated in the said motion shall be taken as confessed, unless his failure or refusal to produce the same shall be explained to the satisfaction of the court. * * *" (116 U.S. at 619–620).

claim it. In other words, the *Boyd* statute flatly denied the privilege to one who could properly claim it and wished to do so; the Act involved here does no such thing.

Furthermore, as was pointed out by the court below (R. 2100–2101), the *Boyd* case dealt with personal, private papers—a fact on which the *Boyd* opinion laid great emphasis (116 U.S. at 622, 623, 624, 630, 633, etc.) and which was, as the court below said, "a key to the decision" (R. 2100). In all the later cases in which *Boyd* is discussed, this Court has emphasized that feature of the case. See, *e.g.*, *Wilson* v. *United States*, 221 U.S. 361, 377; *Essgee Co.* v. *United States*, 262 U.S. 151, 158; *Nathanson* v. *United States*, 290 U.S. 41, 47; *United States* v. *White*, 322 U.S. 694, 699; *Shapiro* v. *United States*, 335 U.S. 1, 33. Here, on the other hand, the books and records which would reflect the data to be included in the registration statement are not personal but organizational records—the distinction which forms the very basis of this Court's decision in *United States* v. *White*, *supra*, 322 U.S. 694 (see *supra*, p. 108; *infra*, pp. 121–125).

*(iii) It cannot be assumed that a claim of self-incrimination will inevitably be made or, if made, that it must necessarily be honored*

There are several reasons why it cannot justifiably be assumed at this time that a substantial claim of privilege will inevitably be made and be required to be honored when petitioner is confronted by the statutory requirement that it register.

a. That it should not be assumed that a claim of privilege will inevitably be made is shown by the prior

history of this very case. In 1951, following the Attorney General's filing with the Board of his petition for an order directing registration, petitioner sought in the United States District Court for the District of Columbia to enjoin the Attorney General from proceeding further. The requested injunction was denied by a statutory three-judge court. *Communist Party of the United States* v. *McGrath*, 96 F. Supp. 47, stay denied, 340 U.S. 950. Judge Bazelon, who dissented below, was one of the members of the three-judge court. As pointed out by Judge Bazelon in his concurring opinion in the injunction proceeding (96 F. Supp. at 50), and recalled in his original dissent below (R. 2163, fn. 39), one of the grounds urged by petitioner for enjoining hearings before the Board was that its defense before the Board required the filing of an answer and the giving of testimony by its officers and that, since "such testimony would necessarily entail their admission of Community Party affiliations" (R. 2163, fn. 39), such officers "will not appear for fear of self-incrimination or, if subpoenaed, will invoke their privilege and, as a result, the Party's defense will necessarily fail" (96 F. Supp. at 50). Notwithstanding these representations, after the dismissal of its suit to enjoin the proceedings from which dismissal it did not appeal, officials of petitioner did appear and testify at the Board hearings (see R. 2650–2651).

This instance shows that the making of a future claim of privilege is never "inevitable," however

likely it may seem or be represented to be. Two of petitioner's three witnesses before the Board, John Gates and Elizabeth Gurley Flynn, voluntarily admitted on the witness stand that they were members of petitioner's governing body, the National Committee of the Communist Party (R. 1199, 1275). Assuming Mrs. Flynn still holds that office,[35] she will be among the persons having the duty to effect the registration of petitioner when the order directing such registration becomes final (28 C.F.R. § 11.205(d); see *infra*, p. 115, fn. 36). If she should hereafter invoke the privilege against self-incrimination as justification for refusing to register petitioner, it may well be rejected on the ground that she has waived the privilege by having taken the stand and voluntarily admitted her membership and high official position in petitioner. Cf. *Rogers* v. *United States*, 340 U.S. 367, 372–373. See the original opinion below, R. 2099.

*b.* In evaluating the merit or lack of merit of a claim of privilege which an officer of petitioner might hereafter advance, one of the fundamental principles is that the privilege in question is a privilege against *self*-incrimination. The claimant may not, under the guise of protecting himself against self-incrimination, seek to shield others. *Rogers* v. *United States*, *supra*, 340 U.S. at 371; *United States* v. *Murdock*, 284 U.S. 141, 148; *Hale* v. *Henkel*, 201 U.S. 43, 69; *Brown* v. *Walker*, 161 U.S. 591, 609.

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[35] She apparently does continue to hold that office since she was reelected in December 1959. She has also been recently elected Vice Chairman of the Communist Party and to the National Executive Committee. Gates, however, has resigned from the Party entirely.

Presumably, the basis of any future claim of privilege on the part of an officer of petitioner having the duty to effect the registration will be the tendency of his act of filing the required registration statement to incriminate him under the Smith Act (18 U.S.C. 2385). That is, it will be claimed by the officer required to file the statement that the very act of filing, even if he were to omit his own name from the membership list, would constitute an admission that he is a member and officer of petitioner, and thus furnish "a link in the chain of evidence" required to convict him under that Act. See Pet. Br. 44–45, citing *Patricia Blau* v. *United States*, 340 U.S. 159, 161. But, as the court below observed, the top officials of petitioner, who are the ones who will have the duty of filing the registration statement,[36] "have never attempted to conceal their membership or their places of leadership" (R. 2097). Hence, there is "no basis for assuming that they would claim protection against a mere revelation of their membership" (*ibid.*).

[36] Section 7(h) of the Act places the duty of effecting the registration of an organization required by Section 7 to register, and which fails to do so, on "the executive officer (or individual performing the ordinary and usual duties of an executive officer)," "the secretary (or individual performing the ordinary and usual duties of a secretary)," and such other "officer or officers * * * as the Attorney General shall by regulations prescribe." Under the regulations, the following additional officials share the registration duty with those named in the Act: (a) the president, chairman, or chief officer, by whatever title he is known; (b) the vice-president or vice-chairman; (c) the treasurer; and (d) members of the governing board, council, or body. 28 C.F.R. § 11.265.

Furthermore, the validity of a claim of privilege on their part would be on a different footing from a similar claim made by a person not publicly known as a Communist Party member or functionary if he were asked whether he is a member of petitioner. Cf. *Patricia Blau* v. *United States, supra,* 340 U.S. 159; *Irving Blau* v. *United States,* 340 U.S. 332; *Rogers* v. *United States, supra,* 340 U.S. at 372–373. It is a matter of common knowledge that each of the individuals who would have the duty of effecting petitioner's registration when the time comes, if petitioner should fail to register itself, is a member and high official of the Party. Many of them have already been prosecuted and convicted under the Smith Act without the benefit of any forced concessions on their part of membership in petitioner. *Dennis* v. *United States,* 341 U.S. 494; *United States* v. *Flynn,* 216 F. 2d 354 (C.A. 2), certiorari denied, 348 U.S. 909.[37] It is difficult to believe that a prosecutor, even assuming the Government might ever bring new criminal proceedings against them for violation of the Smith Act, would find it necessary to establish their membership and high official position in petitioner from the fact that they filed a registration statement under the Subversive Activities Control Act. The privilege against self-incrimination, as this Court has emphasized, "presupposes a real danger of legal detriment arising from the disclosure." *Rogers* v. *United States, supra,* 340 U.S. at 372–373. The protection afforded by the privilege

[37] All eleven of the defendants in *Dennis* and several of the thirteen defendants in *Flynn* were members of the National Committee of petitioner.

"must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. *Mason* v. *United States,* 244 U.S. 362, 365 (1917), and cases cited. The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination." *Hoffman* v. *United States,* 341 U.S. 479, 486.

To argue, as does petitioner, that for a member of petitioner's governing board to be required to perform an act which by implication establishes his membership in petitioner amounts to compulsory self-incrimination, when that person has never sought to conceal and indeed has many times conceded his membership, is too mechanical an application of the constitutional guaranty. To force an admission of membership from an obscure or concealed member of petitioner is one thing. See *Patricia Blau* v. *United States, supra,* 340 U.S. 159. To require, for example, the National Chairman of petitioner to effectuate petitioner's registration under the Act and thus, incidentally, to admit what he has never denied or attempted to conceal and what has been indisputably proved—that he is a member and officer of petitioner—is another. In the one case there is "a real danger of legal detriment arising from the disclosure" (*Rogers* v. *United States, supra,* 340 U.S. at 373); in the other, there is nothing of the sort.

Also relevant to the issue of the *bona fides* of the claim of privilege against self-incrimination, in addition to the considerations already mentioned, would

be the fact that, under the express terms of the Act, neither the holding of office nor membership in any Communist organization by any person shall constitute *per se* a violation of any criminal statute, and the registration of any person under the Act as an officer or member of any Communist organization may not be received in evidence against such person in any prosecution for any alleged violation of any criminal statute (Section 4(f)). While the latter provision is a limited and not an absolute grant of immunity against prosecution (cf. *Counselman* v. *Hitchcock*, 142 U.S. 547, with *Brown* v. *Walker*, 161 U.S. 591, and *Ullman* v. *United States*, 350 U.S. 422), it is nevertheless a pertinent factor to be considered in evaluating the merit or lack of merit of a claim of privilege, that is to say, the verity of the claimed fear of self-incrimination.

*c.* It is not our purpose to explore all the ramifications of the question of the possible privilege of an official of petitioner to refuse to effect petitioner's registration on the ground that to do so would tend to incriminate him. On the contrary, our position is, as we have stated, that this question is not in this case at this time and has been prematurely raised by petitioner. Our purpose has been therefore to refute petitioner's contention that (1) the claim is certain to be made eventually, and that (2) when made it must certainly be upheld, so that (3) it should in the interest of economy be settled in this case (4) in favor

of upholding the claim. We submit that it is clear from what has been said that the premises of this argument are untenable; it cannot justifiably be assumed in this case either that a claim of privilege is certain to be made as soon as the order becomes final, or that, if and when made, it will present a plain and simple issue which must be resolved in favor of the claimant.

*(iv) Even assuming that a claim of privilege will be made and must be honored, this would make the order to register at most unenforceable, not void*

Even if it be assumed that a claim of privilege will be made by each and every one of the officials of petitioner having the duty of effecting petitioner's registration (see *supra*, p. 115, fn. 36), and that such a claim must of necessity be upheld, this would not render either the registration provisions of the Act or the order of the Board invalid. The order to register should still be upheld in this proceeding. "[T]he utmost result," as the court below observed, "would be that the statute and order would be unenforceable" (R. 2100) whenever opposed by a valid claim of the privilege against self-incrimination. The distinction is important for at least three reasons. First, the nonenforceability of the order could be removed by a grant of immunity from prosecution for any offense of which a prospective registerer of petitioner might fear to incriminate himself. See *Brown* v. *Walker*,

161 U.S. 591; *Ullman* v. *United States*, 350 U.S. 422.[38] Second, the non-enforceability of the order to register would not affect the "sanctions" or disabilities which come into being when the order to register becomes final; these have a vitality separate and apart from the registration process and do not depend upon actual registration (see *supra*, pp. 77–82). Third, an important public function is served by the Board's finding that the petitioner is a Communist-action organization and should register, regardless of whether the registration can actually be effectuated; Congress desired to have the facts sifted and established by quasi-judicial proceedings, and then made known to the public (see *supra*, pp. 50–56). Thus, it is significant that Congress gave the Board the power, with regard to "Communist infiltrated" organizations, to make

[38] It is probable that such a grant of immunity would require a new statute. The court below suggested the possibility that immunity might be granted under 18 U.S.C. 3486(c), one of the immunity provisions of the Act of August 20, 1954, c. 769, Section 1, 68 Stat. 745 (see R. 2099–2100). It is true, as the court observed that "[u]nder that statute the courts have broad powers to grant immunity, upon application of the Attorney General, in proceedings before them involving violations of the statute here involved" (R. 2099). However, the immunity statute in question is limited by its terms to cases or proceedings "before any grand jury or court of the United States" involving the national security. This would seem to exclude the possibility of granting immunity in connection with the process of registering organizations with the Attorney General. But the fact that new legislation would probably be required to authorize the granting of immunity in connection with registration proceedings does not affect our argument that, because of the possibility of granting immunity, the order is not constitutionally invalid merely because it might not be enforceable without such a grant.

orders and findings determining the character of such organizations, without requiring them to register (see *supra*, pp. 83–84).

*(b) In any event, the officers of petitioner having the duty under the Act and regulations to effect the registration will not be personally privileged to refuse to do so.*

If the Court should reject our argument that it need not and should not now pass upon the issue of whether an officer of the Party can validly claim the privilege as a ground for not registering the Party, and should desire to determine that issue in this proceeding, our position would be that the privilege is not available to such officers.[39] In *United States* v. *White*, 322 U.S. 694, the Court held not merely that an organization or association cannot invoke the privilege against self-incrimination, but that an officer of an organization or association who has custody of its records, if called upon to produce them pursuant to a subpoena, may not lawfully refuse to do so even if they would tend to incriminate him personally. "[T]he papers and effects which the privilege protects," this Court said, "must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity. * * * But individuals, when acting as representatives of a collective group, cannot be said to be exercising their personal rights

[39] We are not quite sure how such a determination can be made without considerable information about all the particular officers who will be responsible, under the Act and regulations (*supra*, p. 115, fn. 36), for filing petitioner's registration statement. As we have shown above (pp. 114–117), many of petitioner's officers may be unable properly to claim the privilege since *in fact* there is no possibility that the disclosures from their filing the statement will incriminate them.

and duties nor be entitled to their purely personal privileges. Rather they assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by its obligations. In their official capacity, therefore, they have no privilege against self-incrimination. And the official records and documents of the organization that are held by them in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate them personally." *Id.*, p. 699. See also *Wilson* v. *United States*, 221 U.S. 361, 376–385; *Wheeler* v. *United States*, 226 U.S. 478, 489–490; *Essgee Co.* v. *United States*, 262 U.S. 151, 158; *Curcio* v. *United States*, 354 U.S. 118, 122–123.

The rationale of the *White* case is equally applicable, we submit, to the case at bar. Cf. Meltzer, *Required Records, The McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. of Chi. L. Rev. 687, 720. This Court has, in fact, specifically cited the *White* case as authority for the proposition that one of this very petitioner's officers on the local level—the Treasurer of the Communist Party of Denver—"had no privilege with respect to the books of the Party, whether it be a corporation or an unincorporated association." *Rogers* v. *United States*, 340 U.S. 367, 371–372.

Nor is the rationale of *White* inapplicable on the ground that in *White* physical records were in question, while the issue here is the compulsory submission

of a registration statement containing the names and addresses of officers and members of petitioner and an accounting of moneys received and expended. For, as the court below said, the data required to be contained in the registration statement "are reproductions of or extracts from organization records" (R. 2094). If the officer of petitioner having custody of its records, showing the names and addresses of its officers and members and the sources and modes of expenditure of its funds, may be required to submit those records pursuant to a subpoena *duces tecum*, notwithstanding his claim that they tend to incriminate him personally, it would be an exaltation of form over substance to hold that he may not be required to transpose such data to a registration form to be filed as required by the Act. Whether the records reflecting the required data "are kept formally or informally is immaterial," as the court below observed, since "[n]o additional explanatory testimony is required by this statute" (R. 2095).

Indeed, there is authority for the view that, to a limited extent, in cases where the compellability of the production of records is established, oral testimony "auxiliary to the production" may also be compelled as long as this testimony does not add substantially to the danger of self-incrimination. *See Curcio* v. *United States*, 354 U.S. 118, 125. For example, an officer who has been compelled to produce documents which incriminate him may also be required to identify the documents (*Lumber Products Ass'n* v. *United States*, 144 F. 2d 546, 553 (C.A. 9), reversed on other grounds *sub nom. United Brother-*

*hood of Carpenters* v. *United States*, 330 U.S. 395), to testify as to their genuineness (*United States* v. *Austin-Bagley Corporation*, 31 F. 2d 229, 234 (C.A. 2), certiorari denied, 279 U.S. 863; *United States* v. *Daisart Sportswear*, 169 F. 2d 856, 861–862 (C.A. 2), reversed on other grounds *sub nom. Smith* v. *United States*, 337 U.S. 137) or to explain incomplete, illegible, or abbreviated entries (*Fleming* v. *Silverman*, 7 F.R.D. 29, 31 (N.D. Ill.); cf. *Porter* v. *Heend*, 6 F.R.D. 588, 589–590 (N.D. Ill.)).[40]

Judge Bazelon, dissenting below, attempted to distinguish the *White* case on the ground, among others, that the officer executing a registration statement is required to do more than produce records of the organization he is registering; that is, he is required to prepare a statement containing data which may or may not be entirely contained in the organization's records (R. 2159–2160). To the extent that any re-

[40] In *Curcio* v. *United States*, *supra*, 354 U.S. 118, this Court reversed the contempt conviction of a witness who had refused to testify as to a union's records, of which he was the custodian. The Court, however, distinguished several of the cases cited above (*id.*, p. 125):

"* * * The custodian's act of producing books or records in response to a subpoena *duces tecum* is itself a representation that the documents produced are those demanded by the subpoena. Requiring the custodian to identify or authenticate the documents for admission in evidence merely makes explicit what is implicit in the production itself. The custodian is subjected to little, if any, further danger of incrimination. However, in the instant case, the Government is seeking to compel the custodian to do more than identify documents already produced. * * * Answers to such questions are more than 'auxiliary to the production' of unprivileged corporate or association records."

quired data might not be reflected in the records, he pointed out, the officer is required to rely on his own personal knowledge, and if he has to rely on his own personal knowledge, the information he supplies is to that extent "forced from [his] lips * * *, rather than obtained from the records" (R. 2160). But the argument that, because some of the information called for in a statement required to be filed may be privileged, no statement at all need be filed has been specifically rejected by this Court. See *United States* v. *Sullivan*, 274 U.S. 259. There, the Court held that the fact that some of the answers called for on an income tax return form may be incriminating does not excuse a failure to file any return at all, the proper course being to file a return and claim the privilege, where the facts warrant, with respect to specific questions. Similarly with respect to a registration statement, even if it be assumed that the registering officer has a privilege with respect to called-for data not found in the organization's records, he would be required to file as complete a statement as possible based on the records, and claim his privilege with respect to the rest.[21]

[21] Thus, for example, if the filing official were known by more than one name and he feared that the listing of his aliases would tend to be self-incriminatory for some reason (see R. 2101), he could claim the privilege with respect to his own aliases, though, as the court below indicated (*ibid.*), he could *not* do so with respect to the aliases of others.

*(c) The validity of the personal registration requirements of Section 8 is not in issue since no individual member of petitioner has been required to register and none is before the Court*

The court below was obviously correct in holding that the validity of the personal registration requirements of Section 8 of the Act is not presented in this case (R. 2101–2102). As already noted, that section provides, first, that individual members of Communist-action organizations must register personally as members if their organization has been finally ordered to register and fails to do so (Section 8(a)), and, secondly, that if a Communist-action organization registers but fails to include the names of all its members on the membership list it files, the members whose names are omitted must register themselves as members (Section 8(b); see *supra*, pp. 74–75). Section 8 is thus "an alternate, rather than an attachment, to the registration of the organization. As such it poses a separate and independent problem from that posed by the requirement for organization registration. To reach the problem posed under Section 8 we would have to assume that the Party will not register if it is finally ordered to do so, or that if it registers its membership list will be incomplete. But we cannot make such assumptions" (R. 2102). Self-incrimination questions pertaining to the personal registration requirements of Section 8 are thus even more premature than those pertaining to the organizational registration requirements of Section 7. They are

hypothetical questions which may never arise in justiciable form. The Act, moreover, contemplates the institution of proceedings before the Board, culminating in an order, subject to full judicial review, directed to an individual and ordering him to register, as the exclusive means of enforcing Section 8 (see Sections 13 (a), (c), (d), (g)(2), 14 (a), (b), 15(a)(2); and see *supra*, pp. 75, 77). For these reasons, the personal registration provisions of Section 8 are plainly not before the Court. Cf. *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U.S. 419, 443.

*3. The registration provisions are in accord with due process*

Petitioner challenges the registration provisions of the Act as violative of due process in a number of respects (Br. 50–62, 72–95), none of which, we submit, has merit.

*(a) The Act does not predetermine petitioner's liability to registration*

Petitioner first urges (Br. 56–62) that "[t]he Act violates due process because it predetermines facts essential to a finding that petitioner is a Communist-action organization" (Br. 56). Thus, it is claimed, the due process requirement of a hearing is denied. Petitioner's argument, however, is founded on an unwarranted oversimplification of the Act's terms. It seeks to ignore, or unjustifiably to discount, the importance of crucial language in the Section 3(3) definition of a "Communist-action" organization.

(*i*) Under the definition of Section 3(3), a domestic organization which is not "substantially directed, dominated, or controlled" by the foreign government or foreign organization controlling the world Communist movement, *or* which does not "operate primarily to advance the objectives" of that movement, is not a "Communist-action organization" and is not subject to the registration and other provisions of the Act, regardless of how "communistic" its philosophy might be, or how deep might be its bounds of sympathy and kinship with the foreign government or organization. Both requirements, it is to be observed, must be fulfilled for the definition to apply. Either alone is insufficient.

It is therefore entirely without warrant to assert, as petitioner does, that the Board had no real function to perform so far as petitioner was concerned, or that it was, and was meant by Congress to be, no more than a "rubber-stamp" designed to place a predetermined label on petitioner. See *Communist Party of the United States* v. *McGrath*, 96 F. Supp. 47, 50 (Judge Bazelon concurring). That Congress may have confidently believed, on the basis of evidence adduced at Congressional hearings, that petitioner would fall within the definition of Section 3(3) is of no moment so far as the requirements of due process are concerned. Congress supposes in the case of many of the statutes it passes that specific organizations or persons will be subject to their terms. As the court below observed, "A statute is not necessarily null

merely because it fits a known person. Many valid statutes do" (R. 2117).

The important point is that Congress required proof of the two fundamental operative facts, referred to above, by a preponderance of the evidence in proceedings before the Board, and made the Board's findings subject to judicial review, before the obligation to register or any other requirement of the Act could become effective. The Congressional findings as to the existence of a world and an American Communist movement do not make the Act operative against petitioner. Further crucial findings were required to be made, on proof, before that could occur, *viz.*, that petitioner is substantially dominated and controlled by the foreign government or organization controlling the world Communist movement *and* is operating primarily to advance the objectives of that movement.

The decisions cited by petitioner (Br. 56), of which *Tot* v. *United States*, 319 U.S. 463, is representative, do not aid petitioner's argument. These cases concern the validity of statutory presumptions under the due process clause. They hold that, in the language of *Tot*, "a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience" (*id.*, pp. 467–468). But, as we have just pointed out and as observed by the court below (R. 2120), the Subversive Activities Control Act creates no statutory presumptions in this con-

nection. Rather, the Act provides freely for trial of the two issues, stated above, which were left to the Board. We point out below (*infra*, pp. 139–140) that the eight factors listed in Section 13(e) do not constitute statutory "presumptions."

(*ii*) Furthermore, due process does not require, as petitioner contends, that the legislative findings of Section 2 be the subject of redetermination in the quasi-judicial proceedings before the Board (Br. 56–61). This argument confuses two sets of facts—the *legislative* facts, or those facts which the legislature itself found after investigation to exist and to require the legislative action taken, and the *adjudicative* facts which, on proof in adversary litigation, bring a specific person or organization within the purview of the legislation, or otherwise make the general terms of the legislation specifically applicable. See McCormick, *Judicial Notice*, 5 Vand. L. Rev. 296, 315–318; *Davis, Official Notice*, 62 Harv. L. Rev. 537, 549–560.

Legislative facts are general conclusions which support the policy of a particular law, and can be attacked only by showing that Congress acted arbitrarily or unreasonably or beyond its delegated powers. *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 465–466; *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152–153. The facts on which the legislature acted can frequently be the subject of judicial notice; in other cases the courts may make inquiry to determine whether there is a reasonable basis for the legislative action. *United States* v. *Carolene Products Co., supra*, 304 U.S. at 153:

*Borden's Farm Products Co.* v. *Baldwin,* 293 U.S. 194, 209–210; *Chastleton Corp.* v. *Sinclair,* 264 U.S. 543, 547–548; see McCormick, *Judicial Notice,* 5 Vand. L. Rev. 296, 316–317. But, at most, the inquiry is as to whether the legislature has acted reasonably.

Here, Congress recorded in Section 2 the basis for its action, the threat to the United States presented by the Communist movement. The existence of that threat and of that movement are recognized facts of modern history. See *supra,* pp. 46–61. Congress cannot be accused of irrationality in taking account of them. Cf. *Barenblatt* v. *United States,* 360 U.S. 109, 127–129, and the other cases cited *supra,* pp. 96–100. Due process in adversary proceedings, whether before courts or quasi-judicial bodies like the Board, does not require formal proof of these basic facts of which Congress took official notice. The existence of the Communist movement and the fact that it is a threat to this nation's security are, therefore, no more subject to litigation in a particular proceeding under the Act than would be, for example, the fact that much of the world was at war between 1941 and 1945 or that the nation and the world were suffering from severe economic dislocations in the early 1930's.[42] Cf. McCormick, *Judicial Notice,* 5

[42] The latter example suggests a hypothetical analogy to the statute at bar. Suppose that Congress, during the depression of the 1930's, passed an act which found as a fact, among other things, that there existed a world-wide economic depression, having certain described characteristics, which was severely affecting the nation's economy. Suppose further that the act established a regulatory agency with the power, under the guidance of appropriate standards, to control or regulate cer-

Vand. L. Rev. 296, 313, 315–318. In short, these legislative findings in Section 2 are "[t]he reasons for the exercise of power" by Congress. *Carlson* v. *Landon*, 342 U.S. 524, 535. And as this Court said with respect to these very findings, in *Galvan* v. *Press*, 347 U.S. 522, 529:

> On the basis of extensive investigation Congress made many findings, including that in § 2(1) of the [Subversive Activities Control] Act that the "Communist movement * * * is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship," and made present or former membership in the Communist Party, in and of itself, a ground

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tain types of business activity which were found on the basis of evidence to have a substantial tendency to deepen the world and national economic crisis by further depressing interstate and foreign commerce. Could a person or company liable to be affected by an order of such an agency demand the right to seek to prove before it that there was no world-wide economic depression of the type described in the Congressional findings? Or that, if there was, it was not affecting the domestic economy in the manner found by Congress? We submit that there is nothing in any valid concept of due process which could properly be construed to require that every person or company involved in a proceeding before such an agency be granted a hearing in which to attempt to convince it that these basic legislative findings of Congress were erroneous. This is so, we maintain, notwithstanding that the adjudicative findings of the agency would assume the facts incorporated in the legislative findings in precisely the same sense in which the adjudicative findings of the Board in this case assume the facts stated in the legislative findings of Section 2 of the Act.

for deportation. Certainly, we cannot say that this classification by Congress is so baseless as to be violative of due process and therefore beyond the power of Congress.

(*iii*) The fact that Section 4 of the Communist Control Act of 1954 refers to petitioner by name as a "Communist-action" organization under the Subversive Activities Control Act (see Pet. Br. 62) does not aid petitioner's basic contention on this point. Since the Communist Control Act was passed long after the termination of the original proceedings before the Board, it is evident that that Act's designation of petitioner by name could not have influenced the Board's original findings. At most, it amounted to Congressional approval of and concurrence in the Board's decision. And the Board's reaffirmation of the earlier findings in its Modified Report did not even consider the characterization of petitioner in the Communist Control Act. Instead, that decision, as we have pointed out (*supra*, pp. 128–130), was required to be based—and was in fact entirely based (see *infra*, pp. 212–221)—upon judicially reviewable proof that petitioner came within the Section 3(3) definition of a Communist-action organization.

(b) *The Act does not establish a Board which is "necessarily biased" against petitioner*

Related to the previous contention is petitioner's further argument (Br. 74–79) that "[t]he Act violates due process by establishing a Board which is necessarily biased and has an interest in the event" (Br.

74) because to sustain its *raison d'etre* it would have to find the Communist Party to be within the Act. What petitioner in effect is charging is that the structure and scheme of the Act are such that it would be impossible to staff the Board with members who would not enter upon their duties with the intention of violating their oaths of office. This Court has refused to impute, on the theory of constructive bias, a dishonest or interested point of view to government employees sitting as jurors in cases to which the Government is a party (*Frazier* v. *United States,* 335 U.S. 497; *United States* v. *Wood,* 299 U.S. 123), including criminal prosecutions of admitted Communists of high position (*Dennis* v. *United States,* 339 U.S. 162). There is no more reason to believe members of the Board would violate their oaths in a proceeding under this Act by determining to find petitioner registerable as a Communist-action organization, irrespective of the Act's definition of the term and regardless of what the evidence might show.

This Court has said, "We cannot agree that courts should assume in advance that an administrative hearing may not be fairly conducted." *Fahey* v. *Mallonee,* 332 U.S. 245, 256; see also *Federal Trade Commission* v. *Cement Institute,* 333 U.S. 683, 700–703; *National Labor Relations Board* v. *Air Associates,* 121 F. 2d 586 (C.A. 2). This is especially true where full opportunity for judicial review is afforded by the Act (see *Fahey* v. *Mallonee, supra,* 332 U.S. at 256; *Marquette Cement Mfg. Co.* v. *Federal Trade Com-*

*mission*, 147 F. 2d 589, 594 (C.A. 7)), and even more particularly where, as here, the standard of review is the strict "preponderance of the evidence" standard (see R. 2126; *infra*, p. 137, fn. 43). A full and fair hearing was in fact afforded in this case, and the Board's findings (except one (see *infra*, pp. 276–283)) and conclusions were upheld by the court of appeals as sustained by the preponderance of the evidence. The court below is surely not subject to the charges made against the Board.

Nor do we believe that petitioner's allegations (Br. 78) as to bias in two particular members of the Board are nearly sufficient to disqualify them. In any case, neither of them participated in the Modified Report or the Modified Report on Second Remand which is the subject of this review. Thus, these allegations have no present relevancy.

*(c) The Act does not authorize a determination that an organization is a Communist-action organization on the basis of irrational or vague criteria or presumptions*

Petitioner next contends (Br. 79–88) that "[t]he Act violates due process because of its vague and irrational standards" as to what constitutes a Communist-action organization (Br. 79).

*(i) The standards laid down by Congress in Sections 3(3) and 2 provide a sufficiently clear delegation of power.*

In its original brief in this Court, petitioner conceded that "the ultimate standards established by section 3(3) are definite and meaningful" (1955 Br. 53). At present, however, it contends that, while the control component of Section 3(3) is a "reasonably

definite and meaningful standard," the objectives component is "vague" (Br. 85). Petitioner points out that Section 3(3) defines a Communist-action organization as under foreign control and as operating "primarily to advance the objectives of [the] world Communist movement as referred to in section 2" and argues that "section 2 is thoroughly ambiguous and vague as to the nature of these objectives" (Br. 79; see Br. 30–31). Since petitioner failed to make this claim when it was first before the Court—and in fact conceded the contrary—it cannot resurrect the claim after the remand (see *infra*, pp. 283–287).

In any event, Section 2 spells out in considerable detail the objectives of the world Communist movement. Thus, it states that the movement's "purpose * * * is, by treachery, deceit, infiltration * * *, espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship * * * throughout the world" (Section 2(1)). Section 2 (2) and (3) then describes a "totalitarian dictatorship":

> (2) The establishment of a totalitarian dictatorship in any country results in the suppression of all opposition to the party in power, the subordination of the rights of individuals to the state, the denial of fundamental rights and liberties * * *, such as freedom of speech, of the press, of assembly, and of religious worship, and results in the maintenance of control over the people through fear, terrorism, and brutality.
>
> (3) The system of government known as a totalitarian dictatorship is characterized by the

existence of a single political party, organized on a dictatorial basis, and by substantial identity between such party and its policies and the government and governmental policies of the country in which it exists.

We submit that the standards of Sections 3 (3) and 2 are sufficiently clear. First, it is important that the Board's findings are subject to judicial review by the court of appeals. Since the Board's determinations are conclusive only if supported by the preponderance of the evidence (Section 14(a)), the reviewing court has considerably broader powers than is usual in considering determinations of administrative agencies.[13] Thus, the Board's discretion under the standards laid down by Congress is far from unfettered. See *Carlson* v. *Landon*, 342 U.S. 524, 543; *American Power Co.* v. *Securities and Exchange Commission*, 329 U.S. 90, 105–106.

Second, this Court has allowed Congress great latitude in delegating power to administrative agencies on the basis of standards more general and undefined than that involved here. In *American Power Co.* v. *Securities and Exchange Commission, supra*, 329 U.S. at 104–105, the Court held constitutional a provision giving the Commission power to insure that the corporate structure of a holding company system does not "unduly or unnecessarily complicate the structure" or "unfairly or inequitably distribute voting power

[13] The usual rule is that the finding of the administrative agency, if "supported by substantial evidence" shall be final. See Administrative Procedure Act, Section 10(e), 5 U.S.C. 1009(e)(5); National Labor Relations Act, as amended, 29 U.S.C. 160(e).

among security holders." The Court stated (*id.*, p. 105):

> The legislative process would frequently bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation. Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules; it then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. * * *

Similarly, in *Sunshine Coal Co.* v. *Adkins*, 310 U.S. 381, 399–400, the Court said:

> The fact that many instances may occur where its [the definition of bituminous coal] application may be difficult is merely to emphasize the nature of the administrative problem and the reason for the grant of latitude by the Congress. The difficulty or impossibility of drawing a statutory line is one of the reasons for supplying merely a statutory guide. * * * That guide is sufficiently precise for an intelligent determination of the ultimate questions of fact by experts.

While the requirements for delegation of power outside the area of economic regulation may perhaps be stricter, nevertheless these same basic considera-

tions apply." In this Act, Congress set forth a description of the objectives of the world Communist movement in much greater detail than is usual in a statutory delegation of power. We submit that greater specificity would have been almost impossible. Certainly, the standard here was "sufficiently precise for an intelligent determination of the ultimate questions of fact by experts."

(ii) *The items in Section 13(e), are relevant evidentiary considerations and are plainly rational.*

*a.* At the heart of petitioner's contention that the standards of Section 13(e) are vague and irrational, vitiating it in all its ramifications, is its fundamentally erroneous view (see Br. 80, 81, 82, 83) that the eight factors itemized in Section 13(e) are "tests" of whether a given organization is a Communist-action organization. Section 13(e), however, merely requires the Board to "take into consideration" the eight evidentiary matters or factors which it lists "in determining whether any organization is a 'Communist-action organization'." Thus, Congress provided no

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"Cf. *Mahler* v. *Eby*, 264 U.S. 32, 40, where the court upheld delegation of authority to the Attorney General to deport aliens who are "undesirable residents of the United States"; *Donaldson* v. *Read Magazine, Inc.*, 333 U.S. 178, 189–192, upholding the constitutionality of a statute allowing the Postmaster General to return mail to the senders which is addressed to persons the Postmaster General finds are using the mails to obtain money "by means of false and fraudulent pretenses, representations, and promises" (*id.*, p. 180).

such collection of litmus tests as petitioner supposes. The items listed in Section 13(e) are simply relevant considerations or guides to the consideration of evidence bearing upon the question whether an organization is a Communist-action organization. The sole and exclusive "test" is that supplied by the definition of such an organization in Section 3(3), *viz.*, whether it is substantially directed, dominated, or controlled by the foreign government or organization controlling the world Communist movement *and* operates primarily to advance the objectives of that movement as referred to in Section 2. Yet, if petitioner were right in its reading of the items in Section 13(e), the definition in Section 3(3) would serve no purpose at all.

As the court below aptly phrased it (R. 2120), Section 13(e) is merely a "catalog of some basic considerations" bearing on that ultimate issue, and the listed items are in no sense exclusive. "Nothing in the statute hints at an exclusive criterion. The Board should, and so far as we can tell did, admit and consider whatever is competent, relevant and material" (R. 2119).[45]

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[45] In this respect, the Act is comparable to many other federal statutes which set forth guides to administrators, guides which are not separate "test" but factors to be considered. See, *e.g.*, *Hampton & Co.* v. *United States*, 276 U.S. 394; *Mulford* v. *Smith*, 307 U.S. 38; *Sunshine Coal Co.* v. *Adkins*, 310 U.S. 381; *Opp Cotton Mills* v. *Administrator*, 312 U.S. 126; *Yakus* v. *United States*, 321 U.S. 414; *American Power Co.* v. *Securities and Exchange Commission*, 329 U.S. 90; *Fahey* v. *Mallonee*, 332 U.S. 245; *Lichter* v. *United States*, 334 U.S. 742. See also *infra*, pp. 153–156.

*b.* When the function to be served by the Section 13(e) evidentiary considerations is properly understood, they are not, as petitioner contends, irrational. On the contrary, they are all both rational and probative. While we believe this to be evident from a mere reading of the items, we shall take them up *seriatim* and examine each in the light of the particular criticism leveled by petitioner.

*The "directives and policies" consideration (Section 13(e)(1)).*—Section 13(e)(1) requires the Board to take into consideration—

> (1) the extent to which its [the organization's] policies are formulated and carried out and its activities performed, pursuant to directives or to effectuate the policies of the foreign government or foreign organization in which is vested, or under the domination or control of which is exercised, the direction and control of the world Communist movement referred to in section 2 * * *.

This goes directly to the nature of the relationship existing between the organization and the foreign government or organization controlling the world Communist movement, which is the primary focus of the Act. Petitioner contends, however, that Section 13(e)(1) does not require the Board to consider "whether the organization seeks to establish a 'Communist totalitarian dictatorship' * * * much less to use * * * unlawful means" but only whether it "seeks to effectuate Soviet policies on *any* subjects" (Br. 79).

This argument distorts the language of Section 13(e)(1). Section 13(e)(1) does not say that the

Board is to consider the extent to which the organization's policies are formulated and carried out, and its activities performed, to effectuate "any" policies of the foreign government which controls the world Communist movement. The word used is "the," which refers to the policies of the foreign government as a whole. These would certainly include at least those major objectives referred to in Section 2 as presenting a clear and present danger to the security of the United States, *i.e.*, the establishment of Communist totalitarian dictatorships in the countries throughout the world and the forcible overthrow of this Government (see, particularly, Section 2 (1) and (15)), as well as any "good" objectives—objectives which might be shared by and benefit the United States—which could incidentally, as tactical or intermediate ends, accompany the major goals. As the court below remarked (R. 2121)—

> The crucial factor in the statute before us is the aim, spelled out in detail, of the world Communist movement to disestablish our system of government. Our Government may well oppose the establishment in this country of a totalitarian dictatorship of the sort described in the definition, even if such a dictatorship does not meet the definition of "evil" [*i.e.*, having "immediate objectives" which are "morally wrong" (see *ibid.*)] or even if it has many beneficent features.

Thus, contrary to petitioner's claim, Section 13(e)(1), fairly read, does direct the Board to consider evidence that the accused organization is engaged in pro-

moting the disestablishment of our system of government. Furthermore, as we have pointed out (*supra*, pp. 128–130), the Section 3(3) definition of a "Communist-action" organization requires that the Board must in any event be satisfied from all the evidence that the organization before it, besides being controlled by the foreign government or organization controlling the world Communist movement, operates primarily to advance the objectives of that movement "as referred to in section 2." The objectives of the world Communist movement "as referred to in section 2" (see *supra*, pp. 136–137) are precisely those objectives which petitioner contends, erroneously, are not required to be considered.

*The "non-deviation" consideration (Section 13(e)(2)).*—Section 13(e)(2) requires the Board to take into consideration—

> (2) the extent to which its [the organization's] views and policies do not deviate from those of such foreign government or foreign organization [*i.e.*, the foreign government or organization which controls the world Communist movement].

The court below not only held that the "non-deviation" inquiry is a proper one to be made in determining the question of foreign control, but observed that it would be "difficult to conceive of a more proper" one (R. 2121). "In an inquiry as to the domination of one organization by another," said the court, "the extent of the deviation one from the other in views and policies is both relevant and material; indeed it would be one of the necessary considerations" (*ibid.*).

Non-deviation, in short, may not be conclusive, but it is plainly relevant.

Petitioner mistakes the meaning and purpose of this factor when it contends that "[u]nder this obscurantist test, the stigma of foreign control and sedition can be avoided only by adopting views which are demonstrably false if the Soviet Union has adopted views which are demonstrably true" (Br. 80). The fact that a local organization mirrors in each facet of its activities through many years the policies of a foreign state is surely pertinent to proof of its control by that state. See Sutherland, *Freedom and Internal Security* (1951), 64 Harv. L. Rev. 383, 401. That every act of A and B are undeviatingly identical does not, of itself, prove that A controls B; the possibility remains that B controls A, or that each is controlled by C, or that it is simply a matter of extraordinary coincidence. But the fact is certainly relevant to the inquiry. Cf. *North American Co.* v. *Securities and Exchange Commission*, 327 U.S. 686, 692, where this Court observed that, in determining whether one company was subject to the controlling influence of another, the Securities and Exchange Commission was "warranted in considering the harmonization of local policies."

*The "financial aid" consideration (Section 13(e)(3)).*—Section 13(e)(3) requires the Board to take into consideration—

> (3) the extent to which it [the organization] receives financial or other aid, directly or indirectly, from or at the direction of such foreign government or foreign organization [*i.e.*,

> the foreign government or organization which controls the world Communist movement].

Petitioner attacks this evidentiary factor on the ground that foreign financial aid to a local organization does not, *in and of itself,* prove domination and control (Br. 81). Of course it does not. But foreign financial support is a pertinent factor which may reasonably be considered with other evidence as tending to show control by the foreign donor. In the ordinary course of events a foreign power does not contribute funds to a local organization as a bare gratuity, without expectation of some benefit.

Petitioner argues that in such cases "the relevant consideration is not the bare fact of aid, but the terms and conditions, if any, on which it is given" (Br. 81). But as observed by the court below, while "the terms of a contribution are more, even much more, material to the issue of intended influence by means of the gift," nevertheless "the bare fact of the gift is not irrelevant" (R. 2123). While "it may be explained away, as may any of the statutory specifications of considerations" listed in Section 13(e), "the fact of the gift is certainly an admissible item of proof" (*ibid.*).

*The "instruction and training" consideration (Section 13(e)(4)).*—Section 13(e)(4) requires the Board to take into consideration—

> (4) the extent to which it [the organization] sends members or representatives to any foreign country for instruction or training in the principles, policies, strategy, or tactics of such world Communist movement.

Viewed as a factor to be weighed, this consideration is surely pertinent. True, the sending of one representative to one foreign conference might have little or no meaning. On the other hand, a local organization's continuous course of regularly sending representatives for specialized training in the strategy and tactics of world Communism, which is subsequently used for carrying out directions in this country, could be highly significant. Petitioner nevertheless contends that this factor "is irrational because it does not require a showing that the accused organization is obliged to or does conform to what is taught" (Br. 81). As remarked by the court below, however, the question at this point is not whether the Board could legitimately "make an ultimate finding of foreign domination upon the basis of bare evidence that [petitioner] sent agents abroad" (R. 2123), but the propriety of considering such evidence as part of a total picture.

*The "reporting" consideration (Section 13(e)(5)).*—Section 13(e)(5) requires the Board to take into consideration—

> (5) the extent to which it [the organization] reports to such foreign government or foreign organization [*i.e.*, the foreign government or organization which controls the world Communist movement] or to its representatives.

Here, too, it is the context in which the reporting is done—the entire factual background against which the reporting occurs—which gives meaning and significance to the act of making reports. A report may be made, as petitioner says (Br. 82), under circum-

stances which suggest nothing in the way of domination or control. On the other hand, such surrounding circumstances as the length of time the reporting goes on, the frequency of its occurrence, the conditions of secrecy under which it is carried out, the contents of the reports, the reasons therefor, and all the other background data might very well indicate a definite degree of domination and control, or even that the reporting party is an agent of the party reported to. The fact of reporting is consequently a legitimate evidentiary consideration whose significance is to be appraised in the light of the evidence as a whole.

*The "discipline" consideration (Section 13(e)(6)).*—Section 13(e)(6) requires the Board to take into consideration—

> (6) the extent to which its [the organization's] principal leaders or a substantial number of its members are subject to or recognize the disciplinary power of such foreign government or foreign organization [*i.e.*, the foreign government or organization which controls the world Communist movement] or its representatives.

If, as in the hypothetical case petitioner poses (Br. 82), the evidence should show that only a relatively few of the organization's leaders or an unimportant minority of its members are subject to foreign disciplinary power, that fact would, of course, tend to discount the significance of this factor in the total picture which emerges from the evidence as a whole. But the possibility of that result does not negate the propriety of the inquiry, which is into "the extent to which" the

organization's leaders and members are under foreign discipline. As with all the other evidentiary considerations contained in Section 13(e), it is the *degree* to which the particular evidential factor appertains that the Board is directed to consider. If the evidence is equivocal or insignificant with respect to a given item of inquiry, the record will so show. It cannot merely be assumed that Congress intended the Board to be governed—or that the Board was governed—by trivial evidence or evidence having no real probative force with respect to the ultimate issue.

*The "secret practices" consideration (Section 13(e)(7)).*—Section 13(e)(7) requires the Board to take into consideration—

> (7) the extent to which, for the purpose of concealing foreign direction, domination, or control, or of expediting or promoting its objectives, (i) it [the organization] fails to disclose, or resists efforts to obtain information as to its membership (by keeping membership lists in code, by instructing members to refuse to acknowledge membership, or by any other method); (ii) its members refuse to acknowledge membership therein; (iii) it fails to disclose, or resists efforts to obtain information as to, records other than membership lists; (iv) its meetings are secret; and (v) it otherwise operates on a secret basis.

Petitioner contends that this "test" is irrational because it makes "secret practices" relevant (Br. 83)—

> * * * only if employed for the purpose of concealing foreign control or promoting the organization's objectives. The first of these pur-

pose limitations involves circular reasoning, since foreign control is one of the ultimate facts to be established under section 3(3). Obviously, a standard whose application requires proof of an ultimate fact cannot be used to determine the existence of the ultimate fact.

This argument, however, overlooks the fact that the "purpose" clause of Section 13(e)(7) is not limited to "the purpose of concealing foreign direction, domination or control." It is cast in the disjunctive: "* * * or of expediting or promoting its [the organization's] objectives." Thus, so far as the language of Section 13(e)(7) is concerned, the purpose of the secret practices need not be directly concerned with "concealing foreign direction, domination, or control" in order to be considered by the Board. Petitioner's contention that Section 13(e)(7) necessarily involves circular reasoning is therefore untenable.[46]

[46] Petitioner also attempts to build a "circuity" argument on the second part of the "purpose" clause of Section 13(e)(7), *viz*, "for the purpose of * * * expediting or promoting its objectives." Relating this to the second element of the definition of a Communist-action organization—the requirement that the organization in question "operate primarily to advance the objectives of such world Communist movement * * *" (see Section 3(3))—petitioner, in the same manner as it argued in the passage quoted in the text, *supra*, contends that the secrecy test cannot come into play until the ultimate fact that "secret practices" is supposed to establish has first been independently proved (Br. 83). This branch of petitioner's argument, however, is as invalid as the other, and for the same reason—that the two parts of the "purpose" clause of Section 13(e)(7) are in the disjunctive.

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Once again we must stress—because petitioner repeatedly ignores it—that this is but one of several factors to be taken into account and is not determinative in itself. An organization's habit of operating on a basis of secrecy, for either of the purposes referred to in Section 13(e)(7), is obviously a pertinent factor to be considered in determining whether it meets the Section 3(3) definition of a Communist-action organization, along with such evidence as the calculated avoidance of previous registration acts, illegal activities of its leaders, and domination and control by a foreign government. Cf. *American Power Co.* v. *Securities and Exchange Commission*, 329 U.S. 90, 104.

*The "allegiance" consideration (Section 13(e)(8)).*—Section 13(e)(8) requires the Board to take into consideration—

> (8) the extent to which its [the organization's] principal leaders or a substantial number of its members consider the allegiance they owe to the United States as subordinate to their obligations to such foreign government or foreign organization [*i.e.*, the foreign government or organization which controls the world Communist movement].

Petitioner criticizes this "test" on several grounds (Br. 83–84). First, it says, it is "completely subjective. It directs an inquiry into a pure state of mind" (Br. 83). Of course, allegiance is ultimately a matter of mental attitude. But this is determinable from objective facts. Inquiry into states of mind—

for example, the intent underlying a particular action—is a common legal function.

Secondly, says petitioner, the paragraph in question "assumes the facts prerequisite to the state of mind into which the Board is to inquire" (Br. 83). It does not, according to the argument, direct the Board to determine *whether* any of the organization's leaders or members owe obligations to the foreign government or organization but assumes that some leaders and members do owe such obligations and confines the Board's inquiry to whether they consider those obligations subordinate to their allegiance to the United States (Br. 83–84). This argument is little more than a quibble. It could as well be argued that the paragraph assumes—what might be contrary to the facts—that all of the leaders and members of the organization consider that they owe at least some degree of allegiance to the United States. Properly construed, the paragraph simply means that the Board should take into consideration the extent to which the organization's principal leaders or a substantial number of its members consider the allegiance they owe to the United States as subordinate to such obligations as they *may* have or feel they have to the foreign government or organization which controls the world Communist movement.

Thirdly, petitioner urges that the paragraph "imputes to the organization the state of mind of its 'principal leaders or a substantial number of its members' although they may be an unrepresentative or dissenting minority and though the organization

itself is completely loyal" (Br. 84). This is the same attack which petitioner makes against the "discipline" consideration of Section 13(e)(6) and our reply to that criticism (*supra*, pp. 147–148) is also applicable here. The essential point, once again, is that this factor, like all the other factors listed in Section 13(e), presents a pertinent evidentiary consideration and is in no sense a controlling criterion.

The "allegiance" consideration, far from being irrational, is one of the most relevant and cogent factors. The character of an organization is always colored by the viewpoint of its leadership. When that viewpoint is shared by substantial segments of its other members, it may very well stamp the organization with an indelible character. If a significant number of the leaders and members of a certain group feel they owe a higher allegiance to a foreign country (or to an organization or movement controlled by that country) than to their own, that fact is incontestably one indication of the group's character. This factor becomes even more obviously relevant when applied to an autocratic organization dominated and inflexibly disciplined by a central ruling clique from the top down.

If the leaders and significant numbers of the membership pay fealty to the foreign government or organization over the years while manifesting hostility to every move of their own government; if they heap praise on the foreign government while consistently castigating their own; if internally they reflect as a group the thinking and the attitude of that foreign

government to the point of actual identity while disassociating themselves from that of their homeland—such evidence is a legitimate and potent factor, to be evaluated in the light of all the other evidence, in determining the ultimate issue presented by Section 3(3)."

*c.* After attacking each of the considerations separately, petitioner further contends (Br. 84–88) that Section 13(e) is invalid, as a whole, because it is so vague that decision is left to the Board's unfettered discretion. "The Act nowhere indicates whether a registration order must be supported by adverse findings under all eight standards, or whether something less is sufficient" (Br. 84). Furthermore, it is argued, "[t]he obscurity which thus envelops section 13(e) is made even more impenetrable by the phrase 'the extent to which,' which prefaces each of the eight standards" (Br. 84).

The only "standard", however, by which the validity of the Act must be judged is the ultimate standard of Section 3(3), containing the definition of a Communist-action organization. As we have shown (pp. 135–139), this test is "* * * sufficiently precise for an intelligent determination of the ultimate questions of fact by experts." *Sunshine Coal Co.* v. *Adkins,* 310

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[47] Related to and overlapping petitioner's argument that the considerations listed in Section 13(e) are irrational is its argument (Br. 85–86) that the subsection is based upon irrational presumptions. As our discussion of the eight considerations shows (*supra*, pp. 139–153), they are plainly not "presumptions" of any kind, *prima facie* or conclusive, but factors to be weighed—akin to the many similar lists in other federal legislation providing for administrative rulings—and they are certainly not unreasonable.

U.S. 381, 400. This sufficiency is not diluted by the fact that Congress, in addition to formulating the final criterion, directed the Board to "take into consideration" "the extent to which" certain factors were true with respect to a given organization in determining whether it came within Section 3(3). Congress did not tell the Board, as petitioner apparently suggests it should have, what relative weight it should give to each of the factors mentioned, or advise it as to what "extent" each factor should be present to have significance, or how much significance it should have. But no such attempt to affix apothecaries' weights to abstract concepts would have been possible even if desirable. The Constitution "is not to be interpreted as demanding the impossible or the impracticable." *Opp Cotton Mills* v. *Administrator*, 312 U.S. 126, 145. This Court's decisions make clear that there is no defect in Congress' directive to the Board to "take into consideration" "the extent to which" the factors mentioned are true or applicable in a given case.

In *Hampton & Co.* v. *United States*, 276 U.S. 394, the Court upheld a congressional direction to the President, in adjusting tariffs, to "take into consideration," "in so far as he finds it practicable," a variety of economic matters—including the catch-all "any other advantages or disadvantages in competition" (*id.*, p. 401–402). In *Mulford* v. *Smith*, 307 U.S. 38, 48–49, the direction in the Agricultural Adjustment Act of 1938 to the Secretary of Agriculture that, in allotting marketing quotas among states and pro-

ducers, he give "due consideration" to a variety of economic factors (*id.*, p. 43) was sustained. *Opp Cotton Mills* v. *Administrator, supra,* 312 U.S. at 142–146, upheld the requirement in the Fair Labor Standards Act of 1938 that, in fixing minimum wage rates, the Wages and Hours Administrator "consider among other relevant factors" certain itemized economic considerations (*id.*, p. 136). And in *Yakus* v. *United States,* 321 U.S. 414, 423–427, the Court sustained the directive to the Price Administrator, in establishing maximum prices on commodities, to "ascertain and give due consideration to," "so far as practicable," prices prevailing during a designated base period, and to "make adjustments for such relevant factors as he may determine and deem to be of general applicability, including" certain economic factors (*id.*, p. 421).[46]

The *Opp Cotton Mills* case, *supra,* is particularly pertinent. "It is urged," said the Court, "that the statute does not prescribe the relative weight to be given to the specified factors or the other unnamed 'relevant factors.' It is said that this * * * leave[s] the function which the committee and Administrator are to perform so vague and indefinite as to be practically without any Congressional guide or control" (312 U.S. at 143–144). Rejecting this argument, the Court said (*id.*, pp. 145–146):

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[46] See also *American Power Co.* v. *Securities and Exchange Commission,* 329 U.S. 90, 104–106; *Bowles* v. *Willingham,* 321 U.S. 503, 512–516; *Sunshine Coal Co.* v. *Adkins,* 310 U.S. 381, 397–399; *Field* v. *Clark,* 143 U.S. 649, 680–694.

> * * * The fact that Congress accepts the administrative judgment as to the relative weights to be given to these factors in each case when that judgment in other respects is arrived at in the manner prescribed by the statute, instead of attempting the impossible by prescribing their relative weight in advance for all cases, is no more an abandonment of the legislative function than when Congress accepts and acts legislatively upon the advice of experts as to social or economic conditions without reexamining for itself the data upon which that advice is based.

The same view was expressed in *Bowles* v. *Willingham*, 321 U.S. 503, 516.[40]

*(d) The Act does not deny a judicial trial in criminal prosecutions for failure to register by making the Board's determinations of fact conclusive*

Petitioner argues (Br. 72–74) as follows: After the Board's determination that an organization is a Communist-action organization becomes final, the organization and its officers may be criminally prosecuted for failure to register (and its members may be prosecuted for failure to register themselves, applying for passports, etc.); the fact that the organization is a Communist-action organization is a necessary

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[40] "* * * The fact that there is a zone for the exercise of discretion by the the Administrator is no more fatal here than in other situations where Congress has prescribed the general standard and has left to an administrative agency the determination of the precise situations to which the provisions of the Act will be applied and the weight to be accorded various statutory criteria on given facts."

element in these prosecutions; nevertheless, the Board's determination of this fact is conclusive and cannot be relitigated in the criminal trial. These contentions are without merit for several reasons.

(*i*) Petitioner, having failed to make this contention either in the court of appeals or this Court on the original appeal, cannot raise the issue for the first time on remand (see *infra*, pp. 283–287).

(*ii*) This contention is of course premature at the present time; not even the stage for preparing and filing a registration statement has been reached (see *supra*, pp. 107–108, 126–127). Since the present case does not involve a criminal prosecution in any sense, this is not the proper time for defining the constitutionality of prosecutions which may perhaps later occur.

(*iii*) Even if petitioner's claim were not premature, it cannot help petitioner in this case. For assuming, *arguendo*, that petitioner is correct, the effect of its argument is merely to ensure a defendant in the consequent criminal prosecution the opportunity to retry the question whether a particular organization is a "Communist-action organization" under the Act. Certainly, such a defendant cannot claim that his constitutional right to a fair judicial trial is violated merely because the Board has decided for administrative purposes that an organization is a "Communist-action organization" if no use of this determination is made at the criminal trial.

Assuming *arguendo* that no use of the Board's determination could be made in a subsequent trial, it

would not be a mere meaningless and gratuitous proceeding. The Board's determinations have considerable importance apart from their effect in any criminal prosecution. First, the organization, its officers, or its members may obey the order of the Board requiring registration. Second, even if no registration ever occurs, Congress intended the Board to determine, on the basis of quasi-judicial proceedings, those organizations which are "Communist-action organizations" and make this determination known to the public (see *supra*, pp. 120–121). And, third, the Act prohibits officers or employees of the United States or of any defense facility from hiring members of such organizations and prohibits officers or employees of the United States from issuing such persons passports—prohibitions which they will presumably comply with even if they cannot be introduced in any criminal prosecution (Sections 5(a)(2)(B), 6(b)).

(*iv*) In any event, petitioner's contention is on its merits without substance. As we have seen (*supra*, pp. 135–139), Congress validly delegated the power to determine Communist-action organizations to an administrative agency. Congress has decided that this determination should have several effects on the organization, its officers, and members such as requiring registration, forbidding application for passports, etc. If the organization or individuals subsequent to the administrative determination fail to conform with these effects of the determination prescribed by Congress, they are guilty of a criminal offense.

This statutory scheme in effect punishes failure to obey an administrative determination (which is reviewable in the courts). For example, Section 15(a) prescribes a criminal offense for any organization or individual, "[i]f there is in effect with respect to any organization or individual a final order of the Board requiring registration" and the organization or individual has failed to register. Similarly, Section 6 declares that it is unlawful for any member of an organization which is registered under the Act or as to which "there is in effect a final order of the Board requiring such organization to register" to apply for or use a passport with knowledge of the registration or final order. See also Sections 5(a), 10 (*supra*, pp. 78, 79–80, 81). Thus, the only issues in the criminal prosecution are whether a final administrative determination is outstanding, or the organization has registered, and whether the defendant has failed to obey the consequences Congress has proscribed for those actions; the correctness of the administrative determination is not material.

The law is replete with instances in which a status or duty is established administratively, to be followed by criminal consequences in the event of subsequent acts or omissions by the person affected. Such legislation is not to be invalidated upon the theory that the crimes peculiarly associated with the specific status or duties may later indirectly rest upon the original administrative determination of that status. Thus, a person denied a driver's license could not lawfully take it into his own hands to drive

without a license because the denial was by an administrative body.

A significant analogy is found in the selective service legislation. The hundreds of thousands of draft classifications have not been established by jury trials; yet refusals to comply with requirements of the classifications have been made crimes by statute, and the validity of the legislation has been upheld. As observed by this Court in *Cox* v. *United States*, 332 U.S. 442, 453:

> The concept of a jury passing independently on an issue previously determined by an administrative body is contrary to settled federal administrative practice; the constitutional right to jury trial does not include the right to have a jury pass on the validity of an administrative order. * * *

Freight tariffs and price controls established by administrative proceedings have also long been upheld. In *Yakus* v. *United States*, 321 U.S. 414, 444–445, this Court stated:

> * * * [W]e are pointed to no principle of law or provision of the Constitution which * * * precludes the practice, in many ways desirable, of splitting the trial for violations of an administrative regulation by committing the determination of the issue of its validity to the agency which created it, and the issue of violation to a court which is given jurisdiction to punish violations. Such a requirement presents no novel constitutional issue.

* * * * *

> For more than fifty years it has been a penal offense for shippers and interstate rail carriers to fail to observe the duly filed tariffs fixing freight rates—including, since 1906, rates prescribed by the Commission—even though the validity of those rates is open to attack only in a separate administrative proceeding before the Interstate Commerce Commission. 49 U.S.C. §§ 6 (7), 10 (1); *Armour Packing Co.* v. *United States,* 209 U.S. 56, 81; *United States* v. *Adams Express Co.,* 229 U.S. 381, 388. It is no defense to a prosecution for departure from a rate fixed by the filed tariffs that the rate is unreasonable or otherwise unlawful, where its infirmity has not first been established by an independent proceeding before the Interstate Commerce Commission, and the denial of the defense in such a case does not violate any provision of the Constitution. [Citing decisions.]

Similarly, in contempt procedings based on refusal to obey a preliminary injunction, this Court has held that, even if the injunction was incorrectly issued, "we would * * * affirm the judgment for criminal contempt as validly punishing violation of an order then outstanding and unreversed." *United States* v. *United Mine Workers,* 330 U.S. 258, 289–295. While the injunction was issued by a court, it was not even based on full litigation of the merits of the complaint. Similarly, a person charged with refusing to obey a court of appeals' enforcement order of a determination by the National Labor Relations Board certainly could not claim the opportunity to relitigate judicially the administrative determination which the court of ap-

peals had previously found was supported by substantial evidence.

Although contempt cases are not, strictly speaking, criminal prosecutions, persons charged with contempt are of course just as entitled to a fair judicial trial of all the relevant issues. In addition, it would be anomalous for the Constitution to require the relitigation of the Board's determination in criminal prosecutions based on such a determination, but not to require relitigation if the statute had merely provided for judicial enforcement of the Board's order. There could hardly be a constitutional difference if Congress had decided to allow the court of appeals to enforce the Board's determination (based on the same preponderance-of-the-evidence standard of review) by ordering the organization (and, in lieu thereof, its officers and members) to register and its members not to apply for a passport, etc. The fact that Congress has given the organization, its officers, and members the benefit of a full criminal trial (including the guarantees of indictment and trial by jury) when charged with failure to obey the Board's final orders and its statutory consequences can hardly produce, as a constitutionally required result, the right to relitigate the administrative determination itself.

If a defendant could collaterally relitigate the correctness of an administrative order, the result would be to interfere seriously with Congress' power to delegate authority to an administrative agency. Any person could flout the administrative determination

knowing that the order could be relitigated. The only risk would be that the relitigation would result in the same determination as the agency had previously made, thereby subjecting the defendant to criminal penalties. Thus, the determination would serve only as notice to the public of the facts found and to the organization, its officers, and members that they faced criminal prosecution if they did or failed to do certain things. Since all issues of enforcement would be determined by the courts for themselves *de novo*, effective regulatory power would be transferred from the administrative agency, where Congress placed it, to the courts.[80]

In sum, we submit that any organization or individual charged with an offense under the Act is in effect charged with failure to obey a final order of the Board, as read in the light of the effects prescribed by Congress. This order may be challenged only in the manner Congress has provided—that is, by applying for review in the court of appeals and ultimately this Court. The defendant in a criminal

[80] *Wong Wing* v. *United States*, 163 U.S. 228, on which petitioner relies (Br. 72–73), is clearly inapposite. There, this Court held unconstitutional, under the Fifth and Sixth Amendments, a statute providing for trial by a justice, judge, or commissioner of Chinese aliens for being unlawfully in the United States. Thus, the case was never to reach a court. Here, in contrast, any defendant is given the full protection afforded in any criminal prosecution including an indictment and trial by jury on all relevant issues—that is, whether he has violated the consequences established by Congress for an administrative order.

prosecution, however, can litigate only the issues of whether he has obeyed the order and what are its statutory consequences; he has no right to a *de novo* judicial determination of the order itself.[51]

*(e) The Communist Control Act of 1954 does not make it impossible for petitioner to know who its members are*

Petitioner's next challenge (Br. 88–95) to the registration provisions as violative of due process is based on its reading of those provisions in the light of Section 5 of the Communist Control Act of 1954, c. 886, 68 Stat. 776. The argument runs as follows: if the order of the Board becomes final, petitioner and its officers will be required to list the names of all its members in its registration statement, and "other persons" will have to "determine whether they are members" in order to know whether they are subject to the Act's sanctions and whether they must personally register in the event of petitioner's default. But the criteria for determining membership, in Section 5 of the Communist Control Act, are so "vague and irrational," the argument concludes, that it is impossible for any one to know whether or not anybody, including himself, is a member, with the alleged consequence that the registration requirements of the Act, considered in the

[51] Petitioner suggests (Br. 74) that a Board determination cannot be binding in a criminal prosecution of one of the organization's members because the member was not a party to the Board proceeding. However, the organization represents all its members in proceedings as to the character of the organization (see *infra*, p. 208).

light of Section 5 of the Communist Control Act, are void for indefiniteness (Br. 89).[52]

(*i*) For reasons similar to those set forth *supra*, pp. 107–108, 126–127, this contention is premature since the stage of preparing and filing a registration statement has not yet been reached, and the Board's findings and order are valid even though some of the officers of petitioner who will have the duty to effect its registration may have good reasons for not complying with the order, or not complying fully.

(*ii*) In any event, the argument is unsound. As with the considerations set forth in Section 13(e)

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[52] Section 5 provides that—

"In determining membership or participation in the Communist Party or any other organization defined in this Act, or knowledge of the purpose or objective of such party or organization, *the jury, under instructions from the court*, shall consider evidence, if presented, as to whether the *accused person:* * * *." (Emphasis added.)

This is followed by thirteen numbered paragraphs, of which it will suffice here to quote the first few as examples:

"(1) Has been listed to his knowledge as a member in any book or any of the lists, records, correspondence, or any other document of the organization;

"(2) Has made financial contribution to the organization in dues, assessments, loans, or in any other form;

"(3) Has made himself subject to the discipline of the organization in any form whatsoever;

"(4) Has executed orders, plans, or directives of any kind of the organization;

* * * * *"

A fourteenth and final paragraph provides:

"(14) The enumeration of the above subjects of evidence on membership or participation in the Communist Party or any other organization as above defined, shall not limit the inquiry into and consideration of any other subject of evidence on membership and participation as herein stated."

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(*supra*, pp. 139–140), petitioner erroneously attempts to depict Section 5 of the Communist Control Act as a collection of "tests" of membership. But the language of Section 5 makes it absolutely clear that its purpose is merely to list items of evidence to be considered in reaching the ultimate factual conclusion of knowing membership. It states that in determining membership, etc., the jury "shall consider evidence * * * as to whether * * *," etc. And subsection (14) provides that the enumeration of the "above subjects of evidence" shall not limit the inquiry into and consideration of "any other subject of evidence" on membership, etc. See *supra*, p. 165, fn. 52. Each of the evidentiary items listed is plainly a relevant consideration even though it may not itself be determinative. The whole section makes sense when it is realized that the Communist Party, as the evidence before the Board showed (see R. 2618; see also *United States* v. *Hiss*, 185 F. 2d 822, 824, 829 (C.A. 2), certiorari denied, 340 U.S. 948), has traditionally had two broad types or classes of members—"open" members, who hold themselves out to the public as such and make no attempt to conceal their membership, and "secret" or "underground" members, whose membership for various reasons is known only to a select few in the organization.

Petitioner's elaborate attempt to depict Section 5 as a trap for the unwary—as a snare for catching as members persons who do not know they are members—disregards the nature of the items as non-

exclusive evidentiary factors and particularly ignores the provision that the jury's consideration of the types of evidence listed be "under instructions from the court." It is to be presumed that the court's guidance of the jury in its consideration of such evidence will be an intelligent guidance. Petitioner's suggestion that the only way in which a person of prudence can under Section 5 avoid the risk of being found to be a member of it is to "shun association or communication with all men" and "live the life of a hermit" (Br. 95) is certainly incompatible with that premise.

(*iii*) Moreover, the language of Section 5 shows that the section has no application to or connection with petitioner's duty under the Subversive Activities Control Act to file a registration statement (when the order to register becomes final) listing its members, or to possible criminal proceedings against it or its officers for willfully omitting the names of any of its members in such a registration statement. The fact that Section 5 is exclusively concerned with jury trials shows that it has no reference to the administrative process of filing a registration statement with the Attorney General. And the fact that it relates to jury trials in which the "accused person" (see *supra*, p. 165, fn. 52) is one who denies either his membership in the Party or his knowledge of the purpose or objective of the Party shows that it has no relation to possible criminal proceedings against the Party or its officers for willfully omitting the names of any

of its members in the registration statement.[33] Apparently, Section 5 of the Communist Control Act applies to criminal prosecutions brought under Section 15(a)(2) of the Subversive Activities Control Act against individual members who fail to register as required in those limited situations (defined in Section 8) in which individual members are required after Board proceedings to register personally (see *supra*, pp. 74–75).

*(f) The validity of the provision making each day of failure to register a separate offense is not presented, and in any case it is valid*

Petitioner suggests (Br. 27, fn. 12, and 65) that "the Act provides astronomically cumulative fines and prison sentences" by Section 15(a) which declares each day of failure to register, once the obligation to do so arises, a separate offense (Br. 65).

(*i*) This contention, too, is prematurely raised in this proceeding. Petitioner may register, or for some other reason the penalty may never be applied to petitioner, and therefore the issue may never be reached. See *United States* v. *Harriss*, 347 U.S. 612, 626–627.

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[33] Section 15(a)(1) of the Subversive Activities Control Act provides for the punishment of the "organization" if, having been finally ordered to register, it fails to register or to file a registration statement or annual report or to keep records as required. This is the only criminal provision connected with the registration process which is applicable to organizations as such. Section 15(b) provides for the punishment of "[a]ny individual" who, in a registration statement, willfully makes any false statement or willfully omits to state any fact required to be stated. See *supra*, pp. 82–83.

(*ii*) On its merits, petitioner's contention must be rejected. It is clear, in the first place, that there cannot be any such accumulation of penalties unless an organization which has been finally ordered to register chooses to incur them by continued deliberate non-compliance. An organization is not required under the Act to disobey a final order to test its validity. Cf. *Gulf, Colorado & Santa Fe Ry. Co.* v. *Texas*, 246 U.S. 58, 62; *Ex parte Young*, 209 U.S. 123, 145–148. The duty to register arises only after the validity of the registration requirements has been judicially determined and a final order has resulted (see *supra*, p. 77). Thus, penal liability results only from willful refusal to comply with a requirement laid down by Congress, implemented by a Board order after formal hearings, and upheld by the courts.

It is settled, moreover, that the extent of the permissible punishment imposable under an otherwise valid statute is, subject only to the Eighth Amendment's prohibition against cruel and unusual punishments, a matter of exclusive legislative discretion. *Blockburger* v. *United States*, 284 U.S. 299, 305; *Gore* v. *United States*, 357 U.S. 386. Congress was no doubt aware that effective enforcement of registration and reporting requirements is difficult where continuing disobedience can result in but a single penalty, which might be considered *de minimis* by a large organization. And it does not follow that because a court might, in a particular case, inflict punishment in an unreasonably harsh manner that the statutory clause under which the punishment is inflicted is in-

valid. It is easy to see, for example, that the law making a separate offense of each mailing in furtherance of a fraudulent scheme could in certain cases be enforced in a confiscatory manner. But the constitutionality of the statute itself is settled. *Badders* v. *United States*, 240 U.S. 391, 394; cf., *e.g.*, *Marcus* v. *Hess*, 317 U.S. 537, 552; *Blockburger* v. *United States*, *supra*, 284 U.S. 299; *Gore* v. *United States*, *supra*, 357 U.S. 386; *Ebeling* v. *Morgan*, 237 U.S. 625.

B. THE "SANCTION" PROVISIONS OF THE ACT ARE VALID

*Introduction.*—Immediately upon the registration of an organization under the Act, or when an order of the Board requiring an organization to register becomes final (after judicial review), certain legal consequences automatically occur. These consequences are, generally speaking, in the nature of legal disabilities. They are broadly classifiable into two types—those affecting the organization as such, and those affecting members of the organization. They have come to be known in this litigation as "sanctions" (see R. 2082). Briefly, they may be identified as the "labeling," "tax," "contributions," "employment," "passport," and "alien" provisions, the first three being applicable to organizations as entities, and the last three to individual members of the organizations affected. See *supra*, pp. 77–82; *infra*, pp. 172–201.

These sanctions are to be distinguished from the Act's criminal penalties. In addition to the criminal penalties imposed both on organizations and individuals for various offenses connected with the registra-

tion process (see *supra*, pp. 82–85), the Act imposes other penalties on individuals for certain offenses connected with four of the general sanctions (the "labeling," "contributions," "employment," and "passport" provisions; see *supra*, p. 83). But, while the sanctions become automatically operative upon an organization's registration or being finally ordered to register, a criminal penalty associated with a sanction can be enforced only in the usual manner in which criminal penalties are enforced, *i.e.*, by indictment, trial, and conviction.

Petitioner assails the sanctions of the Act on several different constitutional grounds. First, it attempts to show that the sanctions which result from a registration order, make the Act an attempt to "outlaw" petitioner (Br. 26–28) and therefore violate the freedoms guaranteed by the First Amendment (Br. 26–39). Secondly, it contends that the sanction provisions violate due process (Br. 50–56). Finally, it argues that, by virtue of the sanctions, the Act is a bill of attainder, proscribed by Article I, § 9, clause 3 (Br. 63–72). For the reasons suggested above (*supra*, pp. 85–86), the validity of none or only some of the sanctions may now be before the Court;[54] but in view of the court of appeals' treatment of this problem and petitioner's extensive argument we will discuss all of the sanctions.

[54] The "alien" and "tax" sanctions have no criminal penalties associated with them, but their validity could be tested in appropriate proceedings unconnected with the present one (*e.g.*, habeas corpus or declaratory judgment proceedings or proceedings in the Tax Court). Thus, the validity of all the sanctions can be tested in other judicial proceedings.

### *1. The sanction provisions do not violate the First Amendment* [55]

We have previously shown (*supra*, pp. 87–107) that the Act's registration provisions, as such, are consonant with the guaranties of the First Amendment. In that connection, we discussed the gravity of the evil with which Congress was dealing in this Act as well as this Court's rulings showing that First Amendment protections are far from absolute. Against the same significant background, we now consider petitioner's related contention that the Act's sanctions are individually violative of the First Amendment (Br. 37–39, 54–56) and that they confirm its contention that the Act as a whole, by in effect "outlawing" it (Br. 34), will have the practical effect of preventing it from engaging in lawful political action, in alleged further violation of the First Amendment (Br. 33–39).

#### (*a*) *Sanctions applicable to organizations as such*

The sanctions which are applicable to organizations as entities are three—the "labeling," "tax," and "contributions" sanctions.

##### (*i*) *The labeling requirements*

When an organization is registered or has been finally ordered to register, each publication of the organization transmitted by mail or in interstate or

[55] Since petitioner stresses the First Amendment, we include that provision of the Constitution in the heading for this subpoint, but to avoid needless duplication our discussion will also consider certain aspects of substantive due process related to the First Amendment issues.

foreign commerce and intended to be circulated among two or more persons is required to bear on its face and on any wrapper in which it is contained the statement "Disseminated by [name of organization], a Communist organization" (Section 10(1)). Similarly, all radio and television broadcasts sponsored by the organization must be identified as being "sponsored by [name of organization], a Communist organization" (Section 10(2)). Violation of these provisions by the organization or by any person acting on its behalf is made a punishable offense (Sections 10, 15(c)).

These labeling requirements most nearly approach, of all the sanctions, the area of First Amendment rights. We contend nevertheless that, measured against the evil at which the Act strikes, they are well within the power of Congress to impose.

*a.* Labeling imposes no censorship on any mail matter or broadcast material; the content of either is immaterial. What the provisions do is, not to censor the "speech," but to identify the "speaker." If such revelation interferes with the purposes of an organization by destroying its anonymity and disclosing its true nature, it is because of the unpopularity of the organization in the free market of ideas. The "restraints" are entirely social, not legal. Organizations subject to the requirement are at liberty to issue any literature or propaganda they choose, provided it is labeled and does not contain anything constituting a crime in itself, such as, for example, incitement to violent over-

throw of the Government. Furthermore, the labeling requirements apply to organizations only. Individuals, including members of the organizations, are not subject to even the indirect restraint of labeling.

*United States* v. *Harriss*, 347 U.S. 612, 625–626, *Burroughs* v. *United States*, 290 U.S. 534, 545, 548, and *Lewis Publishing Co.* v. *Morgan*, 229 U.S. 288, 312, 315–316, teach that such disclosure and labeling requirements may validly be imposed within the area protected by the First Amendment in order to serve a proper purpose. In *Harriss*, the Regulation of Lobbying Act was sustained by this Court because members of Congress have a right to know "who is being hired" to attempt to influence them, and "who is putting up the money." 347 U.S. at 625. *Burroughs* upheld comparable provisions of the Corrupt Practices Act requiring disclosure by political committees of contributions in order "to safeguard [a federal] election from the improper use of money to influence the result." 290 U.S. at 545. The requirements that newspapers disclose their owners in order to enjoy second-class mail privileges and plainly mark with the word "advertisement" all items which have been paid for were held valid in the *Lewis Publishing Co.* case. These rulings demonstrate that the validity of a disclosure or labeling requirement depends upon the reasonableness of its particular aim and purpose.[56]

[56] *Talley* v. *California*, 362 U.S. 60, which petitioner cites (Br. 38) is not inconsistent with these cases. There, the Court, in considering an ordinance forbidding the distribution in any place under any circumstance of any handbill

*b.* The petitioner in this case is the Communist Party, found by the Board to be foreign-controlled and engaged, having as its ultimate objective the domination, by force, of this country and the world by the world Communist movement under the leadership of the Soviet Union. In order to carry out its objectives, the Party uses propaganda as one of its main weapons (R. 2538–2543).

Much of this propaganda is covert, and all of it attempts to sell itself to the public as peacefully and lawfully inspired. The record shows that it is petitioner's standard policy to exploit situations of human misery and legitimate grievance for the foothold its organizers thereby gain in social, racial, and labor groups (R. 2558–2580). The Party frequently dons its mask of respectability and sympathy to plead for various causes which it thinks will advance its own falsely assumed status as a champion of human rights (cf. Br. 34). "Basic to those techniques [of Communism] is the element of disguise. Over and over, the Communist creed poses under a thousand masks—a thousand fronts—organizations—movements—drives—with glittering, alluring appeal

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which did not have printed on it the name and address of the person who prepared, distributed, or sponsored it, emphasized that no showing had been made that the ordinance was designed to remedy any evil whatsoever (*id.*, p. 64):

"* * * Counsel has urged that this ordinance is aimed at providing a way to identify those responsible for fraud, false advertising and libel. Yet the ordinance is in no manner so limited, nor have we been referred to any legislative history indicating such a purpose. Therefore we do not pass on the validity of an ordinance limited to prevent these or any other supposed evils. * * *"

to snare the unwary."[87] But the ultimate objective remains steadfast and unvaried.

In theory, perhaps, if every one had the time and talent to be able to make an independent evaluation, after sufficient research, of the truth or soundness of each political utterance with which he is propagandized in the mails and over the air waves, he would have no need to know from what source the propaganda came. "But as a practical matter this independent determination is in most cases impossible, and in making judgments we are continually influenced by the source from which statements emanate." Cohen and Fuchs, *Communism's Challenge and the Constitution* (1948), 34 Corn. L.Q. 182, 208. And nowhere is the need for disclosure of the true source of propaganda more pressing than in the case of a Communist-action organization. "In light of the Soviet allegiance of American communists, the extensive degree to which they use the technique of concealment, and the success that they have had in influencing public opinion by this technique, a requirement of disclosure would seem to be justified. This disclosure would greatly diminish their influence, not because of government suppression, but rather because of public recognition of their interests. Although it is true that some methods of achieving disclosure may infringe upon freedom of expression, the objective of putting the spotlight on communist propaganda does not limit that liberty, but adds to

[87] *Internal Security Manual Revised*, S. Doc. No. 40, 84th Cong., 1st Sess., p. 2 (Introduction to the original edition by Senator Alexander Wiley).

the relevant facts in the market-place of competing ideas" (*id.*, pp. 208–209).

As the court below remarked, "surely the people are entitled to know when an organization which falls within the definition of a Communist-action organization in this statute is addressing them over the air" (R. 2113). This observation is no less true with respect to the circularization of propaganda by mail. To paraphrase the words of Mr. Justice Black, with whom Mr. Justice Douglas concurred, dissenting in *Viereck* v. *United States*, 318 U.S. 236, 251 (said with reference to the Foreign Agents Registration Act):

> Resting on the fundamental constitutional principle that our people, adequately informed, may be trusted to distinguish between the true and the false, the [Act] is intended to label information [emanating from a Communist source] so that hearers and readers may not be deceived by the belief that the information comes from a disinterested source. Such legislation implements rather than detracts from the prized freedoms guaranteed by the First Amendment.

Moreover, the petitioner calls itself the "Communist Party." There "seems little to choose", so far as petitioner is concerned, between being identified as "The Communist Party" and as "The Communist Party, a Communist organization," which is what the Act requires (see R. 2112–2113).

It is no answer for petitioner to say (Br. 39) that the requirement that it identify itself not only by name but as "a Communist organization" is discriminatory since other political parties are not subject to special

labeling requirements. This contention, like petitioner's entire First Amendment argument, assumes that petitioner is just another political party, expressing ideas in the political arena. But an organization subject to the labeling requirements of this Act is one that has been found, after a full hearing (including judicial review), to be the puppet of a foreign power, working to achieve the ends of that power—ends which encompass the extension of its totalitarian hegemony over this nation "by any available means, including force if necessary" (Section 2(6)). Cf. *National Labor Relations Board* v. *Falk Corp.*, 308 U.S. 453; *Bryant* v. *Zimmerman*, 278 U.S. 63. Supported by overwhelming evidence, the Board found that petitioner was such an organization and the court of appeals upheld this finding. And this Court has itself held that the Communist Party is not merely an ordinary political party and need not be treated as such. See *Barenblatt* v. *United States*, 360 U.S. 109, 127–129, and the cases cited *supra*, pp. 95–100.

When an agency of the world Communist movement poses for tactical purposes as a benign domestic organization and champion of constitutional liberties, while concealing its ultimate strategy of foisting a communistic dictatorship on the nation in a Czechoslovakia-type or Hungary-type coup as soon as it feels the time to be propitious—*i.e.*, when its leaders are in positions of sufficient power and the ranks of its lesser members have been sufficiently strengthened by the victims of its propaganda (cf. Mr. Justice Jackson, concurring in *Dennis* v. *United States*, 341 U.S. 494, 566)—we submit that Congress can act to

defeat the strategy by compelling the truthful identification of the source of the propaganda, to the end that the people may not be deceived.

*c.* We have seen that Congress has the power to require disclosure or labeling when the purpose of such a requirement is reasonable and that the exercise of such power in the area of concealed Communist propaganda clearly falls within that area. We now show that there is particularly strong precedent for labeling requirements, which are aimed not at private correspondence but at literature sent through the mails or in commerce with the intent that it be circulated publicly.

A 1912 statutory requirement provides that newspapers and magazines, to enjoy the privileges of second-class mail, must publicly disclose the names of their owners and plainly mark with the word "advertisement" all items which have been paid for (Act of August 24, 1912, c. 389, Section 2, 37 Stat. 553; now 39 U.S.C. 233, 234). Sustaining this law against the charge that it unconstitutionally abridged freedom of the press, this Court quoted with approval from the committee report on the bill, as follows (*Lewis Publishing Co.* v. *Morgan*, 229 U.S. 288, 312, 315–316):

> * * * It is a common belief that many periodicals are secretly owned or controlled, and that in reading such papers the public is deceived through ignorance of the interests the publication represents. We believe that * * * it is not only equitable but highly desirable that the public should know the individuals who own or control them.

The purpose behind that statute—which this Court described as "secur[ing] to the public in 'the dissemination of knowledge of current events,' by means of newspapers, the names not only of the apparent, but of what might prove to be the real and substantial owners of the publications, and to enable the public to know whether matter which was published was what it purported to be or was in substance a paid advertisement" (*id.*, pp. 315–316)—was held in no wise to constitute a forbidden invasion of freedom of the press. The pertinence of this decision is clear. If Congress may condition the enjoyment of second-class mail privileges by publishers on their making full disclosure of the true interests represented by their publications, Congress may also require a Communist-action organization to label its publications, or else desist from distributing them by mail.

Similarly, the power of the Government to prevent the fraudulent use of its own mail facilities is a broad one, and has long been established.[58] This power has

[58] In 1872, Congress authorized the Postmaster General to forbid the payment of money orders and the delivery of registered letters to persons or companies found by him to be conducting an enterprise to obtain money by false pretenses through the use of the mails, and to return all such letters to their senders with the word "fraudulent" stamped on the envelope (Act of June 8, 1872, c. 335, Section 300, 17 Stat. 322; now 39 U.S.C. 259, 732). In the same statute, Congress made it a criminal offense to place any letter or package in the mails for the purpose of carrying out any scheme or artifice to defraud (*id.*, Section 301, 17 Stat. 323; now 18 U.S.C. 1341). In 1889, Congress declared all letters and other matter designed to perpetrate frauds to be "non-mailable" (Act of March 2, 1889, c. 393, Section 4, 25 Stat. 874; now 39 U.S.C. 256). In 1895, the Postmaster General's fraud-order

been sustained against contentions that it is, in itself, violative of First Amendment and other constitutional rights. *In re Rapier*, 143 U.S. 110; *Horner* v. *United States*, 143 U.S. 207; *Public Clearing House* v. *Coyne*, 194 U.S. 497, 507; *Milwaukee Publishing Co.* v. *Burleson*, 255 U.S. 407. Recently, this Court again sustained the power in the following language (*Donaldson* v. *Read Magazine*, 333 U.S. 178, 190):

> All of the foregoing statutes [mail fraud statutes], and others which need not be referred to specifically, manifest a purpose of Congress to ulitize its powers, particularly over the mails and in interstate commerce, to protect people against fraud. This governmental power has always been recognized in this country and is firmly established.

Rejecting a contention that the First Amendment stood as a bar to congressional action designed to free the mails of fraudulent material, the Court added (*id.*, p. 191):

> * * * None of the recent cases to which respondents refer, however, provide the slightest support for a contention that the constitutional guarantees of freedom of speech and

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powers were extended to cover all letters or other matter sent by mail (Act of March 2, 1895, c. 191, Section 4, 28 Stat. 964; now 39 U.S.C. 259). Other statutes, such as the Securities Act of 1933 (Act of May 27, 1933, c. 38, Section 5, 48 Stat. 77, as amended by the Securities Exchange Act of 1934, c. 404, Section 204, 48 Stat. 906; now 15 U.S.C. 77e) and the Federal Trade Act of 1938 (Act of March 21, 1938, c. 49, Section 4, 52 Stat. 114; now 15 U.S.C. 52, 53), contain provisions similarly designed to rid the mails and the channels of commerce of false or fraudulent securities, advertising matter, and the like.

freedom of the press include complete freedom, uncontrollable by Congress, to use the mails for perpetration of swindling schemes.

Congress has not, in the Internal Security Act, attempted to exercise the same degree of control as it employs to prevent the type of mail fraud involving financial swindles. The literature-labeling provisions constitute a far milder form of sanction or control-measure, *viz.*, compulsory identification. The provisions do not relate to the contents of any mail matter, however fraudulent they may be, or however inflammatory. They simply identify the sender organization—which in petitioner's case has no unqualified right to conduct its affairs in secret (cf. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652)—with an identifying phrase found to be truthful after a full hearing.

The employment of reasonable identification devices to forestall public deception has other statutory precedents. Congress has provided that all political circulars and other statements relating to candidates running for federal office, which are deposited in the mails or in interstate commerce, must include the names of the persons or groups responsible for the publication in question, as well as the names of the officers of each such group (18 U.S.C. 612). The Foreign Agents Registration Act contains rigorous requirements applicable to the dissemination of "political propaganda" through the mails or commerce. All such propaganda must be labeled with the notation that the sender is registered as an agent of a foreign principal,

together with the names and addresses of the agent and of each of his foreign principals (22 U.S.C. 614)."[9]

*d.* The identification requirements of Section 10 pertaining to radio and television broadcasts are as valid as the literature-labeling requirements, and for the same reasons. Indeed, the reasonableness of requiring accurate identification of speaker and sponsor in such mass media of communication as radio and television is even more apparent, since, because of the inherent physical limitations of those media— "[u]nlike other modes of expression, radio inherently is not available to all"—they are peculiarly subject to government control in the public interest. *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226; see *Radio Commission* v. *Nelson Bros. Co.*, 289 U.S. 266, 285; *Trinity Methodist Church, South* v. *Federal Radio Commission*, 62 F. 2d 850, 851 (C.A. D.C.), certiorari denied, 288 U.S. 599. All paid broadcasts over any radio station have been required since 1934 to be identified and announced at the time of the broadcast as having been paid for by the person furnishing the money (Communications Act of 1934, c. 652, Section 317, 48 Stat. 1089; 47 U.S.C. 317). The Act at bar simply carries this principle one step further in the case of organizations finally ordered to register by requiring them to give the additional identifying

[9] In addition, the Foreign Agents Registration Act goes much further than the Act at bar in another respect. It declares certain types of political propaganda to be entirely nonmailable at the discretion of the Postmaster General under certain circumstances (22 U.S.C. 618(d)).

words, " a Communist organization," a phrase which, as we have shown, is little different from petitioner's chosen name and which cannot be deemed unfairly stigmatizing or discriminatory, in view of the nature of the world Communist movement and petitioner's subordination to it.

*(ii) The tax provisions*

Section 11(a) of the Act disallows the deduction for tax purposes of contributions to any organization which is registered or has been finally ordered to register as a Communist organization, and Section 11(b) denies to such an organization tax exemption under Section 101 of the Internal Revenue Code (26 U.S.C. 101).

Petitioner apparently does not specifically question the validity of these provisions, and, in any event, there can be no real doubt of the power of Congress to withdraw its legislative grace, for reasons of policy, in specific areas relating to taxation. It is clear that the conferring of tax-exempt status on an organization and permitting the deduction from gross income for tax purposes of sums contributed to such organization are matters of legislative grace. *Helvering* v. *Ohio Leather Co.*, 317 U.S. 102, 106; *Helvering* v. *Northwest Steel Mills*, 311 U.S. 46, 49; *Cornell* v. *Coyne*, 192 U.S. 418, 431; *Rector of Christ Church* v. *County of Philadelphia*, 24 How. 300; cf. *Cammarano* v. *United States*, 358 U.S. 498. Such grants vest no permanent right in the favored class to continue its enjoyment of special treatment (*Choate* v. *Trapp*, 224 U.S. 665, 674; *Yazoo and Mississippi Valley Ry. Co.* v. *Adams*, 180 U.S. 1, 22) and may be withdrawn at

will by legislative act. *Rector of Christ Church* v. *County of Philadelphia, supra.*

Federal tax-exemption and deductibility provisions are founded on the public interest in fostering, as a matter of policy, the types of activity pursued by the favored organizations (*Helvering* v. *Bliss*, 293 U.S. 144, 150–151), most of which enjoy that status because, by performing public services, they relieve the public *pro tanto* of a burden which otherwise would fall on it. *Trinidad* v. *Sagrada Orden*, 263 U.S. 578, 581. Since they thus constitute a form of subsidy to activities deemed by Congress to be beneficial to the public, Congress may withdraw its favor when it sees that a one-time beneficiary of its grace is engaged in activities thought to be inimical to the public interest. It would be strange if this Government were required to foster through special exemptions in its tax laws the activities of a domestic agency of a world-wide movement which is dedicated to its violent overthrow.[60]

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[60] *Speiser* v. *Randall*, 357 U.S. 513, is not in point. There, this Court, in considering a state statute denying tax deductions to organizations whose officers refused to take an oath that they did not advocate the overthrow of the Government by force and violence, found the statute unconstitutional on a procedural ground—*i.e.*, because the statute put the burden of proof on the claimant that his oath was true. Here, the burden is on the Attorney General to prove his case by a "preponderance of the evidence" (Section 14(a)), and the organization has the protection of a quasi-judicial hearing and judicial review. In addition, unlike in *Speiser*, this Act does not purport "to deal directly with speech and the expression of political ideas" (357 U.S. at 527). Rather, as we have shown (*supra*, pp. 93–95), here Congress has attempted to strike at an evil "thought sufficiently grave to justify limited infringement of political rights" (*ibid.*).

*(iii) The contributions prohibition*

Section 5(a)(2)(A) indirectly affects organizations required to register under the Act by making it unlawful for any officer or employee of the United States or of any defense facility, with knowledge or notice that an organization is registered or has been finally ordered to register, to contribute funds or services to such an organization. Violations are punishable by fine or imprisonment or both (Section 15(c)).

This provision has only an indirect and conjectural effect on petitioner's finances. Nevertheless, we shall assume *arguendo* that the effect of this prohibition on petitioner is not so remote as to deprive it of standing to challenge. Cf. *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 458–460; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 143, 150–160; *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535–536; *Buchanan* v. *Warley*, 245 U.S. 60, 72–73; *Truax* v. *Raich*, 239 U.S. 33, 38–39; but see *Tileston* v. *Ullman*, 318 U.S. 44.

The forbidding of money contributions or other contributions of value by government and defense-facility employees to a Communist-action organization, as the term is defined in this Act, is a reasonable measure in relation to the problem which faced Congress and which led to the passage of the Act. If Congress can validly forbid employees of the United States to engage in partisan politics (*United Public Workers* v. *Mitchell*, 330 U.S. 75), it can validly forbid them to contribute to the welfare of an organization found to have as one of its primary objectives the

destruction of their employer at the earliest feasible opportunity. Similarly, if the Government has the power to safeguard itself by barring government employment to persons who are members of Communist-action organizations (see *infra*, pp. 188–190), it has also the power to forbid its employees to contribute to the treasury of an organization dedicated to its forcible overthrow. Since the prohibition has prospective effect only, no employee can complain of it. If he insists on his right to make the prohibited contribution, he must quit the employment which Congress has declared to be incompatible with this particular type of political donation. See *Adler* v. *Board of Education*, 342 U.S. 485, 492.

The prohibition against the making of contributions to registered organizations by defense-facility employees, is, we submit, on no greatly different footing. The importance of keeping subversive elements out of the ranks of employees of defense facilities is no less pressing than in the case of employees of the Government itself. If Congress can validly provide that members of a registered Communist-action organization shall be ineligible for defense-facility employment, as we think it can (see *infra*, pp. 190–194), it can also forbid the employees of such facilities to support such an organization with money contributions.[41]

[41] Petitioner points out (Br. 6) that under Section 3(6) the term "to contribute funds or services" is defined to include the "* * * making of any gift, *subscription*, loan, advance, or deposit, of money or of anything of value * * *" (emphasis added). From this it reasons that the prohibition of

*(b) Sanctions applicable to individual members of organizations ordered to register*

There are three general categories of sanctions applicable to individual members of organizations which have registered or been finally ordered to register—the "employment," "passport," and "alien" provisions. Again, we assume *arguendo* (though the point is doubtful) that petitioner has standing to contest these provisions, which do not apply directly to it, but only to its members (see *supra*, p. 186).

*(i) The employment restrictions*

The employment restrictions are broadly divisible into three types: prohibitions against (a) employment by the Federal Government, (b) employment in any defense facility, and (c) holding office in or employment with any labor organization or as an employer-representative in a proceeding under the National Labor Relations Act.

*a. The prohibition against employment by the Federal Government*

When an organization is registered under the Act or has been finally ordered to register, all of its members having knowledge or notice of that fact

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Section 5([illegible](2)(A) extends to "subscribing" to a publication of an organization ordered to register. It is clear, however, under the principle of *ejusdem generis*, that Congress, in using the term "subscription," meant the act of subscribing in the sense of "promis[ing] to give or contribute, by writing one's name with the amount" (Webster's *New International Dictionary*, 2d ed., unabridged), rather than in the more colloquial sense of "enter[ing] one's name for a newspaper, a book, etc." (*ibid.*).

are forbidden to conceal or fail to disclose their membership in seeking, accepting, or holding any nonelective employment with the Federal Government (Section 5(a)(1)(A)) or to hold such employment (Section 5(a)(1)(B)), under penalty of a fine or imprisonment or both (Section 15(c)).

The reasonableness and validity of these provisions is clear. "The restrictions upon Government employment," as the court below observed, "are directly related to the substantive evil at which Congress was aiming in this statute. Infiltration of government by world Communist adherents is one of the specified evils recited by the Congress [Section 2(1)] and certainly a prohibition of Government employment to such adherents is a direct attack upon that evil. Indeed we can think of no more direct relationship than that which would exist between the objectives of the world Communist movement, as it is described in this statute, and the occupation of Government positions by members of a Communist-action organization" (R. 2110).

Both Congress and the Executive have repeatedly provided that persons who are members of organizations advocating overthrow of the Government cannot become or remain federal employees. *E.g.*, Hatch Act (of August 2,) 1939, c. 410, Section 9A, 53 Stat. 1148; Emergency Relief Appropriation Act of 1941, c. 432, Sections 15(f), 17(b), 54 Stat. 611; E.O. 9835 of March 21, 1947 (12 F.R. 1935); E.O. 10450 of April 27, 1953 (18 F.R. 2489). The prohibition in this Act applies only to those members of Communist-action organizations who continue to re-

main members with knowledge or notice that the organization to which they belong either has voluntarily registered under the Act or has been finally ordered to do so. *Bona fide* termination of membership ends the applicability of the provisions. That Congress possesses this power to bar from the ranks of employees of the United States Government persons who knowingly remain members of an organization after that organization has been duly found to be a Communist-action organization and has been finally ordered to register as such, is beyond doubt. See *Wieman* v. *Updegraff*, 344 U.S. 183, 188–192; *Adler* v. *Board of Education*, 342 U.S. 485, 494–495; *Garner* v. *Los Angeles Board*, 341 U.S. 716.[62] And the power to exclude such members entirely from government employment includes the power to penalize those who willfully conceal their membership in order to obtain or continue to hold such employment.

*b. The prohibition against employment in any defense facility*

When an organization is registered under the Act or has been finally ordered to register, all of its members having knowledge or notice of that fact are prohibited from concealing or failing to disclose their membership in seeking, accepting, or holding employment in any defense facility (Section

[62] The substantive power of the Federal Government to dismiss employees on loyalty grounds has been assumed by both the parties and the Court in such cases as *Peters* v. *Hobby*, 349 U.S. 331, and *Cole* v. *Young*, 351 U.S. 536. The only issues in those cases were whether the Government had followed the procedures it had established for dismissal and whether such procedures were constitutional.

5(a)(1)(C)) or, if the organization is a Communist-action organization, from working in any defense facility (Section 5(a)(1)(D)), under penalty of a fine or imprisonment or both (Section 15(c)).

These provisions are on a par with those relating to government employment. The court below summed up the pertinent considerations when it said, "We think the considerations which validate power to forbid Government employment likewise support the power to forbid defense facility employment. The latter employment is sensitive business, and it would be sheer folly to say that the Government cannot close the gates of such facilities against those who are knowingly members of organizations under the dominion of a foreign government" (R. 2111). Particularly is this true, we would add, when the danger caused by the foreign government is the very *raison d'etre* of most of these defense facilities.

The manifest purpose of these provisions is to guard against sabotage and espionage in establishments vital to the national defense. They constitute a valid exercise of the war and defense powers. Congress has never regarded itself, or been thought by the courts to be, impotent to deal with the problems of sabotage and espionage in defense facilities. See, *e.g.*, 18 U.S.C. 793–794 (espionage); 18 U.S.C. 2151–2156 (sabotage); *Korematsu* v. *United States*, 323 U.S. 214, 216–217; *Gorin* v. *United States*, 312 U.S. 19; *United States* v. *Gray*, 207 F. 2d 237, 241 (C.A. 9); *Parker* v. *Lester*, 112 F. Supp. 433, 443 (N.D. Cal.), reversed on other grounds, 227 F. 2d 709 (C.A. 9).

Nor is Congress limited, in striking at these evils, to exacting criminal penalties after they occur. It can adopt reasonable measures to prevent their occurring. The *Gray* case involved the constitutionality of the so-called Magnuson Act of August 9, 1950, c. 656, 64 Stat. 427, 50 U.S.C. 191, 192, which, together with the regulations promulgated under it (see E.O. 10173 of October 18, 1950 (15 F.R. 7005); E.O. 10277 (16 F.R. 7537); E.O. 10352 (17 F.R. 4607)), are known as the Port Security Program. It provides for Coast Guard screening of workers in harbors, ports, vessels, and waterfront facilities. The Court of Appeals for the Ninth Circuit, while it found the procedures in the particular cases before it defective, had no doubt of the power of Congress to prohibit members of subversive organizations from engaging in employment which would give them opportunities to commit sabotage and espionage. "There seems no reason to doubt that the screening operation initiated by the Magnuson Act is a legitimate war measure" (207 F. 2d at 241). Similarly, the district court in *Parker* v. *Lester, supra,* 112 F. Supp. at 443, referred to the same Port Security Program as being justified by "the undoubted right of the Nation to protect itself from subversion." And the court of appeals, although reversing the district court decision because of procedural defects, stated (227 F. 2d at 718):

> It may be taken for granted that in view of the emergencies referred to in the Act and in the Executive order it was altogether appropriate to establish a system whereby persons who are security risks may be denied employment

> upon merchant ships. The existence of the emergency, the seriousness of the danger legislated against, and the necessity for such legislation are for determination by other Departments of the Government, not by us. We think it clear that the screening of persons who are security risks is permissible as a matter of substantive due process.

If ship and harbor workers may, subject to criminal penalties for non-compliance (50 U.S.C. 192), be denied clearance to work as a security measure to protect our merchant marine and harbor facilities, we submit that the same considerations justify the prohibitions of Section 5(a)(1) (C) and (D) of the Act at bar. Both programs subject violators to criminal sanctions appropriate to curb the evil aimed at. Both are valid exercises of the nation's power to provide for its own survival.

We must assume that the Secretary of Defense, under the power granted him by Section 5(b), will designate "defense facilities" just as vital to national security as are ships, ports, and waterfront installations. And despite petitioner's claim of "unfettered" and "unreviewable authority" to designate any private enterprise, including the most non-sensitive (Br. 54), it is evident that the Secretary's discretion, while unquestionably broad, would not be unlimited; if it were abused by an unreasonable designation this would doubtless either be a defense in a criminal prosecution or could be challenged in some other judicial proceeding. Cf. *Speiser* v. *Randell*, 357 U.S. 513; *Truax* v. *Raich*, 239 U.S. 33.

Petitioner's further argument that its members cannot be barred from work in non-sensitive jobs in sensitive businesses (Br. 54) is also untenable. Neither Congress nor the Secretary of Defense is *constitutionally* required to make the difficult distinctions between "sensitive" and "non-sensitive" jobs at such installations as the Oak Ridge laboratories.[83] Congress has the power, if that is its policy, wholly to bar those who insist on remaining a part of the world Communist movement from establishments which, because of the general nature of their business, are properly classifiable as "defense facilities."

*c. The prohibition against holding office or employment with a labor organization or as an employer-representative in a proceeding under the National Labor Relations Act*

When an organization is registered under the Act or has been finally ordered to register, it becomes unlawful for any member having knowledge or notice of that fact to hold office in or employment with any labor organization as defined in the National Labor Relations Act (see *supra*, p. 80, fn. 24), or to represent any employer in any proceeding under that Act (Section 5(a)(1)(E)),[84] under penalty of a fine or imprisonment or both (Section 15(c)).

By its terms this prohibition is applicable only to the holding of office in or employment by labor organ-

[83] At the present time, by contract, the Secretary of Defense exercises his discretion as to which physical areas of defense facilities that have classified government contracts shall be accessible only to persons having security clearance.

[84] These provisions were added to the Subversive Activities Control Act by Section 6 of the Communist Control Act of 1954, 68 Stat. 777.

izations; it does not extend to mere membership in a union. We submit that the validity of this provision is a logical corollary of *American Communications Assn.* v. *Douds*, 339 U.S. 382. The Court there sustained the validity of Section 9(h) of the National Labor Relations Act, as amended by the Labor-Management Relations Act of 1947, under which the benefits of that Act were limited to unions whose officers filed with the Labor Board affidavits attesting that they were not members of the Communist Party. The objective of the clause in issue, as this Court observed, was the elimination of the obstruction to interstate commerce resulting from the so-called "political strike," which Congress had found after lengthy studies to be the result of the infiltration by Communist Party members into positions of power in labor organizations (339 U.S. at 388–389). "No useful purpose would be served," said the Court, "by setting out at length the evidence before Congress relating to the problem of political strikes, nor can we attempt to assess the validity of each item of evidence. It is sufficient to say that Congress had a great mass of material before it which tended to show that Communists and others proscribed by the statute had infiltrated union organizations not to support and further trade union objectives, including the advocacy of change by democratic methods, but to make them a device by which commerce and industry might be disrupted when the dictates of political policy required such action" (*ibid.*). See also *Osman* v. *Douds*, 339 U.S. 846; *National Labor Relations Board* v. *Highland*

*Park Co.*, 341 U.S. 322, 325; *National Labor Relations Board* v. *Dant*, 344 U.S. 375, 385.

The *Douds* decision thus accepted as a reasonable basis for the non-Communist affidavit legislation the Congressional finding that Communists in positions of influence in labor unions tend to promote political strikes and thereby to endanger the national interest in time of peace as well as of national peril. This finding was reinforced by the findings of Section 2 of the Act at bar, which emphasize even more forcefully the need to keep adherents of the world Communist movement out of positions of influence in labor and industry (see, particularly, Section 2(1) and (15)).[65]

On that basis, there is no significant difference between the policy and purpose of Section 9(h) of the amended National Labor Relations Act and Section 5(a)(1)(E) of the Subversive Activities Control Act. If a union officer who cannot subscribe to a non-Communist affidavit can be forced out of his position of leadership in the union by the indirect method of depriving his union of rights it would otherwise enjoy before the Labor Board, there can be no infirmity in directly prohibiting him from being on a labor union staff as an officer or employee. The justification for either method is the same—the reasonableness of re-

[65] See also the portion of the Board's report (R. 2562-2569) relating to Communist infiltration into the labor union movement, the control exercised by Communists over national trade union activities, the systematic training of Communist organizers to gain leverage within the basic industries, and the use made by petitioner of the political strike as an effective means of crippling the economy in periods of crisis.

moving from positions of influence in unions those persons who can be expected to use these positions to the detriment of the nation. In neither case is any person permanently or categorically barred from holding such a position—he can by renouncing in good faith his Communist ties resume his eligibility with respect to his union. *American Communications Assn.* v. *Douds, supra,* 339 U.S. at 414. His ineligibility is only with respect to a special category of employment and lasts only for so long as he continues it by a self-imposed exile.[66] See also *infra,* pp. 204–208, 211.

What has been said with respect to the prohibition against holding office or employment with a labor union applies with equal force to the prohibition against representing any employer in any proceeding arising under the Labor Act. The same logic which underlies the need to eradicate members of Communist-action organizations from positions of influence in labor unions is equally applicable to management representatives, who, from their places on the other side of the bargaining table, could not only exert an adverse influence on interstate labor-management relations and thus on interstate commerce, but could use their positions for political ends to the same extent as union officials. Such representatives are clothed with broad powers and enjoy "an operating participation in governmental facilities." *Na-*

[66] We are dealing here only with *members* of a Communist-action organization. No self-appraisal or searching for subjective beliefs is called for—unlike some aspects of the non-Communist affidavit clause of the Labor Act. See *Osman* v. *Douds,* 339 U.S. 846.

*tional Maritime Union of America* v. *Herzog*, 78 F. Supp. 146, 172 (D. D.C.), affirmed, 334 U.S. 854.

(*ii*) *The passport provisions*

When an organization is registered under the Act or an order directing it to register has become final, members of the group having knowledge or notice of that fact are prohibited from applying for, seeking to renew, using, or attempting to use any passport issued under the authority of the United States (Section 6(a)). In addition, officers and employees of the United States are forbidden to issue passports to or renew passports of any individuals whom they know or have reason to believe to be members of a Communist-*action* organization which has registered or been finally ordered to register (Section 6(b)). Violations of these prohibitions are punishable by fine or imprisonment or both (Section 15(c)). Taken together, these provisions remove from eligibility for passports all persons who remain members of a Communist-action organization after it registers or is finally ordered to do so.

At the present time, a passport has the dual function of extending governmental protection while abroad and also of granting permission to travel to many parts of the world. See *Shachtman* v. *Dulles*, 225 F. 2d 938 (C.A. D.C.). In the first aspect, a passport is addressed to foreign governments and requests for the holder "permission to come and go as well as lawful aid and protection." *United States* v. *Browder*, 113 F. 2d 97, 98 (C.A. 2), affirmed, 312 U.S. 335; Borchard, *Diplomatic Protection of Citizens*

*Abroad* (1915), p. 493; cf. *Urtetiqui* v. *D'Arcy*, 9 Pet. 692, 698. An American passport "indicates that it is the right of the bearer to receive the protection and good offices of American diplomatic and consular officers abroad and requests on the part of the Government of the United States that the officials of foreign governments permit the bearer to travel or sojourn in their territories and in case of need to give him all lawful aid and protection." 3 Hackworth, *Digest of International Law* (1942), ch. X, § 259. Certainly, as remarked by the court below, "the Government may validly decline to confer its diplomatic protection upon, and to request foreign governments to give aid and protection to, a member of an organization operating primarily to achieve the objectives of a world movement such as the Communist movement is defined to be in this statute. Surely a government owes no duty of protection to those who, dominated by a foreign organization, seek its overthrow" (R. 2111).

The passport sanction is also valid insofar as it prevents travel abroad by members of a Communist-action organization. Congress has specifically found in the Act that "[d]ue to the nature and scope of the world Communist movement, with the existence of affiliated constituent elements working toward common objectives in various countries of the world, travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the world Communist movement" (Section 2(8)). It is evident that

the unity and cohesive force of the world Communist movement, and its capacity to endanger the independence of this Government and the continuation of our free institutions, are promoted through personal contacts of its members both here and abroad. For one thing, there is evidence that American Communists have secured the traditional indoctrination in the Soviet Union given to most non-Russian Communist leaders (see R. 2597–2603), and travel abroad by local Communist leaders certainly facilitates their effectiveness as couriers, both of intelligence to foreign countries and of directives to this country (see R. 2605–2613). Aside from the findings of the Board on this subject (R. 2596–2613), it is also of judicial record that Communist leaders have made fraudulent use of passports in the past. See, *e.g.*, *Browder* v. *United States*, 312 U.S. 335; *Eisler* v. *United States*, 176 F. 2d 21 (C.A. D.C.), certiorari denied, 337 U.S. 958. For these reasons, the barring, in effect, of foreign travel outside of the Western Hemisphere to persons continuing their membership in a Communist-action organization is valid as an appropriate method of obtaining the serious and legitimate congressional objectives embodied in the Act. *Briehl* v. *Dulles*, 248 F. 2d 561, 571–573 (C.A. D.C.), reversed on other grounds *sub nom. Kent* v. *Dulles*, 357 U.S. 116; *Dayton* v. *Dulles*, 254 F. 2d 71, 73–74 (C.A. D.C.), reversed on other grounds, 357 U.S. 144; cf. *Galvan* v. *Press*, 347 U.S. 522, 529.[67]

[67] For fuller discussion of the power of Congress validly to restrict the travel of members of the Communist Party, see the Government's Briefs for the Respondent in *Kent* v. *Dulles*.

Thus, the prohibitions of Section 6 (a) and (b) relating to use or attempted use of passports by members of covered organizations and the issuing or the renewing of passports to such persons by federal employees are clearly reasonable. Nor is it unreasonable to impose criminal sanctions for the very act of applying for a passport with knowledge of ineligibility under the law to receive one. Congress might, it is true, have limited itself to the punishment of false representations in and fraudulent use of passports—crimes already defined in the criminal code. 18 U.S.C. 1541–1546; see *Browder* v. *United States, supra*, 312 U.S. 336; *Warszower* v. *United States*, 312 U.S. 342; *United States* v. *Rubenstein*, 151 F. 2d 915 (C.A. 2), certiorari denied, 326 U.S. 766. But these remedies would not have as effectively prevented attempts by members of covered organizations to obtain passports despite known ineligibility. They could apply for and, perhaps by concealing pertinent information, obtain a passport. The use of aliases is a commonplace among them.[48] Congress preferred to forestall such frauds—which may be difficult to prove—by making the application for a passport a crime.

*(iii) The provisions applicable to aliens*

*a. Exclusion and deportation*

Petitioner does not attack the exclusion and deportation sanctions presumably because, as stated in its

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No. 481, Oct. Term 1957, at pp. 60–75, 89–100, and *Dayton* v. *Dulles*, No. 621, Oct. Term 1957, at pp. 46 *ff.*

[48] See, for example, the aliases used by Gerhardt Eisler and other foreign representatives to petitioner (R. 2525–2528).

original brief, it "recognize[s] that *Galvan* v. *Press*, 347 U.S. 522, is decisive of the validity of the deportation and exclusion sanctions" (p. 72, fn. 31). Since we agree that *Galvan* is decisive (see also *Niukkanen* v. *McAlexander*, 362 U.S. 390), there is no need for further disucssion of these particular sanctions, which are described at p. 80, *supra*.

*b. Ineligibility for naturalization*

Under Section 313(a)(2)(G) of the Immigration and Nationality Act of 1952, which substantially reenacts and carries forward the naturalization provisions of the now-repealed Section 25 of the Subversive Activities Control Act, any alien who is a member of or affiliated with a Communist-action organization during such time as it is registered or required to be registered under the latter Act is ineligible for naturalization. Petitioner, while it does not expressly admit the validity of this sanction, does not specifically challenge it (see Br. 55). In any event, there can be no real doubt of its constitutionality, in view of the plenary power of Congress to impose conditions upon the conferring of citizenship by naturalization. *Schneiderman* v. *United States*, 320 U.S. 118, 131; *United States* v. *Macintosh*, 283 U.S. 605, 615; see Note, *The Internal Security Act of 1950* (1951), 51 Colum. L. Rev. 606, 644-645. Certainly, it lies within the power of Congress to withhold the privilege of citizenship from alien members of an organization found to be the domestic instrument of the foreign government or group controlling the world Communist movement

and to be dedicated to promoting the objectives of that movement. If the exclusion and deportation sanctions are valid, as petitioner has conceded (*supra*, pp. 201–202), the validity of this sanction necessarily follows *a fortiori*.

*c. Denaturalization*

Section 25 of the Act, besides enacting the prohibition against naturalization just discussed, contained a further provision amending the nationality laws with respect to denaturalization proceedings. Like the other provisions relating to immigration and nationality, this provision is now contained in the Immigration and Nationality Act of 1952, which carried it forward as Section 340(c). Applying only to persons who become naturalized after the effective date of the latter Act,[69] it provides that if any such person shall within five years next following his naturalization become a member of or affiliated with any organization, membership in or affiliation with which at the time of naturalization would have precluded him from naturalization under the provisions of Section 313,[70] that fact shall be considered *prima facie* evidence, warranting revocation of citizenship in a denaturali-

[69] *I.e.*, December 24, 1952. The Immigration and Nationality Act, passed on June 27, 1952, took effect 180 days later (Section 407, 66 Stat. 281). The provision in question in its original form, *i.e.*, before it was transferred to the Immigration and Nationality Act of 1952, applied to persons naturalized "after January 1, 1951" (Section 25 of the Subversive Activities Control Act).

[70] This includes Communist-action organizations registered or required to register under the Subversive Activities Control Act.

zation proceeding if not rebutted, of lack of attachment to the principles of the Constitution and of the quality of being well disposed to the good order and happiness of the United States at the time of his naturalization.

We submit that this sanction is valid. Persons who obtain their naturalization after December 24, 1952, do so subject to the conditions and provisions laid down by Congress, including this provision. There can be no question of retroactivity, or of the Government's taking back its grant of citizenship on grounds which the naturalized person could have had no reason to anticipate when he received it. In view of the broad power of Congress to impose conditions on its grant of citizenship (*Schneiderman* v. *United States, supra,* 320 U.S. at 131; *United States* v. *Macintosh, supra,* 283 U.S. at 615) and the reasonableness of the rebuttable presumption established by this provision for the future, it cannot be said to be beyond Congressional authority. Cf. *Galvan* v. *Press,* 347 U.S. 522; *Carlson* v. *Landon,* 342 U.S. 524, 535–536.[11]

*2. The member-sanction provisions do not rest on innocent or unknowing past membership and therefore do not deprive petitioner's members of due process*

Petitioner contends (Br. 50–56) that the sanctions imposed on members of action organizations which have registered or been ordered to register are im-

[11] The court below did not pass upon this provision. It said, "A denaturalization does not flow automatically from registration; a regular proceeding for the purpose must be brought. No such case is before us * * *" (R. 2115). Accordingly, the court expressed no views as to the validity of this sanction, saying that decision thereon "must await a specific test" (*ibid.*).

posed even though the members "have no knowledge of the alleged character of petitioner" (Br. 51), in alleged violation of the rule of *Wieman* v. *Updegraff*, 344 U.S. 183. Petitioner also argues that, because the Act "makes conclusive a presumption of unfitness [*i.e.*, to do the things forbidden by the sanctions] arising from membership" (Br. 53), it conflicts with *Adler* v. *Board of Education*, 342 U.S. 485.[72]

Petitioner's contention that the member-sanctions are visited upon "innocent" and "unknowing" members fails to take adequately into account the conditions which must be fulfilled before those sanctions become applicable. We limit our discussion to those member-sanctions applicable to citizens, *viz.*, the employment restrictions and passport prohibitions. The alien sanctions are not, we believe, open to any serious challenge on the grounds urged.[73] The employment and passport provisions (and their supporting criminal penalties) are applicable only when the members of an organization have "knowledge or notice"[74]

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[72] We point out, once again, that petitioner raises this issue on behalf of its members, none of whom is before the Court.

[73] As has been seen, petitioner has conceded the validity of the exclusion and deportation sanctions (*supra*, pp. 201–202), and, for the reasons set forth at pp. 202–204, *supra*, we believe the validity of the naturalization sanction and the denaturalization sanction, establishing a *rebuttable* presumption *for the future*, is equally beyond dispute.

[74] The Act provides that publication in the Federal Register of the fact that an organization has registered or been finally ordered to register "shall constitute notice to all members of such organization" that it has so registered or been finally ordered to do so (Sections 9(d), 13(k)). Since petitioner does not challenge the validity of these provisions (see Br. 53, fn. 21), we shall not discuss them otherwise than to state that their

either that the organization has registered voluntarily or has been finally ordered to do so after court review (Sections 5(a)(1), 6(a)).[75] In complaining that these sanctions are imposed on members without regard to whether or not they have "knowledge of the alleged character of" the organization, petitioner is apparently arguing that it is not permissible to impose sanctions on a member if he does not agree with the organization's own estimate of its character or with the formal finding made by the Board and upheld by the courts. Nothing in the due process clause or this Court's *Wieman* decision, *supra*, supports such a claim.

*Wieman* held that the due process clause does not permit "a state, in attempting to bar disloyal individuals from its employ, to exclude persons solely on the basis of organizational membership, regardless of their knowledge concerning the organizations to which they *had* belonged" (344 U.S. at 190; emphasis added). "[M]embership may be innocent," observed the Court (*ibid.*), and "[i]ndiscriminate classification of innocent with knowing activity * * * offends due

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validity is clear under such decisions as *United States* v. *Balint*, 258 U.S. 250, 251–252, and *Shevlin-Carpenter Co.* v. *Minnesota*, 218 U.S. 57, 68–70. The Act also requires the Attorney General to notify all individuals the reporting organization lists as officers or members (Section 7 (g)).

[75] As petitioner points out (Br. 54), an officer or employee of the United States or of a defense facility is forbidden under Section 5(a)(2) to employ, and an officer or employee of the United States is forbidden under Section 6(b) to issue a passport to, any individual who he knows or has reason to believe is a member of a registered action organization or of an action organization which has been finally ordered to register, without regard to any "knowledge or notice" on the part of the applicant. These special situations, however, do not, in our opinion affect the due process issues raised by petitioner. Cf. the original decision of the court of appeals, R. 2105.

process" (*id.*, p. 191). But the employment and passport provisions of the Act at bar are not imposed on "innocent," "unknowing," *former* members of any organization. They apply only to *current* members of organizations which either admit being (by registering) or are formally found to be (by a judicially-reviewed Board finding) substantially controlled by the foreign government or group which controls the world Communist movement and to be primarily operating to advance the objectives of that movement.

If perchance a member was not aware of these facts before the organization's registration or the entry of a final order directing it to do so, he is made aware of them when the one or the other of these eventualities occurs. He then has it within his power to "renounce the allegiances" and effect a "voluntary alteration of the loyalties" (*American Communications Assn.* v. *Douds,* 339 U.S. 382, 414) which threaten to bring disabling consequences on him. He can avoid the Act's sanctions by a good-faith termination of his membership. There is thus no possibility of the unconscionable result against which the *Wieman* decision was aimed, viz., preclusion from legitimate employment opportunities by innocent and unknowing memberships and associations of one's past. And if the member knowingly continues his membership, he is properly subject to the sanctions. See *Adler* v. *Board of Education,* 342 U.S. 485; *Garner* v. *Los Angeles Board,* 341 U.S. 716; *Gerende* v. *Election Board,* 341 U.S. 56.

Nor is petitioner's second due process contention (*supra,* p. 205)—*i.e.,* that based on its reading of

*Adler* v. *Board of Education*, 342 U.S. 485—any more tenable. If we correctly understand the contention, it is that, after an organization has registered as a Communist-action organization, thereby admitting its character as defined in Section 3(3), or after it has been formally found to be such an organization by a Board finding which has been judicially reviewed and sustained, each member of the organization must be afforded an opportunity personally to rebut the organization's own estimate of its character, or the judicially affirmed Board finding with respect thereto, before any member-sanction can be made applicable to him on account of his continued membership. Nothing in the *Adler* decision, we submit, requires so strained a result. On the contrary, the organization is the representative of all its members as to the character of the organization. Therefore, when the organization registers or is ordered to register, the sole remedy of any member is to resign.

### *3. The sanction provisions do not make of the Act a bill of attainder*

Petitioner also contends (Br. 63–72) that the sanction provisions make of the Act a bill of attainder, forbidden by Article I, § 9, clause 3, of the Constitution. The Act, it says, "imposes various sanctions on the organization identified by the registration order and on its members" after giving the organization "only an administrative hearing, not a judicial trial" and thus, allegedly, "meets the definition of a bill of attainder" (Br. 63).

A bill of attainder is a legislative act which inflicts punishment without a judicial trial on named individuals or on easily ascertainable members of a group for past conduct. *Cummings* v. *Missouri*, 4 Wall. 277, 323; *Ex parte Garland*, 4 Wall. 333, 377; *United States* v. *Lovett*, 328 U.S. 303, 315–317; *American Communications Assn.* v. *Douds*, 339 U.S. 382, 413–414; *Garner* v. *Los Angeles Board*, 341 U.S. 716, 722. Petitioner's attempt to depict itself as a possible victim of a bill of attainder, by referring to an order directing an organization to register as "outlaw[ing] the organization and thus prohibit[ing] it from engaging in any future activity," comparable to "execution of an individu[al]" (Br. 65; cf. Br. 66), is unavailing. The punishment inflicted must be visited on individuals.

For a statute to constitute a bill of attainder, it is also necessary that there be *punishment* and that the conduct punished be *past* conduct. *American Communications Assn.* v. *Douds, supra*, 339 U.S. at 413–414. The punishment inflicted, however, need not necessarily be punishment in the usual sense of fine or imprisonment. It may consist of deprivation of the privilege of pursuing a certain profession (*Ex parte Garland, supra*, 4 Wall. at 377), or in some circumstances of working for the Government (*United States* v. *Lovett, supra*, 328 U.S. at 316), or, in general, of "any rights, civil or political, previously enjoyed," depending upon "the circumstances attending and the causes of the deprivation." *Cummings* v. *Missouri, supra*, 4 Wall. at 320; *Garner* v. *Los Angeles Board, supra*, 341 U.S. at 722. Yet it is settled that

not all disabilities constitute punishment. This Court has recently held that whether a statute is a bill of attainder depends upon the purpose of the statute. See the opinion of the Chief Justice in *Trop* v. *Dulles*, 356 U.S. 86, 96:

> If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose. The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a nonpenal effect. The controlling nature of such statutes normally depends on the evident purpose of the legislature.

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See also *Flemming* v. *Nestor*, 363 U.S. 603, 613–616, and the opinion of Mr. Justice Frankfurter in *De Veau* v. *Braisted*, 363 U.S. 144, 160.

Applying these principles to this Act, there can be no question of its being a bill of attainder. First, under the Act, after an organization has either voluntarily registered with the Attorney General or been finally ordered to do so by the Board, its members incur the various disabilities and restrictions which have been called sanctions. That is, certain avenues of employment are foreclosed to them, they are no longer free to use passports, and, if aliens, they become excludable, deportable, and ineligible for citizenship. These restrictions were clearly not imposed by Congress for the purpose of punishing the members of Communist-action organizations. Instead, as Section

2 of the Act makes clear, Congress intended to accomplish the "legitimate governmental purpose" of checking the serious worldwide Communist danger insofar as it was working through organizations within the United States. And, as we have shown (*supra*, pp. 172–204), the restrictions were all reasonably related to this objective.

Second, the "members" on whom these sanctions are imposed are not past or former members of the organization, but *current* members. The sanctions have no retroactive effect; they apply only to persons who continue their membership in the organization after it has registered or been finally ordered to do so, or who become members thereafter. *Bona fide* termination of membership precludes the sanctions' taking effect as to him from that time on. Thus, the *Douds* decision, upholding the non-Communist oath provision against a similar attack, is precisely applicable to the case at bar. Just as "there is no one who may not, by voluntary alteration of the loyalties which impel him to action, become eligible to sign the [non-Communist] affidavit" (339 U.S. at 414), so too there is no present member of petitioner who may not, by a voluntary and good-faith 'ermination of that membership prior to the time when the or ler directing registration becomes final, avoid the restrictions and disabilities imposed by the Act. For this reason, regardless of whether those restrictions and disabilities be deemed of a penal nature or not, the Act lacks one of the essential characteristics of a bill of attainder, *viz*, the punishment of *past* action or conduct. See

Sutherland, *Freedom and Internal Security* (1951), 64 Harv. L. Rev. 383, 403.

## III

### THE COURT BELOW CORRECTLY SUSTAINED THE BOARD'S ULTIMATE FACTUAL FINDING THAT PETITIONER IS A COMMUNIST-ACTION ORGANIZATION AS DEFINED IN THE ACT

#### INTRODUCTION: SUMMARY OF MODIFIED REPORT

The findings of fact made by the Board in its Modified Report fill over 230 pages of the printed transcript of record (R. 2413–2644). As stated by the Board: "The evidence in this proceeding traces the entire existence of the Communist Party of the United States, a period of more than 30 years. It has been a satellite of the Soviet Union from its inception" (R. 2642). We discuss below (pp. 232–263) the nature of the evidence underlying the Board's subsidiary and ultimate findings. We give here a summary of the findings of the Modified Report.

Basically, the Board found that a world Communist movement directed, dominated, and controlled by the Soviet Union exists and has as its primary objective the establishment of Communist dictatorships of the proletariat in all countries throughout the world, including the United States (*e.g.*, R. 2509–2510), and also that the Communist Party of the United States practically since its inception has been an active integral part of this world movement (*e.g.*, R. 2509). Thus, the Board concluded that petitioner operates under the direction, domination, and control of the

Soviet Union primarily to advance the objectives of this movement (R. 2644).

*The World Communist Movement.*—One of the important subsidiary findings of the Board was that the world Communist movement and the Communist Party of the United States adhere to and operate on the basis of "Marxism-Leninism" (R. 2414, 2446–2451, 2453–2456, 2520, 2544, *passim*). "Marxism-Leninism" is a comprehensive compilation of Communist doctrine, general strategy, and tactical operational methods (R. 2414–2453), based on the theories of Marx and Engels as implemented primarily by Lenin and Stalin (R. 2415). It prescribes common programs for accomplishing violent revolutions for the ultimate purpose of establishing the dictatorship of the proletariat, *i.e.*, Communist dictatorship, throughout the world (R. 2420–2422). While the disciplined Communist Party of each country directs the Communist revolution in that country (R. 2429–2434), the various national parties owe loyalty and allegiance to the Soviet Union and its Communist Party which holds a dominant position (R. 2421–2424). "Marxism-Leninism" gives special attention to the United States as the arch enemy of the Communist movement (R. 2424–2428). The Board concluded that "* * * fulfilling the role of the vanguard Communist Party called for in Marxism-Leninism and the adherence to and practice by an organization of Marxism-Leninism is * * * strong evidence that it is substantially under the domination and control of the Soviet Union, the leader of the world Communist movement and that it operates pri-

marily to advance the objectives of the world Communist movement" (R. 2453).

Having determined the doctrinal content of "Marxism-Leninism" as used, understood, and followed by petitioner, the modified Report next found that a world Communist movement as called for in "Marxism-Leninism" exists in fact and has been effective (R. 2453–2510). The present movement was organized by the Russian Communists when they called for the world revolution after the 1917 revolutions had brought them into control in Russia; the purposes of organizing the world movement were to consolidate and protect the Communist victory in Russia and to foment and aid Communist revolution in any part of the world where it might be successful (R. 2419, 2455–2456). From 1919 until 1943 the movement operated through, in effect, a world Communist Party, called the Communist International or Comintern, which was directed by the Soviet Union with the various Communist Parties throughout the world constituting sections (R. 2456–2485). This particular organizational form was then discontinued because it was no longer required to insure unity and because the open membership of the various Communist Parties in the world Party dominated by the Soviet Union became a hindrance to them in acquiring support (R. 2485–2487).

However, the substance of the world Communist movement, under the hegemony of the Soviet Union,

continued to exist at least until the time of the Board proceeding (R. 2485–2499). In 1947, several European Communist Parties formed the Communist Information Bureau or Cominform as a means of maintaining contact in the world Communist movement (R. 2487–2497). The Board found that working in conjunction with the national Communist Parties the Soviet Union has directed and aided such Parties to acquire governmental power and establish dictatorships in the countries of Eastern and Central Europe and China (R. 2500–2509). In recent years the world Communist movement has been referred to by the various national Communist Parties as the "world camp of peace" or the "camp of peace and democracy", in which the Communist Parties are aligned under the leadership of the Soviet Union to continue the international Communist revolution or "struggle against imperialism" (R. 2493–2499, 2551–2554).

The Board noted that the existence of the world Communist movement and the objectives of the movement to overthrow present non-Communist governments and to establish subservient Communist totalitarian dictatorships are legislative facts found by Congress in the Act itself. The Board, however, itself found (on the basis of the evidence before it) the existence of the world Communist movement substantially as found by Congress in Section 2 of the Act (R. 2453–2454).

*The Communist Party of the United States.*—Petitioner joined and became a part of the Communist International shortly after it was constituted in 1919 (R. 2459). In doing so petitioner adopted a resolution in its 1921 convention endorsing the twenty-one "Conditions of Admission to the Communist International" (R. 2461, 2139, A7G. Ex. 8). These conditions included the requirement that national parties become "sections" of the International and that "[a]ll the resolutions of the congresses of the Communist International, as well as the resolutions of the Executive Committee are binding for all parties joining the Communist International. * * * Those members of the party who reject the conditions and the theses of the Third International, are liable to be excluded from the party" (R. 2139). Petitioner also bound itself to adopt the Communist principle of democratic centralism or control from the top; to maintain a controlled Party press; to follow in its propaganda and agitation the line of the Comintern; to maintain programs in accordance with the resolutions of the Comintern; to support and defend the Soviet Union; and to work for the revolutionary overthrow of capitalism (R. 2461–2463). While petitioner, in 1940, disaffiliated organizationally from the Communist International, the Board found that the purpose was to avoid a federal law and was done to preserve, rather than to end or change substantially, petitioner's role as a part of the international Communist movement (R. 2515).[76] Thus, petitioner has continued to adhere to

[76] While petitioner did not become a formal member of the

the programs and conditions of the world Communist movement.

The Board found that the name of petitioner—the Communist Party of the United States of America"—and petitioner's organization, including reorganizations that have taken place, were the result of directives or statements from the international Communist leadership (R. 2510–2522). Organizationally, petitioner practices the iron discipline and "democratic centralism" required for any Communist Party anywhere in the world (R. 2528–2538). Included in "democratic centralism" is strict control from the top at both the national and international levels (R. 2529). Consistent with Marxism-Leninism, petitioner has operated secretly in many respects (R. 2613–2631).

Before World War II, the Soviet Union provided training in Moscow for many of petitioner's outstanding workers and leaders (R. 2596–2603). This training included instructions in the policies, strategy, and tactics of the world Communist movement and in methods for carrying out the proletariat revolution,

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Cominform after its organization in 1947, petitioner used and relied upon important Cominform documents (R. 2516; see, *e.g.*, R. 775).

[11] The change from "Communist Political Association" to petitioner's present name in 1945 was not a mere matter of form. It was considered an integral part of petitioner's major reorganization in that year resulting from the criticism of Jacques Duclos, an important French Communist (R. 2520–2521; see *infra*, p. 235). As an article in petitioner's official organ stated, "It is necessary to resume the name *Communist Party* to restore the correct Marxist concept and role of a vanguard party of the working class" (R. 2521).

including guerrilla warfare, sabotage, the arming of supporters, and seizure of food and supplies (R. 2599, 2602–2603). Among the Party members so trained were petitioner's highest officer and other top officials and leaders at the time of the Board hearing. These officials had held important positions in the Party for many years, had held positions in the organized world Communist Party in addition to their positions with petitioner, and had visited the Soviet Union on Party business (R. 2522–2525, 2597–2603). They in turn have indoctrinated petitioner's membership, and operated the Party in this country in accordance with instructions received while in the Soviet Union (R. 2523, 2602–2603). Some of these same leaders of petitioner while attending a Communist conclave in the Soviet Union in 1935 took an oath of fealty to Stalin, the then head of the Soviet Union, and have never repudiated it (R. 2636–2637).

As part of its organizational structure, petitioner maintains a Communist press which follows specific directives from the Communist International and the rules of "Marxism-Leninism" (R. 2538–2543). The Modified Report contains numerous instances from the Party's official organs which demonstrate their use as a means of spreading Communist propaganda in this country and particularly in aiding the Soviet Union (*e.g.*, R. 2539–2541, 2546–2547, 2550, 2610, 2632–2633). Besides the Party press, petitioner maintains schools and devotes part of its membership meetings to teaching and advocating the various doctrines, programs, strategy, and tactics of the world Communist

movement (*e.g.*, R. 2446–2451, 2518–2521, 2523, 2549, 2555, 2568, 2570–2571, 2626, 2641).

The Board considered the positions advanced by petitioner throughout its history and continuing up to the time of the hearing and found that petitioner has invariably supported the policies of the Soviet Union (R. 2580–2590). Petitioner has supported the positions of the Soviet Union in at least forty-five international questions of major importance (R. 2581). In fact, petitioner has immediately conformed its policies to reversals in those of the Soviet Union (R. 2583–2585, 2590). Translations received by petitioner of articles in the official Soviet Union press, such as *Pravda,* provide a source of directives to be followed by petitioner in this country (R. 2541–2542).

Petitioner, as required by Marxism-Leninism, has throughout its existence aimed at the overthrow of capitalist or "imperialist" nations, particularly the United States, and has actively supported the Soviet Union for this purpose (R. 2543–2558, 2631–2642). The teaching and advocacy of the overthrow of "imperialist" governments includes the use of force and violence, if necessary (R. 2631–2633). In order to overthrow the United States, petitioner urged the study of "Marxism-Leninism," as a guide to action, in the classics, schools, and discussion groups. This instruction in support of the Soviet Union included the concept of "just" and "unjust" wars (R. 2640–2641, 2555–2558). According to this doctrine, Communists will not bear arms in a war against the Soviet Union; in the event of a war between the Soviet Union and

the United States, petitioner's members are to work for the defeat of the United States; and, in the event of a war between two "imperialist" countries the Communist role is to work for the destruction of both, thus leaving the Soviet Union a clear path for future victory (R. 2557, 2640–2641).

The Modified Report reviews petitioner's current activities in the fields of labor, youth, and minority groups and finds that these programs and activities have continually followed the policies of the Communist International and the Soviet Union (R. 2558–2580). Petitioner attempts to infiltrate these groups and take them over are for the purpose of effectuating the policies of the Soviet Union and furthering the world Communist movement (R. 2580).

In addition to its recognition and acceptance of the Soviet Union as the leader of the world Communist movement and its activities in support and defense of the Soviet Union, the Board found that petitioner was aligned with the other Communist Parties in the movement. During its open membership in the Communist International, petitioner carried out the task of supervising the Communists in Canada, Cuba, Mexico, and Central America (R. 2458–2459). In 1939, petitioner joined with the Communist Parties of France, Great Britain, and Germany in adopting a resolution for use of *History of the Communist Party of the Soviet Union*, a basic text for teaching Marxism-Leninism which was still used as such at the time of the Board proceeding (R. 2450–2451). In 1945, petitioner's most recent reorganization took place following a statement that it should reorganize,

issued by the head of the Communist Party of France purporting to express the views of European Communists (R. 2518). Petitioner's own leader, William Z. Foster, praised the so-called "People's Democracies" in Central and Eastern Europe as correct forms of the proletarian dictatorship and as following the fundamentals laid down by the Communist International and by Marxism-Leninism (R. 2506–2509). After the Chinese civil war commenced in 1948, petitioner urged full support of the Chinese Communists, sent congratulatory and cooperative messages to the Communist Party of China and its leader Mao Tse-tung, and used the Communist revolution in China as an example to inspire Communists in the United States (R. 2501–2503). Pledges of full solidarity and cooperation were received by petitioner in December 1950 from thirty-one Communist Parties throughout the world (R. 2498–2499, 2606–2613). The message from the Soviet Union was treated by petitioner as of particularly great importance (R. 2613). Many of the communications from other Communist Parties affirmed the leadership role of the Soviet Union in "united proletarian internationalism" (R. 2499).

A. THERE IS NO OCCASION FOR A SECOND JUDICIAL REVIEW OF THE BOARD'S FACTUAL FINDING THAT PETITIONER IS A COMMUNIST-ACTION ORGANIZATION

The evidence in this proceeding consists of more than 14,000 typewritten pages of testimony from 19 witnesses (R. 2412, 2646–2650), and more than 500 exhibits. Its presentation consumed more than 14 months (R. 2406–2407). The exhibits consisted of copies of official Communist Party documents, includ-

ing reports made by Party leaders to official Party boards, committees, and other groups, study and teaching materials used in Party schools and training sessions, resolutions and programs adopted by the Party and its leadership, and various authoritative Party writings. They also consisted of copies of official publications and material issued by the Soviet Union (see, *e.g.*, R. 1499–1798). The oral testimony covered to a large extent Party conduct and activities participated in by, or otherwise within the personal knowledge of, the witnesses. Sixteen of the witnesses for the Attorney General were former members of the Communist Party (R. 2646). Twelve had been members until 1945 or later, four as late at 1952 (R. 2646–2650).[78] Most of the Party member-witnesses had held leadership or functionary positions in the Party; had attended and taught in Party schools or other training sessions; and had done organization and other work for the Party (R. 2646–2650).

The specificity and first-hand knowledge of the Attorney General's witnesses were noted by the court of appeals, and the testimony of witness Philbrick was summarized by the court as an illustration (R. 2126–2128). As stated by the court, Philbrick's entire period of membership in the Communist Party, some five years, was after the disaffiliation of the Party from the International. His testimony, based in large part on what he had been taught in Party classes, in-

[78] The Board's hearings for taking evidence started in April 1951 and extended until July 1952 (R. 2406–2407). The testimony of three other witnesses was struck on remand from this Court (R. 2411).

cluded statements that the basic objective of the Party was to establish a Soviet state in the United States following the dictates and methods laid down by Marxism-Leninism (R. 2126–2128).

Another illustration of the current and first-hand knowledge of the Attorney General's witnesses is John Lautner, who was a member of the Party from 1929 until 1950 (R. 2648). He was an organizer in Party sections and districts, director of a Party training school, and member of the Party's National Review Commission (R. 2648). He testified to the use in Party training classes as late as 1947, 1948, and 1949 of the *Program of the Communist International* as laying down the strategic aims of the Communist Parties (R. 2447) and to the influence exercised over the Communist Party of the United States by foreign Communist representative Gerhardt Eisler (R. 2526). Lautner identified the leadership of the world Communist movement as the rulers of the Soviet Union and was taught as a Party functionary that the basic objective of the movement was to bring about the downfall of imperialism and of the United States as the leading imperialist country (R. 2549). He testified that a message sent by petitioner to Joseph Stalin in 1949 was in reality a reaffirmation of the Party's loyalty and a further acknowledgment of Stalin's leadership of the world Communist movement (R. 2637–2638).

Petition presented only three witnesses and 92 exhibits. Two of the witnesses were top officials and the other a member who was called as an expert (R. 2650–2651). The Board found that there was "a

significant lack of rebuttal" by the Communist Party on the "multiplicity of specific conversations and events put in evidence by [the Attorney General] at which witnesses available to [the Communist Party] were present" (R. 2412–2413).

A unanimous Board found, on the basis of the "overwhelming weight of the evidence" (R. 132 [2042]; see also R. 133 [2044]), that petitioner is a Communist-action organization as defined in the Act and, as such, required to register. The Board presented the grounds of this finding, and the subsidiary findings on which it rests, in an exhaustive report which also appears in the record in annotated form, *i.e.*, with supporting references to the testimony and exhibits (R. 1–133 [1804–2044]). After remand by this Court, the Board, in its Modified Report, expunged from the record the testimony of three witnesses, but found, after thorough reconsideration of the remaining evidence (no new evidence was introduced),[79] "that the evidence establishes beyond doubt that [petitioner] is substantially directed, dominated, and controlled by the Soviet Union, which controls the world Communist movement * * * and operates primarily to advance the objectives of such world movement * * *" (R. 2644). Therefore, the Board reaffirmed its prior determination that petitioner is a Communist-action organization as defined in the Act (R. 2644). On the new remand from the court of ap-

[79] Attorney General's witness Markward was recalled merely to test the credibility of her original testimony (R. 2225).

peals, the Board, after striking certain evidence and reevaluating the entire record, found in its Modified Report on Second Remand that the findings in the Modified Report were established by a "preponderance of the evidence," particularly the ultimate finding that petitioner is a Communist-action organization (R. 2402). In the Modified Report, as in its original Report, the Board,[80] under appropriate headings and subheadings, summarized the evidence on both sides; where issues of credibility involved important points, the Board recorded its position, and where there were conflicts in the testimony on particular issues, the Board resolved them.

The court below recognized that the statutory "preponderance of the evidence" test in Section 14(a) of the Act imposed "a less stringent restriction upon the function of judicial review than is customary in such statutes"[81] and that "[b]y the same token it imposes

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[80] The Modified Report on Second Remand (R. 2375–2402, unlike the Modified Report, does not include a complete new analysis of the evidence and the findings based on this evidence. Rather, the former Report discusses only the effect of the court of appeals' order and subsequent proceedings before the Board on the findings of the Modified Report. It therefore constitutes, in effect, an amendment to the Modified Report.

[81] Preponderance of the evidence means the greater weight of the evidence. See *Lilienthal's Tobacco* v. *United States*, 97 U.S. 237, 266; *General Foods Corp.* v. *Brannan*, 170 F. 2d 220, 223–224 (C.A.7): The usual rule is that the findings of the administrative agency, if "supported by substantial evidence," shall be final. See, *e.g.*, Administrative Procedure Act, Section 10(e)(5), 5 U.S.C. 1009(e)(5); National Labor Relations Act, as amended, 29 U.S.C. 160(e).

a laborious task upon the reviewing court" (R. 2126). See 96 Cong. Rec. 13764–13765; cf. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 492; *General Foods Corp.* v. *Brannan*, 170 F. 2d 220, 223–224 (C.A. 7); *Great Western Food Distributors* v. *Brannan*, 201 F. 2d 476, 479 (C.A. 7), certiorari denied, 345 U.S. 997. Accordingly, in discharge of this heavy responsibility for review, the court devoted more than a third (R. 2125–2153) of its original 76-page opinion to a discussion and analysis of the evidence on both sides. In its two subsequent opinions, the court of appeals again considered the evidence before the Board (R. 2653–2656, 2700–2701, 2705–2706). The court's original opinion, while not attempting to "comment upon the evidence on each minute issue of fact" or to "evaluate particles of proof," did "indicate the extent, nature, particularity, and personal character of the testimony presented by the Government, and the nature and extent of the evidence presented by [petitioner], including the character of both its denials and its explanations" (R. 2126). The court concluded from its exhaustive review that two of the Board's eight subsidiary findings should be modified (*infra*, p. 276), but that otherwise all of the Board's findings, including its ultimate and decisive finding that petitioner is a Communist-action organization as defined in the Act, were "supported by the preponderance of the evidence" (R. 2152–2153). This determination was reaffirmed by the court in both its subsequent decisions (R. 2655, 2701, 2706). In affirming the Second Modified Report, the court

held that its "findings are amply supported" (R. 2701) and that "[t]he preponderance of all the evidence supports the conclusion of the Board" (R. 2706).

This being the present posture of the litigation, we submit that there is no occasion for the Court to subject the lengthy transcript to a second—indeed, a fourth—judicial review for the purpose of reappraising and reevaluating the evidence and determining its sufficiency to support the Board's findings and order. Section 14(a) of the Act provides that, where review of a Board order is sought:

> The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari * * *.

Relying on a similar provision in the Taft-Hartley Act, this Court in *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502, held that "Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders," and concluded (*id.*, pp. 502–503):

> The same considerations that should lead us to leave undisturbed, by denying certiorari, decisions of Courts of Appeals involving solely a fair assessment of a record on the issue of unsubstantiality, ought to lead us to do no more than decide that there was such a fair assessment when the case is here, as this is, on other legal issues.

This view was emphatically reiterated and applied in *National Labor Relations Board* v. *American Insurance Co.*, 343 U.S. 395, 409–410; *Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396, 397–404; and *Peurifoy* v. *Commissioner*, 358 U.S. 59, 61; cf. *Federal Communications Commission* v. *Allentown Broadcasting Co.*, 349 U.S. 358, 364–365.

We suggest that, under the Subversive Activities Control Act, Congress charged the courts of appeals and not this Court with the primary responsibility for ascertaining that the findings of the Board are supported by a preponderance of the evidence. This should lead this Court to do no more than to satisfy itself that the court of appeals made a fair assessment of the record on the issue of the sufficiency of the evidence. That the court of appeals did so, we submit, is evident from its opinions.

B. THE COURT BELOW CORRECTLY AFFIRMED THE BOARD'S FINDINGS AS BASED ON THE PREPONDERANCE OF THE EVIDENCE

The Board found that "the evidence establishes beyond doubt that [petitioner] is substantially directed, dominated, and controlled by the Soviet Union, which controls the world Communist movement" and "operates primarily to advance the objectives of such world movement" (R. 2644). These findings brought petitioner within the Section 3(3) definition of a Communist-action organization and made it subject, as such, to the mandatory registration requirements of the Act. In this sense these findings may be described as the ultimate or decisive findings of the Board. In

addition to these ultimate findings, the Board made subsidiary findings keyed to the eight paragraphs under Section 13(e), which lists the various factors required to be taken into consideration by the Board in arriving at its ultimate determination (see *supra*, pp. 139–140). Thus, for example, the Board made a finding, corresponding to Section 13(e)(2), that petitioner's "views and policies do not deviate from those of the Soviet Union" (R. 2590). And so on with respect to the other paragraphs of Section 13(e).

The evidence of record is elaborately summarized in the Modified Report of the Board, which contains supporting references. The original Report—which, with several significant exceptions, is substantially the same as the Modified Report—has itself been carefully reviewed and summarized in the original opinion of the court of appeals, which on the basis of its "laborious" study of the record affirmed the order of the Board as supported by "the preponderance of the evidence." We have summarized the Modified Report, *supra*, at pp. 212–221. Therefore, we shall confine ourselves in this portion of the brief to a general discussion of the evidence amply supporting the Board's finding.

A more extended discussion of the sufficiency of the evidence does not appear to be required in this case, for petitioner makes no attempt to assay the significance of any of the proof it attacks from the standpoint of the sufficiency of the evidence as a whole. Its attack, rather, is concentrated on the minutiae of the evidence, frequently lifted out of context. As the

court of appeals stated in its most recent decision (R. 2705):

> By concentrating on segments of the evidence and expanding their importance by discussion, to the exclusion of all the rest of the evidence, the Party seeks to have us believe there are no other significant features in the record.

This fragmentary approach overlooks the fact that, as the court below has remarked, "all relevant facts are cumulative in delineating a completed whole" (R. 2138). One knows "fish from fowl," to use the court's figure (*ibid.*), as a result of simultaneous consideration of an accumulation of evidence, seen from an over-all view. Petitioner's approach to the evidence ignores the fact that, to change the figure, an unmistakable pattern or mosaic can emerge from numerous fragments having little individual significance. "When the parts are put together," the court below observed, "the picture is clear and forceful" (R. 2152). Cf. *Interstate Circuit* v. *United States*, 306 U.S. 208, 223–226.

Viewed from the standpoint of the record as a whole, petitioner's criticisms are but pinpricks at the evidence, often relating to matters having obviously minor bearing on the ultimate issue. The fallacy of this method is shown by the fact that petitioner, by hacking away at the individual trees and ignoring the forest, has reached the astounding conclusion that it is impossible rationally to conclude that the Commu-

nist Party of the United States is the pawn of the Soviet Union and exists to further the objectives of the world Communist movement. In the guise of an elaborate factual and statutory argument, petitioner is simply denying that reasonable men can characterize it as has been done many times by all three branches of our government, by countless scholars throughout the world, by a multitude of foreign states, and by most of the press of the free nations. And this argument is made even though the members of the Board, who saw and heard and questioned the witnesses on both sides and observed their demeanor on the witness stand, had the best seats of vantage from which to see the development of the picture which the evidence, viewed as a whole, so clearly portrays.

We deal below with petitioner's claim that the evidence does not support the Board's findings under the criteria for Communist-action organizations contained in Section 3(3) (Br. 96–104), its attack on the evidence relating to the evidentiary considerations listed in Section 13(e) (Br. 111–124), its contention that the Board's conclusion that petitioner is a Communist-action organization is based on evidence of conduct which has been discontinued (Br. 105–111), and its attack on the legislative determination, underlying the Act, that there exists a world Communist movement as described in Section 2 (Br. 124–126).

*1. The Board and the court below correctly construed and applied the evidentiary considerations enumerated in Section 13(e) of the Act* [82]

Congress, in Section 13(e) of the Act, directed the Board, in "determining whether any organization is a 'Communist-action organization,'", to "take into consideration" the "extent to which" the organization or its leaders do certain things. We have previously indicated the error in petitioner's assumption that these evidentiary factors are "tests" of whether an organization fulfills the Section 3(3) definition of a Communist-action organization as distinguished from matters, as the statute plainly indicates, "to be taken into consideration" and evaluated by the Board in making its ultimate determination (*supra*, pp. 139–140). A brief discussion of petitioner's attack on the proof adduced with respect to four of these considerations will expose the insubstantial nature of petitioner's factual contentions when weighed against the obvious purpose of the statutory guides and the thrust of the evidence, considered as a whole. [83]

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[82] We discuss the evidence as to the Section 13(e) evidentiary considerations first because these considerations provide a convenient method for analyzing the evidence. As we have shown (pp. 139–140), the criteria in Section 3(3) are the decisive standards which must be met to prove that an organization is a Communist-action organization.

[83] Petitioner's contentions with respect to the proof relating to the remaining four evidential factors, which we do not discuss, are similarly insubstantial and, in view of the force of the findings which we review, of cumulative significance only. Moreover, the Board did not mention its subsidiary findings on these other four evidentiary considerations in making its ultimate determination that petitioner is a Communist-action organization. The court below modified the Board's findings with respect to "secret practices," but correctly concluded that this

*(a) The directives and policies consideration*

Section 13(e)(1) directs the Board to take into consideration, in determining whether an organization is a Communist-action organization, the extent to which its policies are formulated and carried out and its activities performed "pursuant to directives or to effectuate the policies of" the foreign government or organization which directs and controls the world Communist movement. The Board devoted much more than one-half of its Modified Report (R. 2414–2580) to a review and analysis of the evidence pertaining to this factor. It found, using the substance of the language of Section 13(e)(1), that "[petitioner's] policies, programs, and activities were originally formulated and carried out pursuant to directives of, and to effectuate the policies of, the foreign leadership of the world Communist movement," that petitioner "is still pursuing policies enunciated by the Soviet Union through the Communist International," and that petitioner's "policies, programs, and activities regarding trade unions, youth, and national minorities have as their fundamental purpose to effectuate the policies of the Soviet Union and to further

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modification did not require a remand to the Board in view of the overwhelming nature of the findings which were sustained (R. 2701; see *infra*, pp. 276–283). The Board did not rely heavily on the evidence relating to "financial aid," since it related, with but one exception, to the pre-1940 period (R. 2596). Similarly, the Board found, with respect to the "instruction and training" factor (Br. 118), that there is "no credited evidence showing training of [petitioner's] members in the Soviet Union subsequent to the outbreak of World War II" (R. 2602). As to reporting, the Board found only that petitioner "upon occasion reports to the Soviet Union and its representatives" (R. 2613).

the world Communist movement" (R. 2579–2580). These findings are supported by more than ample evidence.

As we have indicated, petitioner began its history by joining, and becoming the United States section of, the Communist International, or "Comintern," an organization of Communist Parties throughout the world with headquarters in Moscow and completely controlled as to policy and activity by the Soviet Union (R. 2458–2460). Its roots were thereby planted in the Soviet Union and it grew and matured under especially close supervision by and assistance from the Soviet Union. In numerous instances the Soviet Union directed important changes (often through representatives of the Communist International (R. 2525–2528)) in petitioner's organization or policies. These included the amalgamation, pursuant to Soviet directives, of various Communist factions in the United States into the one, single Communist Party and the selection by Soviet leaders of the individuals to serve as petitioner's leaders (R. 2511–2512). Among these individuals was William Z. Foster, who rose to become petitioner's leading official and held that position at the time of the Board hearings (R. 2522–2523). As a resolution passed by petitioner's 1940 convention states (see *supra*, p. 55), petitioner left the Communist International in 1940 solely in an effort to avoid registration as an organization subject to foreign control under the Voorhis Act (R. 2512–2515). Thus petitioner's policies and role in the world Communist movement remained essentially the same (R. 2514–2515). Indeed, Earl Browder, petitioner's top official from 1930 to 1945, stated that all ma-

jor policies put into effect by petitioner during that time were with the previous knowledge, consent, and active support of the decisive interested Communist leadership (R. 2521–2522).[54] And in 1945, petitioner completely reorganized—expelling Earl Browder, petitioner's top leader and substantially changing its structure—as the result of criticism by Jacques Duclos in an official French Communist organ[55] (R. 2518–2522).

Both before and since 1940, petitioner has followed and attempted to effectuate the policies of the Soviet Union. For example, it has taught and advocated the Marxist-Leninist theory of "imperialism" which teaches the overthrow of imperialist governments by the use of force and violence, if necessary. Thus, pe-

[54] Petitioner correctly states (Br. 117) that the Board made no finding that petitioner has continued to receive directives from the Soviet Union after its disaffiliation from the Communist International. Petitioner argues (Br. 117) that the Board therefore erred in using the finding as to Soviet directives prior to 1940 to show that petitioner is currently controlled by the Soviet Union (R. 2642–2644). It seems obvious, however, that the finding of pre-1940 directives has considerable probative value, when combined with other findings such as that petitioner has continued to support and effectuate the policies of the Soviet Union, that petitioner still follows with complete fidelity the principles and current interpretations of Marxism-Leninism, etc. (see *infra*, pp. 242–244, 236–240). Moreover, petitioner's immediate response to the Duclos criticism constitutes significant post-1940 evidence.

[55] Duclos' criticism first appeared in the April 1945 issue of "Cahiers du Communisme", a publication of the French Communist Party. It was printed in the Daily Worker on May 24, 1945 (R. 1137). Nine days later, petitioner's National Board drafted a resolution criticizing the Browder period as a notorious revision of basic Marxist-Leninist theories (Daily Worker, June 4, 1945, p. 4). On June 18–20 the National Committee stripped Browder of his functions, and appointed a three-member Secretariat to rule until the National Convention in July 1945 (R. 1143–1149; Daily

titioner has taught support of the Soviet Union rather than the United States, not only at the present but in event of war (see *supra*, pp. 219–220). Similarly, following the principles of Marxism-Leninism, the Communist International, and the Soviet Union, petitioner's major programs have been in the area of trade unions, minorities, and labor (R. 2558–2580). The evidence shows that, contrary to petitioner's contention (Br. 117), these programs were carried out not merely to win popular support but for the purpose of implementing the proletariat revolution (*e.g.*, R. 2562–2563, 2564, 2565, 2569, 2572, 2575).

Underlying all the evidence showing that petitioner followed the directives of the Soviet Union prior to 1940, and has continued its efforts to effectuate its policies since that time, is its complete and unquestioning adherence to the doctrines of Marxism-Leninism."[86] The Board therefore traced the history of

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Worker, June 22, 1945, p. 2). At the Convention (July 26-28) the delegates "unanimously" (except for Browder's one vote) voted to reconstitute the Communist Party (R. 1152; Daily Worker, July 30, 1945, pp. 2, 4).

[86] The Board noted that "the merits of the theory of Marxism-Leninism, as such, is [sic] not an issue in this proceeding" (R. 2414) and that (R. 2416–2417):

"* * * there may be, and probably are those who subscribe to portions of Marxism-Leninism, e.g., the labor theory of values and public ownership of the means of production, and yet would advance toward their objective within the principles of the Constitution. But that is not this [petitioner]. It at no time asserts it embraces only isolated portions of Marxism-Leninism, such as those just specified. It espouses Marxism-Leninism in its totality and then proceeds to the position that in so doing it nevertheless embraces the Constitution and is an independent, domestic political organization.

"As the evidence now to be discussed will show, [petitioner's] adherence to Marxism-Leninism and its operations on the basis

Marxism-Leninism. After explaining how "Marxism" originated with Marx and Engels in the middle of the nineteenth century, and after stating the basic tenets of that philosophy (R. 2417–2418), the Board pointed out that Lenin "adapted Marxism to Russian revolutionary purposes" (R. 2419) and that "Stalin gave the Marxist-Leninist ideas a practicality which developed somewhat differently from Marxist theoretical schemes" (*ibid.*). The Board noted that, since Marx and Engels, the content of Marxism-Leninism has been interpreted mainly by Soviet authors who themselves are the leaders of the Communist International, Soviet Communist Party, and the Soviet Union (R. 2415).

The record shows and the Board found that the Soviet leaders integrated into Marxism-Leninism the principle that the Soviet Union is the "leader of the world Communist movement" (R. 2453). For example, in *Foundations of Leninism,* a basic document in the Marxism-Leninist "Classics," Stalin emphasized that "the Russian proletariat [is] the vanguard of the international revolutionary proletariat" and that "the centre of the revolutionary movement was bound to shift to Russia" (R. 2421). Furthermore, he stated, in the conflict between the "camp of peace and democracy" and the "camp of imperialism," the former is headed by the Soviet Union (R. 2426–2427). Similarly, "democratic centralism" is interpreted by the *Programme of the Communist International,* another important Marxist-Leninist work, to mean (R. 2433):

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thereof exclude adherence to the Constitution as the Party proclaims."

> This international Communist discipline must find expression in the subordination of the partial and local interests of the movement to its general and lasting interests and in the strict fulfillment, by all members, of the decisions passed by the leading bodies of the Communist International.

*The Strategy and Tactics of the Proletarian Revolution* emphasizes that, if an imperialist war begins, the interests of workers of all countries demand that they come to the defense of the Soviet Union (R. 2437). *The United Front,* a work written in the late 1930's, similarly states (R. 2421–2422):

> You cannot carry on a real struggle against fascism if you do not render all possible assistance in strengthening the most important buttress of this struggle, the Soviet Union. You cannot carry on a serious struggle against the fascist instigators of a new world blood bath, if you do not render undivided support to the U.S.S.R. * * *.

In view of the role assigned to the Soviet Union by Marxism-Leninism, the Board was clearly correct in concluding that "fulfilling the role of the vanguard Communist Party called for in Marxism-Leninism and the adherence to and practice by an organization of Marxism-Leninism is evidence, and strong evidence, that [an organization] is substantially under the domination and control of the Soviet Union * * *" (R. 2453).

There is no doubt from the record that petitioner assumes the role of the vanguard Communist Party

in the United States and adheres to and practices Marxism-Leninism. Petitioner's own constitution states that it is based on the "principles of scientific socialism, Marxism-Leninism" and its amended answer admitted that Marxism-Leninism is basic to its being (R. 2414). Marxist-Leninist texts were considered by Party leaders in the 1940's to be the very basis of Party policy and were taught to petitioner's members in Party classes (*e.g.*, R. 2447–2450). Throughout the Board's Report are numerous instances of specific programs and activities undertaken by petitioner because they were dictated by Marxism-Leninism and thus by the Soviet Union. See, *e.g.*, R. 2518–2522 as to the most recent internal reorganization in 1945; R. 2558–2580 as to compliance with Marxism-Leninism in petitioner's major programs.

Indeed, the record demonstrates that petitioner supports and teaches the particular tenet of Marxism-Leninism that makes the Soviet Union the controlling leader of the movement. The Attorney General's witness Lautner, a former high Party official and teacher, testified that Marxism-Leninism requires the complete subservience of all Communist Party organizations, including that in the United States, to the Soviet Union (R. 2447, 2433). He stated that he used the *Program of the Communist International* in teaching Party classes in 1947 to 1949 "because the program of the Communist International lays down the strategic aims of the Communist Parties" (R. 2447). And the Attorney General's witness Budenz,

the former editor of the *Daily Worker,* testified (R. 2448):

> I referred to Marxism-Leninism. I referred to Stalin as the leader, teacher and guide, things of that sort, which was Aesopian to the extent that it presented Stalin as the leader, teacher and guide, but didn't explain that he completely controlled the Communist movement, although I could have done it because Bittelman had stated in Milestones that Stalin was the leader, the Communist Party of the Soviet Union was the leader.

In sum, Marxism-Leninism is relevant in two respects to the directives and policies consideration of Section 13(e)(1): first, by following the principles of Marxism-Leninism, as interpreted by Stalin and his successors, petitioner is in effect acting pursuant to directives of the government or organization directing the world Communist movement;[87] and, second, by adhering to Marxism-Leninism, petitioner agrees to support fully the Soviet Union, which Marxism-Leninism makes the leader of world Communism, and thus to effectuate the policies of the government directing the world Communist movement.

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[87] The Marxist-Leninist "Classics," as well as the more recent Soviet documents which purport to interpret them, contain instructions and directives to Party members as to how they should conduct themselves and what action they must take in working toward the goal of the dictatorship of the proletariat in all sorts of tactical situations in the "ebb and flow" of events (R. 2434–2453).

*(b) The non-deviation consideration*

The Board found that "the views and policies of [petitioner] throughout its history invariably coincide with the views and policies of the Soviet Union." Moreover, the Board stated that petitioner "conforms immediately to each reversal in the Soviet Union's views and policies" and concluded that "[petitioner's] views and policies do not deviate from those of the Soviet Union" (R. 2590). The overwhelming evidence supporting this finding is summarized in the Board's Report at R. 2580–2590.

Petitioner does not deny the fact of the identity of its program and policy with that of the Soviet Union. And as we have seen (*supra*, pp. 143–144), proof of the fact of identity is all that is contemplated by Section 13(e)(2). Petitioner's discussion of this consideration (Br. 111–117), therefore, is but a further attack on the relevance of nondeviation as one factor tending to establish foreign domination and control—a contention which we have shown to be without merit (*supra*, pp. 143–144).

Petitioner presses its argument by urging that to establish non-deviation within the meaning of Section 13(e)(2) it must be shown that in each instance the view it shared with the Soviet Union (1) was adopted by it after its adoption by the Soviet Union (Br. 112–114), (2) was itself false or unreasonable and not generally accepted (Br. 114–115), and (3) did not emanate from a common philosophy (Br. 115–117).

The argument is beside the point, for it is obvious that Marxist-Leninist philosophy as implemented by

the Soviet Union may have caused petitioner to adopt views on *specific* issues that were not themselves unreasonable. Such is to be expected. Proof, therefore, that this was the case with respect to selected issues was, as the Board consistently ruled (R. 836–845, 861–864, 1274–1275), not relevant to the question of non-deviation. The point of non-deviation is not that petitioner's views on every issue were necessarily evil in themselves. The point is rather that the fact that a domestic organization, throughout its thirty years' history, has undeviatingly mirrored the views of the foreign power which controls the world Communist movement on every significant aspect of world politics is evidence, to be weighed with all the other evidence, that that foreign power controls the domestic organization and that the domestic organization operates primarily to advance the objectives of the world Communist movement. Petitioner's repeated assertion that such an inference is irrational offends common experience. The inference is an entirely reasonable and natural one.[88]

It is true, as petitioner observed in its original petition for certiorari, that the fact that two persons "both believe that the sum of two and two is four" (Pet. 73) does not give rise to an inference that one controls the other. It is also true that the fact that "two organizations oppose racial segregation" (Br. 114) does not prove that the one is under the other's dominion. But the fact that petitioner, in conformity

[88] Cf. 96 Cong. Rec. 14532 (observations on this point by Senator Mundt).

with the position of the Soviet Union, denounced Fascism in Nazi Germany as a peace menace until the Hitler-Stalin Pact of 1939, following which it about-faced and, with the Soviet Union, hailed the Pact as an outstanding contribution to the peace of the world (R. 2583; 2145), is evidence of a different character. So is the evidence that petitioner abruptly reversed its attitude toward the Tito government in Yugoslavia on June 29, 1948, following the Soviet Union's bitter attack on that government on June 28, 1948 (R. 2584–2585, 2145–2146).

"Dr. Mosely's[89] testimony," observed the Board, "traced the continuing stream of international questions upon which both the Soviet Union and [petitioner] have announced a position. He enumerated some 45 international questions of major import, extending over the past 30 years, with respect to which there was, as revealed by his testimony, no substantial difference between the position announced on each by the Soviet Union through its official and controlled organs and that announced by the [petitioner] through its official and controlled organs. * * * [Petitioner's] witnesses were unable to cite a single instance throughout its history where, in taking a position on a question which found the views or policies of the Soviet Union and the United States Government in conflict, the [petitioner] had agreed

[89] Dr. Philip E. Mosely, Professor of International Relations at Columbia University and Director of the University's Russian Institute, was the Attorney General's expert witness on "non-deviation" (R. 2580–2581).

with the announced position of the United States; nor could they show a single instance when the [petitioner] had disagreed with the Soviet Union on any policy question where both [petitioner] and the Soviet Union have announced a position" (R. 2581, 2588).[90]

Petitioner's contention that the proof of non-deviation failed, because it was not shown as to all of the issues in question that the position held by both the Soviet Union and petitioner was first adopted by the Soviet Union and thereafter announced as the position of petitioner, is equally without substance. As the court below held: "The statutory phrase [non-deviation] refers to identity or coincidence and not to chronological adoption" (R. 2146). Indeed this is the only tenable construction, for Congress could hardly be supposed to have placed upon the Board the impossible task of determining the exact time when a foreign government "first established" (Br. 112) each of its positions on political affairs.

Furthermore, contrary to petitioner's suggestion, a great deal of the non-deviation evidence itself showed that petitioner's adoption of a given position or policy did in fact follow the adoption of that position or policy by the Soviet Union. The sudden reversal of

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[90] The testimony of petitioner's witnesses Gates and Flynn, to which the Board referred, appears at R. 1247–1248, 1299–1300. Both had been members of petitioner's National Committee for many years, the former since 1945 (R. 1199), and the latter since 1938 (R. 1275). Gates, who had been the editor of the *Daily Worker* from 1947 until the time of the hearings (R. 2650), explicitly stated that he could not remember any instance in which the *Worker* had supported the United States in opposition to the Soviet Union (R. 1247).

petitioner's attitude *vis-à-vis* Nazi Germany following the Hitler-Stalin Pact of 1939 and *vis-à-vis* Yugoslavia in 1948, to which we have already referred (*supra*, pp. 242–243), provide two examples of this. A third is petitioner's overnight change of view as to the justness of the war against Germany, which followed the German invasion of the Soviet Union in June 1941 (see R. 2583–2584, 2145).[91]

The testimony of petitioner's witnesses, to the effect that all these parallelisms of view between petitioner and the Soviet Union, including the abrupt reversals and re-reversals, were coincidences which sprang from their joint concern for the true interests of the American people, was considered and evaluated by the Board (R. 2588) and was also taken into consideration by the court below in the performance of its review function (R. 2146–2147). In the light of the whole record the conclusion is inescapable that the Board was amply justified in refusing to credit this testimony. Cf. *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 715–716.

(*c*) *The discipline consideration*

Petitioner's contention (Br. 120–122) that the Board and court below misconstrued and misapplied

[91] See also, among other incidents referred to in the Board's Report, the evidence relating to the purge trials of Communist leaders in the Soviet Union in 1937, the Russo-Finnish War, the absorption of Latvia, Estonia, and Lithuania, and the Berlin Blockade (R. 2584–2585). Petitioner points out that, with respect to certain of the "non-deviation" issues, "the domestic exhibits antedated the foreign exhibits" (Br. 113, fn. 48). But obviously the dates of the exhibits do not necessarily reflect the dates when the views and policies evidenced therein were adopted.

the discipline factor of Section 13(e)(6)—*i.e.*, the direction to the Board to consider, in determining whether an organization is a Communist-action group, "the extent to which its principal leaders or a substantial number of its members are subject to or recognize the disciplinary power" of the foreign government or organization controlling the world Communist movement, or its representatives—is in reality nothing more than an attack on the sufficiency of the evidence supporting the Board's finding on this point. The Board found that "[petitioner's] principal leaders and a substantial number of its members are subject to and recognize the disciplinary power of the Soviet Union and its representatives" (R. 2538). The evidence supporting this finding is reviewed in the Board's Report at R. 2528–2538. The court below in its original opinion reviewed the evidence on this point at (R. 2149–2150)—which was substantially the same as that underlying the Board's Modified Report—and concluded that the Board's finding was supported by "a clear preponderance of the proof" (R. 2150). As the court of appeals observed, "[t]he requirement of iron discipline within the Communist movement is one of the basic principles of the movement. It is the 'democratic centralism' so vigorously insisted upon by Communist leaders in both speeches and documents" (R. 2149),[92] and "[i]dentification of the Soviet

[92] For explanation of the principle of "democratic centralism" and how it works as a disciplinary factor among Communists throughout the world, see the Board's Report at R. 2431–2434, 2529–2532.

Union as the leader of the world Communist movement is amply shown" (R. 2150).

Petitioner's argument illustrates its mistaken insistence, met with throughout its discussion of the evidence, that the evidence under each of the Section 13(c) categories be considered *in vacuo*, unconnected with and unilluminated by any of the other evidence of record. Thus, after devoting a page (Br. 121–122) to summarizing specific examples, cited in the Board's Report, of expulsions of members from its ranks (including a 1951 expulsion for the offense of urging others to distribute anti-Soviet leaflets), and other instances of the "iron discipline" exercised over its membership, petitioner argues that none of this evidence can "conceivably support the Board's finding that petitioner and its members are subject to Soviet discipline" (Br. 122). Not only does this argument ignore the evidence tending to illuminate these incidents, to which the Board refers (see, *e.g.*, R. 2532–2537),[22] but it ignores all the other evidence of record regarding the Soviet Union's position in the world Communist movement.

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[22] This evidence includes the expulsion of Kornfeder in 1934 for failing to obey the instructions of a Soviet Union representative in the United States, the expulsion of a number of Party functionaries in 1939 for refusing to accept the reversal of Party policy to conform with the Soviet Union's position in signing the Hitler-Stalin Pact, and the expulsion of Earl Browder and a number of his followers in 1945 as a result of the criticism by Jacques Duclos, as spokesman for the world Communist movement (see R. 2518–2521), that they had deviated from true Marxism-Leninism.

Petitioner's argument is also based in large measure on its erroneous assumption, continually reiterated in its brief, that the Board and the court below were required to accept its organizational disaffiliation from the Communist International in 1940 as involving a substantive as distinguished from a merely formal change in its relationship to that body, the Soviet Union, and the world Communist movement. On the contrary, we submit that the Board's (R. 2512–2515, 2643) and the court's (R. 2141–2142) refusal to accept that premise was amply justified by the evidence (see *supra*, pp. 55, 234–235).

*(d) The allegiance consideration*

The Board found that "[petitioner's] leaders and a substantial proportion of its membership consider the allegiance they owe to the United States as subordinate to their loyalty and obligations to the Soviet Union" (R. 2642). The overwhelming evidence supporting this finding is summarized in the Board's Report at R. 2631–2641. The court below, in its original opinion, remarked, on the basis of substantially the same evidence, that "[t]he evidence on this point is long and in great detail" (R. 2151), reviewed it briefly (R. 2151–2152), and concluded that the Board's finding was "amply supported" (R. 2152).

One of the several grounds on which the Board based its finding on this point consisted of petitioner's teachings, consistent with the theory of Marxism-Leninism, concerning the necessity and desirability of forcible overthrow of the United States Government to achieve its ends. After reviewing the evi-

dence on this subject (R. 2632–2635), the Board observed that "[petitioner's] adherence to and implementation of a concept requiring the overthrow of the United States Government by any means, including force and violence, is completely incompatible with, and the exact antithesis of, allegiance to the United States" (R. 2635). In attacking this finding, petitioner (Br. 123–124) asserts that the Board based its conclusion that petitioner advocates the violent overthrow of this Government "primarily on the Board's interpretation of writings of Marx, Engels, Lenin and Stalin, and on the conclusory testimony of informer witnesses," and argues that this Court, in *Schneiderman* v. *United States*, 320 U.S. 118, "after a study of the same texts," concluded that "adherence to Marxism-Leninism is not inconsistent with attachment to the principles of the Constitution and being well-disposed toward the good order and happiness of the United States" (Br. 123). The contention does not bear analysis.

In the first place, as this Court stated in *Yates* v. *United States*, 354 U.S. 298, 336–337: "The Court in *Schneiderman* certainly did not purport to determine what the doctrinal content of 'Marxism-Leninism' might be at all times and in all places. Nor did it establish that the books and pamphlets introduced against Schneiderman in that proceeding could not support in any way an inference of criminality, no matted how or by whom they might thereafter be used." Here the Board's findings with respect to petitioner's teachings concerning the use of force and violence does not rest only on the literature of Marxism-Leninism considered in *Schneiderman*. It

was based at least as much on the personal testimony of eight witnesses, who had been members of petitioner, recounting their individual experiences (R. 2633). That testimony established that petitioner "in reality advocates the overthrow of the government of the United States by force and violence" (*ibid.*). The membership of these witnesses "spanned the entire existence of the Party until February 1952" (*ibid.*). Their positions in the Party "ranged from high offices to rank and file Party membership" (*ibid.*). Included among them was a former General Secretary of the Party (Tr. 2647), the highest executive position in the organization (Tr. 1697), and a former managing editor of the *Daily Worker* (R. 2646), the Party's official organ. Truly, as the Board observed, these witnesses "were in a position to know whereof they spoke" (R. 2633). This evidence is confirmed by the conviction of most of petitioner's leaders for conspiring as the Communist Party to advocate overthrow of the Government by force and violence (R. 2635).[20]

Furthermore, the literature of Marxism-Leninism to which the Board referred in its Report was not limited to the literature which this Court considered in the *Schneiderman* case. In *Schneiderman*, the relevant literature was that which had been published prior to 1927, the date of Schneiderman's naturalization (320 U.S. at 148). The writings which were published after that date, the Court said, were "entitled to little weight because they were published

[20] Under *Yates* v. *United States*, 354 U.S. 298, mere advocacy is not enough for conviction; for violation of the Smith Act, proof of incitement to action is required. This Court found such a standard had been met in *Dennis* v. *United States*, 341

after the critical period" (*id.*, pp. 151–152). Here, on the other hand, the Board had before it all the significant literature of Marxism-Leninism published up to the time of the Board's hearings, which included a span of more than twenty years beyond the "critical period" of the *Schneiderman* case. The literature received in evidence by the Board in this case, a few "illustrative" passages from which the Board quoted in its original Report (R. 118–119 [2017–2020]) and which the Board cited in its Modified Report (R. 2632), leaves no doubt that force and violence was and is advocated as a means of overthrowing all "bourgeois" governments, including that of the United States. Significantly, the two works from which the Board quoted for "illustrative" purposes—Stalin's *Problems of Leninism* (1934) and *Foundations of Leninism* (1932)—were not even in evidence in the *Schneiderman* case.[28]

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U.S. 494. Thus, at least, petitioner's "first-string" leaders were convicted of conspiring to incite overthrow of the Government by force and violence.

[28] The dates given are the dates of the first editions published in the United States. According to petitioner, these works had been written in 1926 and 1924, respectively (1955 Br. 198, fn. 116).

Moreover, even on the basis of the literature which this Court considered in *Schneiderman*, the Court did not question that it could reasonably have been found that "the Communist Party in 1927 actively urged the overthrow of the Government by force and violence" (320 U.S. at 153). As the Court observed in *Schneiderman*, the issue there was not whether the Communist Party in 1927 had urged the overthrow of the government by force and violence, but rather whether the government had sustained its burden of proving, by "clear, unequivocal, and convincing" evidence, that Schneiderman himself was lacking in attachment to the Constitution at the time of his naturalization (*id.*, pp. 153–154).

The Board, in concluding that petitioner considered its allegiance to the United States subordinate to its loyalty to the Soviet Union, also relied on petitioner's complete adherence to the Marxist-Leninist theory of imperialism. According to this theory, Communist Parties throughout the world are duty-bound to support and defend their leader, the Soviet Union against the imperialist camp and particularly the United States (R. 2551–2558, 2638–2641). This means that in case of war between the Soviet Union and the United States, petitioner's members must do all in their power to support the Soviet Union (R. 2554–2556).[96] As just a few recent examples of such indoctrination of petitioner's members, witness Lautner, a high Party official, testified that the Party's position when he left it in 1950 was that Party members should do all they could to aid the Soviet Union and defeat the United States (R. 2551–2552, 2555); seven other former members of petitioner testified that they were taught between 1943 and 1952 that, in a war between the Soviet Union and the United States, they must aid the Soviet Union even if it meant hindering American military operations (R. 2551, 2555–2556);

[96] The theory of imperialism is closely related to the Marxist-Leninist theory of "just" and "unjust" wars (R. 2554–2555), which petitioner taught its members at least as late as between 1945 and 1950 (R. 2555, 2641). Any war engaged in by imperialist countries and especially against the Soviet Union is an unjust war. Inherent in this doctrine is the requirement that Communists support the Soviet Union and overthrow imperialism even if it means defeating one's own government. Petitioner took the position that the Korean War was such an "unjust war" (R. 2641).

in 1950 one of petitioner's leaders denounced the United States for inciting war against the Soviet Union and urged petitioner's members to wage a "ideological and political offensive in the defense of the Soviet Union" (R. 2640).

*2. The Board and the court below correctly construed and applied the statutory criteria for a Communist-action organization in Section 3(3) of the Act*

Section 3(3), as we have shown (*supra*, pp. 139–140), provides the sole criterion for determining whether an action is a "Communist-action organization." It defines "Communist-action organization" as "any organization in the United States * * * which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement [described at length in Section 2] and (ii) operates primarily to advance the objectives of such world Communist movement * * *." As to the first requirement, the Board found that petitioner "is substantially directed, dominated, and controlled by the Soviet Union, which controls the world Communist movement referred to in section 2 of the Act," and, as to the second, that petitioner "operates primarily to advance the objectives of such world movement" (R. 2644, 2402). In arriving at these conclusions the Board considered, as required by the Act, the evidentiary considerations set forth in Section 13(c) (see *supra*, pp. 233–253):

*(a) The foreign control requirement of Section 3(3)*

Petitioner attacks the Board's finding that petitioner is substantially directed, dominated, or con-

trolled by the Soviet Union in two respects; first, it claims (Br. 96–98) that Section 3(3) requires proof of control, not merely voluntary adherence, and that control "presupposes the existence of some significant means whereby the superior can compel compliance with its requirements or at least impose sanctions for non-compliance" (Br. 96); second, petitioner contends that there is no evidence that petitioner receives orders from the Soviet Union nor any evidence of any means by which the Soviet Union could exact compliance with such orders were any given (Br. 98–102).

(*i*) Petitioner asserts that Section 3(3) requires proof of power in the principal "to insure satisfactory compliance with its orders, such as the supervision of an employee by an employer or the reporting by a soldier to his commander" (Br. 97). Thus, it implies that the Act requires proof that the Soviet Union can imprison or remove petitioner's officers who refuse to follow the orders of the world Communist movement. But Congress could not have intended to include within the definition of Communist-action organization only those organizations which are subject to such direct compulsion or sanctions by the Soviet Union. If this were the meaning of Section 3(3), it would be almost impossible for any organization to be a Communist-action organization as long as the United States is a sovereign nation. Congress of course knew that the world Communist movement could not imprison officials of American Communist-action organizations who disobeyed its orders; similarly, Congress knew that the Soviet Union could directly remove only its own employees, *i.e.*, persons

already required to register under the Foreign Agents Registration Act (see *supra*, pp. 50–53). Since Congress clearly intended the provisions of the Act relating to "Communist-action organizations" to have at least some possible application, the phrase "substantially directed, dominated, or controlled" must be construed in a more realistic and reasonable fashion.

Such a construction, moreover, is the only one fully consistent with the language of the Act. First, it is necessary to examine the language of Section 3(3) itself. While petitioner emphasizes that Section 3(3) includes a "control component," in fact proof of direction, domination, *or* control is sufficient. Indeed, Section 3(3) requires only that the organization be "*substantially* directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement * * *" (emphasis added). This phraseology strongly implies that proof of direct, coercive power is not required.

Second, Section 13(c) provides that "[i]n determining whether any organization is a 'Communist-action organization,' the Board shall take into consideration" eight particular factors. Among them is the direction that the Board shall consider "the extent to which [the organization's] principal leaders or a substantial number of its members are subject to or recognize the disciplinary power of such foreign government or foreign organization or its representatives" which control the world Communist movement. If petitioner's view were correct, the Board would be required to consider only whether the organization's

leaders and members "are subject to" the disciplinary power, not alternatively whether they "recognize" it. This phraseology strongly supports the view of the court of appeals that voluntary compliance, *i.e.*, recognition as well as compulsion, may be sufficient.

As the court of appeals held (R. 2654): "An organization or a person may be substantially under the direction or domination of another person or organization by voluntary compliance as well as through compulsion. This is especially true if voluntary compliance is simultaneous in time with the direction and is undeviating over a period of time and under variations of direction. If the Sovet Union directs a line of policy and an organization voluntarily follows the direction, the terms of this statutory definition would be met."

(*ii*) Petitioner's claim as to the lack of evidence showing substantial direction, domination, or control is dependent on its argument concerning the proper construction of the Act. For the Board's findings as to the evidentiary considerations in Section 13(e), which we have discussed above (pp. 232–253), clearly show continued and complete voluntary compliance having the same effect as total control enforced by direct sanctions. As the Board found, this evidence demonstrates that "[a]t the outset of its existence [petitioner] joined the Communist International * * * [and] agreed to accept its directions and to adopt the policies enunciated by it" and that, despite petitioner's formal disaffiliation from the Communist International, its adherence to the world Communist movement remains intact (R. 2642–2643).

"Leaving aside the denials of its witnesses that the alleged relationship with the Soviet Union and the world Communist movement exists, it is striking that [petitioner] is unable to point to events in the various periods of its history demonstrating its independence and bona fide domestic character. Having continually fought the charge at least for two decades, if not before, that it is foreign controlled the lack of affirmative, substantial evidence of independence is all the more significant" (R. 2643–2644).

Moreover, even if the Government was required to show more than "voluntary compliance," the evidence described above is still sufficient. While the Soviet Union may not be able to imprison or remove disobedient leaders of petitioner directly, it has decisive coercive power through its power to criticize petitioner and, if need be, expel it from the world Communist movement. While to a non-Communist this may not have coercive effect, to believers in Marxism-Leninism and its doctrine of "democratic centralism" this is a very serious punishment indeed.

Obviously, whether the possibility of a particular action has a significant coercive effect depends on the mental attitudes and views of the person affected. If an employee does not care whether he loses his job, the employer's power to discharge him has no coercive effect. Similarly, a non-Communist can hardly be coerced by the threat of being labeled a "revisionist" or "left-wing sectarian" by the Soviet Union. But to a Communist the mere threat of such labels is likely to be frightening. *A fortiori,* for petitioner, the loss of its connection with the world Communist movement—

the fate of the Tito government [97]—constitutes a threat to the very existence of petitioner as it is now constituted. Thus, while petitioner's attempts to avoid such a serious result—coupled with its total allegiance to the Soviet Union—may have the appearance of "voluntary compliance," nevertheless, the Soviet Union possesses substantial coercive power to prevent any important deviation.[98]

*(b) The objectives requirement of Section 3(3).*

In order for an organization to be a Communist-action organization, Section 3(3) also requires that a finding that the organization "operate[s] primarily to advance the objectives of [the] world Communist movement." Section 2(1) defines the "purpose" of this movement as "by treachery, deceit, infiltration * * *, espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship * * * throughout the world." And Section 2(2) and (3) describes a "totalitarian dictatorship" as a system of government characterized by the existence of a single political party, organized on a dictatorial basis, * * * by substantial identity between such party and its policies and the government and governmental policies," and by "the suppression

[97] It is significant that petitioner immediately complied with the Soviet Union's bitter attack on the Tito government in 1948 and with Jacques Duclos' criticism of petitioner's leadership and policies in 1945 (see *supra*, pp. 235, 243).

[98] Petitioner itself suggests that the power of the Communist International to expel members "might supply a means of control" (Br. 109). The same is true as to the power of the world Communist movement—whether formally organized or not—to expel disobedient national Communist Parties.

of all opposition to the party in power, the subordination of the rights of individuals to the state, the denial of fundamental rights and liberties * * *, such as freedom of speech, of the press, of assembly, and of religious worship, and results in the maintenance of control over the people through fear, terrorism and brutality."[30] The Board concluded, in substantially the same terms as Section 3(3), that petitioner "operates primarily to advance the objectives of [the] world [Communist] movement" (R. 2644). We submit that this finding is fully supported by the evidence.

(*i*) As we have seen (pp. 238–239), petitioner throughout its history has adhered to, taught, and practiced the doctrines of Marxism-Leninism. Lenin defines the dictatorship of the proletariat as a state in which all important decisions are made at the direction of the Party: "[I]t could be said that the dictatorship of the proletariat is in essence the 'dictatorship' of its * * * Party * ** *" (R. 2429). Stalin stated that all opposition of landlords and capitalists must be liquidated, that "the dictatorship of the proletariat is the rule—unrestricted by law and based on force—of the proletariat over the bourgeoisie * * *," and that the dictatorship of the proletariat will abolish "democracy for all" (R. 2430, 2431). The record includes overwhelming evidence that, according to Marxism-Leninism, the Communist Party is to be the only party in the dictatorship of the proletariat, its policies will be those of the state, and the Party will be organized on a dic-

[30] See *supra*, pp. 135–139, for our discussion concerning the constitutionality of this standard.

tatorial basis according to democratic centralism (R. 2431–2434). Thus, it is clear that one of petitioner's objectives is a system of government "characterized by the existence of a single political party, organized on a dictatorial basis, * * * by substantial identity between such party and its policies and the government and governmental policies," and "by the suppression of all opposition to the party in power * * *."

While of course neither Marxism-Leninism nor petitioner's own publications specifically praise "the denial of fundamental liberties * * * and * * * the maintenance of control over the people through fear, terrorism and brutality," this is clearly the meaning of the dictatorship as it has been practiced in all Communist countries. And indeed, in an official party publication in 1950, William Z. Foster, petitioner's leader at the time of the Board hearing, endorsed the methods of proletarian dictatorship followed in the People's Democracies (R. 2507), *i.e.*, the Communist governments of Eastern Europe, which, of course, have suppressed liberty and used brutality and terrorism.

Petitioner contends (Br. 103–104), again, that *Schneiderman* v. *United States*, 320 U.S. 118, establishes that the "dictatorship of the proletariat" is not the equivalent of a "totalitarian dictatorship." But this Court's finding in *Schneiderman* was of course based on the evidence before it. The Court did not consider the texts of Stalin, as well as other subsequent Marxist-Leninist "Classics," relied on by the Board here (see R. 2428–2434; see *infra*, pp. 249–

251). Nor, of course, did the Court have before it the content poured into the term "dictatorship of the proletariat" by over thirty years of history in the Soviet Union as well as shorter periods in eastern Europe and China—history which petitioner has specifically endorsed (R. 2507–2509).

(*ii*) Petitioner also argues (Br. 102–103) that the objectives requirement of Section 3(3) requires proof that the organization seeks as an objective "the overthrow of all existing capitalist governments by espionage, sabotage, terrorism, or force and violence" (Br. 102). Section 3(3) requires proof, however, only of the organization's objectives not as to its particular methods. And Section 2(1) states as a legislative fact, not as an element to be proved, that the world Communist movement used "treachery, deceit, [etc.] and *any other means deemed necessary*" to achieve its objectives (emphasis added). Thus, when Sections 3(3) and 2(1) are read together, it is clear that the objectives requirement is satisfied by proof that an organization operates in order to establish a Communist totalitarian dictatorship as defined in Section 2(2) and (3).

Petitioner's argument rests on Section 2(6) which states that "Communist action organizations * * * endeavor to carry out the objectives of the world Communist movement by bringing about the overthrow of existing governments by any available means, including force if necessary, and setting up Communist totalitarian dictatorships which will be subservient to the most powerful existing Communist totalitarian dictatorship." But this provision as to the means used by Communist-action organizations merely as-

serts legislative facts; it adds nothing to the requirements of Section 3(3) that the Board need find only that the organization operates primarily to advance the objectives of the world Communist movement. And Section 2(6) itself indicates that these are means to attain the "objectives of the world Communist movement," which is virtually the same phrase used in Section 3(3), and which therefore refers to the only definition of these objectives in the Act, *i.e.*, the "purpose" stated in Section 2(1).

In any event, even if proof of advocacy of force and violence is necessary, it is amply shown in the record before the Board. See our discussion of the "allegiance" consideration in Section 13(e)(8), *supra*, pp. 248–253. In short, the Board had substantial evidence on which to base its finding that petitioner "has as a fundamental purpose, which it constantly seeks to further, the overthrow of the government of the United States by any means, including force and violence if necessary * * *" (R. 2641–2642).[1]

(*iii*) Petitioner further claims (Br. 102, 104) that the government must also prove that the totalitarian dictatorship established "will be subservient to the most powerful existing Communist totalitarian dictatorship." This contention also rests on Section 2(6) which, as we have shown, states legislative facts concerning Communist-action organizations but does not add to the objectives ("purpose") of the world Communist movement specified in Section 2(1).

[1] As we have shown (pp. 104–106), the First Amendment does not require proof of incitement to illegal action before a registration provision can be enforced. And nowhere is there any indication in the Act of such a requirement.

But even if Section 2(6) is construed as requiring proof of this additional objective, the evidence provides such proof. The evidence which we have summarized above as to the foreign control requirement of Section 3(3) (*supra*, pp. 253–258) shows that in the Marxist-Leninist system, which is taught and practiced by petitioner, the Soviet Union is the dominant leader of the world Communist movement whether the particular national Communist Party has achieved power (the totalitarian dictatorship) or not. Therefore, after the attainment of the dictatorship of the proletariat in the United States, petitioner would continue to be controlled by, and *a fortiori* subservient to, the Soviet Union.[2]

*The Board's finding that petitioner is a Communist-action organization is based upon proof as to its current practices and activities as illuminated by its past history*

Petitioner's contention (Br. 105–111) that "[t]he Board and the court below erroneously relied on evidence of conduct discontinued before enactment of the Act" (Br. 105) is without merit. The finding that petitioner is a Communist-action organization is based on petitioner's current practices and activities as illuminated by its entire past history.

That an organization's past history is a relevant and important consideration in determining its present character and status cannot be doubted. See *Federal Trade Commission* v. *Cement Institute*, 333

[2] The court of appeals did not decide whether petitioner's construction of the "objectives component" was correct, since it found that ample evidence to satisfy the objectives requirement even as construed by petitioner (R. 2655).

U.S. 683, 703–706; *United States* v. *Oregon Medical Society*, 343 U.S. 326, 333; *United States* v. *Reading Co.*, 253 U.S. 26, 43–44; *Standard Oil Co.* v. *United States*, 221 U.S. 1, 74–76; *United States* v. *Dennis*, 183 F. 2d 201, 231 (C.A. 2), affirmed, 341 U.S. 494. It is both good sense and good law to use the past to illuminate the present. As the court below said (R. 2140–2141):

> The past is clearly pertinent to the present nature of a person or an organization. Surely a person's education and experience are pertinent to his present nature. The same is true of an organization. As a matter of fact it is rarely, if ever, possible to prove present nature by some instantaneous, contemporaneous fact, totally ignoring the whole of the past. Not only is the past clearly pertinent, it may be quite material to a determination of present nature. Whether it is material depends upon whether there is affirmative evidence of departure from the established past. In the ordinary affairs of life and in ordinary litigation, if a person or an organization is shown to have had over many years a certain policy and program, and no more is shown, the conclusion is clearly indicated that he or it has the same policy and program in the present.

Petitioner, however, attacks the Board's use of pre-Act evidence in two respects. It claims (Br. 108–111) that the Government failed to prove that petitioner continued to be controlled by the Soviet Union after petitioner's disaffiliation from the Communist International in 1940. Ample evidence, however, was before the Board—including a resolution of petitioner's

1940 convention (*supra*, p. 55)—to show that the reason for the disaffiliation was to avoid a federal statute, not because of any meaningful change in petitioner's views or role in the world Communist movement (R. 2512–2515); that petitioner's reorganization in 1945, including the expulsion of its top officer and his supporters and the marked change in several of its policies, was a result of criticism from important international Communist leaders (*supra*, p. 235); that the identity of position between petitioner and the Soviet Union has continued since 1940 and has included the reversal of petitioner's position with regard to the Tito government in 1948, one day after the Soviet Union's bitter attack on that government (*supra*, 242–245); that petitioner has retained its complete adherence to the doctrines of Marxism-Leninism, including that which makes the Soviet Union the unquestioned leader of the world Communist movement, entitled, according to the doctrine of democratic centralism, to full obedience from all lesser groups within the movement (*supra*, p. 236–240); and that petitioner has indoctrinated its members since World War II with the doctrine that complete loyalty must be given to the Soviet Union, superseding any allegiance to the United States even to the extent of fighting against the United States in case of war (*supra*, pp. 248–253). All this evidence relates to petitioner's activities beginning with its formal disaffiliation from the world Communist movement in 1940 and demonstrates that petitioner's character has remained substantially unchanged.

Petitioner further contends (Br. 105–108) that the evidence relating to events after 1950 is insufficient to show "the current character of petitioner, i.e., whether or not it was a Communist-action organization at the time of the administrative proceeding, or, in any event, after September 23, 1950, the date of enactment of the Act" (Br. 105). The post-Act evidence is, however, far from being as negligible as petitioner would have it. The fact that it requires two pages of petitioner's brief (Br. 106–108) merely to itemize the post-Act evidence, whose insufficiency it insists upon, is significant.

Nor is this evidence "absurdly irrelevant" (Br. 108), as petitioner suggests. Petitioner recognizes, for example, that the "non-deviation" evidence relates to the post-Act period quite as much as to the preceding thirty years of its history (Br. 107; see also the testimony of Gates, the editor of the Daily Worker at the time of the hearing (*supra*, p. 244, fn. 90). We have already shown that such evidence is of substantial importance (*supra*, pp. 143–144, 241–245). Moreover, petitioner admits that there is post-1950 evidence that petitioner continues to adhere to Marxism-Leninism, including the specific tenet that capitalistic governments must be overthrown by force and violence, if necessary, and that the Soviet Union is the dominating leader of the movement (Br. 107). As we have shown (pp. 236–240, 259–261), petitioner's complete allegiance to Marxism-Leninism goes far in establishing both the control and objectives requirements of the Section 3(3) definition of Communist-action organization. Neither is petitioner's argument aided, to cite but one more example,

by its including among the "irrelevant" items of post-Act evidence the fact that some of its present officials "held positions in the Communist International prior to 1940 and had visited, and in some cases studied, in the Soviet Union prior to 1940" (Br. 106).

Petitioner's argument that the post-Act evidence is of but trifling significance is further refuted by the fact that, of the 493 government exhibits in evidence, 57 post-dated the Act and were extensively used as the evidential bases of many particular findings in the Board's Modified Report. Four of the sixteen[8] former members of petitioner who testified for the Government were members during the post-Act period, as late as 1952 (see R. 2646–2649), and all of these testified extensively concerning the post-Act period. Not one of these witnesses indicated that petitioner's character and nature had undergone any change in the post-Act period. Their testimony was, rather, entirely to the contrary. Petitioner's own witnesses similarly insisted that, at least since the time that they had become members of petitioner's National Committee, which was in 1938 in the case of Miss Flynn and 1945 in the case of Gates (R. 1275, 1199–1200), the Party was the same sort of organization at the time of their testifying as it had previously been (R. 1211–1227, 1235–1241, 1282–1291; Tr. 15031–15032, 15795–15796). Petitioner does not even now claim to have changed its essential character and nature since the Act became law. Its whole position

[8] This figure does not include the three witnesses whose testimony was stricken, since their evidence was not considered in the Modified Report.

in this case has been that it has not been, at least since 1940, an organization of the type this Act defines. The Government's evidence established the contrary—that the petitioner was and is such an organization.

Indeed, even if the record showed sudden protestations of reform upon the passage of the Act, *United States* v. *Oregon Medical Society*, 343 U.S. 326, teaches that such protestations should be scrutinized with care before being accepted at face value. "When defendants are shown to have settled into a continuing practice or entered into a conspiracy violative of antitrust laws," the Court said, "courts will not assume that it has been abandoned without clear proof. * * * It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption" (*id.*, p. 333). See also *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 48; *Independent Employees Assn.* v. *National Labor Relations Board*, 158 F. 2d 448, 455 (C.A. 2), certiorari denied, 333 U.S. 826. The same considerations apply in considering petitioner's efforts to defeat various forms of federal regulation since 1940 "by protestations of repentance and reform."

In sum, the evidence establishes the character of petitioner as a Communist-action organization from 1919, when it was founded, through the 1940's. While the Government's evidence as to petitioner's post-1950 activities might, perhaps, not independently prove it to be a Communist-action

organization, this evidence is at least sufficient to show that petitioner's character has not substantially changed, at least as to matters relevant under the Act. And petitioner, which is obviously in a position to prove any such change, has completely failed to do so.

*4. The Board's conclusion that there exists a world Communist movement, having the characteristics described in Section 2 of the Act, while not essential to the validity of its order, was in any event supported by the preponderance of the evidence*

Petitioner contends (Br. 124–126) that the Board erred in finding from the evidence before it that "there exists a world Communist movement, substantially as described in Section 2 of the Act" (Petitioner's 1955 Br. 193; R. 2509). This contention is based, however, on the assumption that the existence of a world Communist movement as found by Congress in Section 2 of the Act, and having the characteristics described in that section, was subject to redetermination in the administrative proceeding before the Board. As petitioner admits in a different portion of his brief (Br. 57), this assumption is untenable—the existence of this world movement is one of the legislative facts found by Congress in the Act itself.[4] Section 3(3) defines "Communist-action organization" and it requires no findings in this regard. The court below was correct, therefore, in stating that it was unnecessary to redetermine the existence of what Congress had found in

[4] See *supra*, pp. 127–133, for our answer to petitioner's contention that this finding by Congress renders the Act unconstitutional.

the Act to exist (R. 2133). *Galvan* v. *Press*, 347 U.S. 522, 529; *Carlson* v. *Landon*, 342 U.S. 524, 535–536.

The Board, however, reviewed the evidence before it (R. 2453–2510) and made an independent finding that there exists such a world Communist movement, substantially as described in Section 2 (R. 2509). Similarly, in the original opinion, the court below, notwithstanding its holding that it was unnecessary to redetermine the existence of this movement, undertook, because the Board had made such an independent finding, to review the evidence (R. 2133–2138), and concluded that the finding was "supported by a clear preponderance of the evidence" (R. 2138). Subsequently, the court reaffirmed the Board's finding (R. 2656): "[W]hether that finding is superfluous or not the fact is established, either by the congressional finding or by the Board finding, or by both."[5] We submit that this conclusion is correct.

The evidence established far more than the presence of what petitioner describes as "a world Communist movement in the sense that the various Communist parties throughout the world have a common outlook and work in their respective countries for the revolutionary attainment of a 'classless, stateless society ruled by the proletariat of the world' " (Br. 124–125). This assertion as to the finding of the court below is a serious distortion. The court, while observing that the professed "ultimate objective" of the world Communist movement is a world-wide "classless, stateless society" (R. 2137), observed also that "[i]n the in-

[5] See also the most recent opinion of the court below (R. 2761).

terim the program calls for a small, hard core of revolutionaries, formed into a disciplined Party in every country"; that "[t]his Party is to attain control of the government of its country for the purpose of destroying its present form"; and that "[i]n this interim operation the Party must be ruthless" (*ibid.*).

What this "ruthlessness" is to consist of is also described by the court. In the achievement of the "dictatorship of the proletariat," the court stated, Stalin, the heir of Lenin and the recognized leader of the world movement until his death, "stressed the necessity for violence" (R. 2134). The court quoted Stalin's statement in his *Foundations of Leninism* (A.G. Ex. 121, R. 1427, at 1434) to the effect that Lenin was "right in saying" that the "proletarian revolution" would be "impossible without the forcible destruction of the bourgeois state machine and the substitution for it of a new one * * *" (R. 2135). The court then quoted passages from other authoritative works among the classics of world Communism (R. 2135–2137), all in evidence in this case, and all tending to prove beyond a doubt that the world Communist movement is indeed, substantially, as Section 2(1) of the Act describes it, "a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization."

Petitioner assumes that, because its witness Aptheker testified that a "dictatorship of the proletariat" would be, and as practiced in the Soviet Union is, democratic government in its purest form (see R. 1266–1267, 1306–1309, 1310),[6] the Board was bound to accept his testimony and to make findings with respect to the objective of the world Communist movement which would in effect adopt his views (Petitioner's 1955 Br. 196–198). The Board, however, was under no such compulsion, particularly when it had before it the following more authoritative views as to what the dictatorship of the proletariat is, how it should arise, and how it should operate in practice (Stalin, *Problems of Leninism*, A.G. Ex. 138, R. 1500, at 1505–1507):[7]

> "In order to win the majority of the population to its side," Lenin continues, "the proletariat must first of all overthrow the bourgeoisie

[6] Among other things Aptheker testified that freedom of religion and of the press is enjoyed in the Soviet Union (R. 1308). He stated that when Communists succeed in getting control of a country opposing political parties are allowed to continue to exist and publicize their views as long as "different classes" continue to exist (R. 1306); that, indeed, when the Communist Party gets into a position of leadership in a country it willingly shares its leadership with other parties (*ibid.*)

[7] This work was described by witness Meyer as one of the "central" textbooks used in Communist Party schools in the United States (R. 689). Though written in 1926 (Petitioner's 1955 Br. 198, fn. 116), the English translation was first pub-

and seize state power and, secondly, it must introduce Soviet rule, smash to pieces the old state apparatus, and thus at one blow undermine the rule, authority and influence of the bourgeoisie and of the petty-bourgeoisie compromisers in the ranks of the non-proletarian toiling masses. * * * "

Such are the characteristic symptoms of the proletarian revolution.

* * * * *

Replying to those who confuse the dictatorship of the proletariat with "popular," "elected" and "non-class" government, Lenin states:

"The class which has seized political power has done so conscious of the fact that it has seized power alone. This is implicit in the concept of the dictatorship of the proletariat. This concept has meaning only when one class knows that it alone takes political power into its own hands, and does not deceive itself or others by talk about popular, elected government, sanctified by the whole people." * * *

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lished in the United States in 1934 (R. 1500). It was one of the "classics" studied by witness Lautner at the Party's National Training School in 1941 (R. 943-944, 946, 949) and used by him as a textbook and sourcebook when he himself became a teacher in the Party's schools from 1947 till his expulsion in 1950 (R. 950-952).

Pointing to one of the most important aims of the dictatorship, namely the suppression of the exploiters, Lenin states:

"The scientific concept, dictatorship, means nothing more nor less than power which directly rests on violence, which is not limited by any laws or restricted by any absolute rules * * *. Dictatorship means—note this once and for all, Messrs. Cadets [ed. note: "The Constitutional Democrats"]—unlimited power, resting on violence and not on law. * * *"

Petitioner also argues (Br. 125–126) that Section 2 describes the world Communist movement as having "a highly centralized world-wide organization, rigid Soviet control, and use of violent and criminal means, if necessary" and that the evidence does not show such a movement (Br. 125). As to petitioner's first contention, it is clear that Congress in finding that the world Communist movement operated through a world-wide Communist organization (Section 2(1), (5), (8)) did not use "organization" in any narrow sense. Thus, Section 2(8) describes the world Communist movement as "affiliated constituent elements working toward common objectives in various countries of the world", and Section 3(2) defines an organization as "an organization, corporation, * * * and includes a group of persons [which is defined in Section 3(1) as an individual or organization], whether or not incorporated, permanently or temporarily associated together for joint action on any subject or subjects." The record overwhelmingly establishes a world Communist movement in this

sense not only when the Communist International was in existence before 1943 (R. 2456–2487), but since that time (R. 2487–2499). Thus, the Board notes numerous statements by high Soviet officials, the origin of the Cominform, and resolutions of national Communist Parties showing, at the least, the close affiliation and association of Communist Parties throughout the world.

Second, the evidence is equally clear that the world Communist movement is directed and controlled by the Soviet Union (Section 2(4), (5)). As we have seen (*supra*, pp. 236–240), Marxism-Leninism, which is the basic doctrine of the national Communist Parties, makes the Soviet Union the dominating leader of the movement. This is reflected in repeated statements by Communist leaders throughout the world of the leadership position of the Soviet Union (R. 2488–2499). Just as petitioner gives its complete allegiance to the Soviet Union (*supra*, pp. 243–253), so do other national Communist Parties (R. 2497–2499).

Third, there is also no doubt that the world Communist movement advocates the use of violent and criminal means, if necessary. Not only is force and violence an accepted part of the Marxist-Leninist doctrine (see *supra*, pp. 248–251, 271–274), but these means have actually been used since World War II in Czechoslovakia and China, among other places (see R. 2501–2504).

In short, the record amply supports the Board's conclusion that there exists a world Communist movement substantially as described in Section 2 of the Act.

C. THE COURT BELOW CORRECTLY AFFIRMED THE BOARD'S ORDER, NOTWITHSTANDING THE FACT THAT IT MODIFIED ONE OF THE SUBSIDIARY FINDINGS OF THE BOARD

Petitioner contends (Br. 144–146) that "the court below, having stricken a key finding of the Board, erred in not remanding the case for administrative redetermination" (Br. 144).

In its original Report, the Board made a subsidiary finding under Section 13(e)(7) that petitioner engages in secret practices both to "promot[e] its objectives and thereby to advance those of the world Communist movement" and for concealing * * * its direction, domination and control by the Soviet Union" (R. 117 [2016]). On appeal, the court below stated that "[t]here is no serious dispute as to the facts in respect to [petitioner's secret] operations," but struck the Board's finding as to the purpose of these operations: "[w]hether the secret practices of the Party are for the purpose of protecting the liberties of the members or are for the purpose of promoting the objectives of the Party is a nebulous one. The two purposes may well overlap" (R. 2150–2151). But the court also stated that petitioner's claim as to the purpose of secrecy was also "not shown by a preponderance of the evidence" (R. 2151).

After the remand by this Court, the Board re-evaluated the entire record and found that petitioner engaged in secret practices "for the primary purpose of promoting its objectives and thereby to advance those of the world Communist movement" (R. 2615, 2631), but made no finding that these practices were "undertaken to conceal foreign domina-

tion" (R. 2615, fn. 116). On appeal, petitioner moved in the court below for a remand to require the Board to conform its findings on secret practices to the earlier decision of the court of appeals and to reconsider its conclusions in the light of the conformed finding (R. 2717). The court of appeals denied this motion. After argument, the court below, in its latest opinion, again indicated that the Board's "purpose" finding was not supported by a preponderance of the evidence but refused to order the Board to reconsider its ultimate determination that petitioner is a Communist-action organization (R. 2701). Despite the striking of this subsidiary finding, the court found that "[t]he preponderance of all the evidence supports the conclusion of the Board" (R. 2706).

1. We submit that, contrary to the decision below, the Board's secrecy finding is supported by a preponderance of the evidence. First, as the court below held in its original opinion, there can be no doubt that the record (see R. 2613–2631) shows the use of "concealed membership, refusal to reveal information, secretion of records, deceptive language, the use of aliases, the use of codes, false swearing, secret meetings, reduction of committee memberships, assignment of members to small groups, underground plans and operations, and the infiltration of other organizations" (R. 2150). The only real issue is the purpose of these practices.

The record shows that the Marxist-Leninist "Classics" to which petitioner fully adheres, and the official publications of the Comintern, provide that secret

practices must be employed by Communist Parties to achieve their objectives. Lenin emphasizes that some secrecy is always necessary, although the amount depends on whether the Party is allowed to operate legally in a particular country (R. 2615–2616). The Marxist-Leninist "Classics" also state that secrecy was one of the vital elements of the Russian Revolution (R. 2615, 2617). And it is clear that the secrecy prescribed by Marxism-Leninism is not to protect the Party's members—rather, at the "decisive moment," there will be a secret apparatus which will "in every way possible assist the revolution" (R. 2616).

Petitioner operated entirely underground in the early 1920's (R. 2619). While the Party subsequently started to operate openly, the underground apparatus remained. This apparatus was strengthened between the signing of the Hitler-Stalin Pact in 1939 and the German invasion of the Soviet Union in June 1941 so that—as Eugene Dennis stated—if the United States joined Great Britain against Hitler, petitioner would be prepared to turn an imperialist war into a civil war, as Lenin had advocated (R. 2619–2620). For this reason, a complete underground system was established (R. 2620).

While this system was relaxed after 1941, extensive secret practices were renewed in 1948 (R. 2620–2623). In *Political Affairs*, an official Party organ, Gilbert Green stated that the purpose of secrecy was to prevent the disruption of the world Communist movement (R. 2623). Witness Meyer, a long time Party member, testified that the reason petitioner stopped issuing membership books was "to protect [its] mem-

bers * * * from an attack on the Party" and, in addition, "[t]o keep the apparatus of the Party in such shape that it could function even if the Party were [declared] illegal" (R. 698). Witness Lautner, who was a member of the Party's National Review Commission and in charge of security for the Party in New York State in 1948–1950 (R. 2648), testified that, by January 1950, petitioner had put into effect "a system of threes" patterned after the European Communist Parties in order "to safeguard the continuity of the Party" (R. 913; see R. 2621). Petitioner's members were taught and have used various code systems for transmitting Party information (R. 2627–2628). Reserve sums of money were set aside and mimeograph and printing equipment assembled in secret hiding places (R. 2618). That the purpose of these methods was to protect the Party and its objectives appears not only from the direct testimony of the Attorney General's witnesses, but from the very nature of the methods. Ordinary secrecy could conceivably be intended to protect petitioner's members; secret codes and mimeographing equipment are intended to further Party purposes.

Through the post-war period, petitioner continued its program of infiltrating other organizations and forming secret factions within them for the ultimate purpose of attaining control (R. 2624). Petitioner's activity through secret Party members has been particularly great in trade unions (R. 2624–2625). This is consistent with Lenin's statement that trade unions are "a very useful auxiliary to the political, agitational and revolutionary organisations" and that they

can be controlled by a "small, compact core" of agents "connected by all the rules of strict secrecy within the organisations of revolutionists" (R. 2624). In the late 1940's, petitioner instructed its members holding positions in labor unions to "resign" formally, to avoid the non-Communist affidavit provisions of the Labor Management Relations Act, but nevertheless continue functioning as Party members (R. 2625). As the Board found, "It is clear that these measures were undertaken by [petitioner] for the express purpose of effectuating its trade union policies and not to protect its members" (*ibid.*).

It is true that many of petitioner's secret practices also help in protecting its members from federal prosecution since the Party can advance its objectives only if its members are not in jail. The court below, however, in its original decision (to which it subsequently adhered) indicated that the evidence must show that the practices were *either* intended to further Party objectives *or* were intended to protect its members. But Section 13(e)(7) does not suggest that the Board can only consider evidence of petitioner's secret practices which have as their *sole* basis the advancing of petitioner's objectives. On the contrary, that section allows the Board to consider "*the extent to which,* for the purpose of * * * expediting or promoting its objectives * * *," an organization uses secret practices. Therefore, the Board was justified in making a finding as to the primary aim of the secrecy even though the secret "practices doubtless have a dual effect" (R. 2631). We submit that the evidence

overwhelmingly supported the Board's finding that the primary purpose of the secret practices was to carry out petitioner's objectives.

And even if the finding were erroneous, it is surely only so in stating that carrying out petitioner's objectives is *the* primary purpose, rather than one of the primary purposes of the secret practices. Such an error would be completely insubstantial, since it could not affect the Board's ultimate determination that petitioner operates primarily to advance the objectives of the world Communist movement. For the other possible primary objective of the secret practices—the protection of petitioner's members—cannot be the primary objective of petitioner's operations as a whole. If it were, petitioner could best protect its members from prosecution simply by dissolving. In short, a finding that the secret practices have as one of their primary purposes the carrying out of Party objectives would be equally substantial in proving the objectives requirement of Section 3(3) as the finding that the Board actually made.

2. But even if the Board's finding as to the purpose of the secret practices should be stricken in entirety, the decision of the court below not to remand this litigation to the Board for a complete redetermination of its finding is clearly correct. As we have seen (*supra*, pp. 139–140), the statutory considerations of Section 13(c) are in no true sense tests or criteria, the fulfillment of any one of which would suffice to establish that an organization met the Act's definition of a Communist-action group. It would be equally erroneous,

however, to assume that the Act requires affirmative findings under each of the Section 13(e) categories before an organization can be held to fulfill the Section 3(3) definition of a Communist-action group. Section 13(e) simply establishes certain categories of proof which Congress identified as relevant to the decisive issue presented by the Section 3(3) definition. Here, the Board made a finding as to secret practices since Section 13(e) requires the Board "to consider" eight categories of evidence. But the Board did not rely on or even mention this finding in making its ultimate determination (see R. 2642–2644).

The subsidiary findings which the court below affirmed as established by a preponderance of evidence, together with the other findings as modified, abundantly supported the ultimate and controlling finding that petitioner is a Communist-action organization, pursuant to which the Board ordered it to register under the Act. Under these circumstances—where it is clear that the Board's order would have been the same if the "purpose" finding had been omitted—remand of the case to the Board for redetermination of that issue was not required and would have served no useful purpose. The court below correctly affirmed the Board's order. *National Labor Relations Board* v. *Newport News Co.*, 308 U.S. 241, 247; *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131 (C.A. 1), certiorari denied, 346 U.S. 887; *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 169 F. 2d 881, 883 (C.A. D.C.), certiorari denied, 335 U.S. 854; cf. *Universal Camera*

*Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 488.[8]

## IV

THE BOARD'S DETERMINATIONS RELATING TO PETITIONER'S MOTIONS TO REQUIRE THE GOVERNMENT TO PRODUCE VARIOUS DOCUMENTS WERE CORRECT AND DO NOT REQUIRE REVERSAL

Before considering the merits of petitioner's contentions, we submit that these contentions are not properly before the Court. Petitioner, when this case was first before the court of appeals, included the issue as to production of F.B.I. reports among the questions presented. Thus, even though petitioner did not argue the issue in its brief, it was properly before the court below on its original review. See Rule 76, Fed. R. Civ. P. But in the questions presented in its original petition for certiorari (pp. 4–5)

[8] The cases relied on by petitioner (Br. 146) are distinguishable from the case at bar. This is not a case in which it is unclear from the record on just what evidence the administrative findings are based (*National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U.S. 469, 479); nor one in which the administrative order would be sustainable if based on grounds which the record shows were not the actual grounds on which it was based (*Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 94–95); nor one in which the reviewing court modified an administrative order (*Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20–21); nor one in which the administrative findings are "so shrouded in doubt" that the basis of the agency's action is not determinable (*Colorado-Wyoming Gas Co.* v. *Federal Power Commission*, 324 U.S. 626, 634–635); nor one where the agency has failed to find essential basic facts (*Atchison, Topeka & Santa Fe Ry.* v. *United States*, 295 U.S. 193, 202; *Interstate Commerce Commission* v. *Chicago, B. & Q. R.R.*, 186 U.S. 320, 340–342).

and brief on the merits (pp. 2-3), petitioner stated no question which even by implication suggested any issue as to the production of documents. The only mention of the issue is in two passing footnotes in which petitioner claimed that the Board had refused to order production of reports relating to two specific factual incidents (pp. 204–205, fn. 130, and p. 207, fn. 132). Petitioner contended, not that such refusals to order production constituted error warranting reversal, but that the Board erred in making findings on the basis of the two incidents.[9] On remand, both findings were specifically struck by the Board (R. 2393 and 2549, fn. 84). Thus, neither of the issues petitioner alludes to in these footnotes are now of any relevance.

The Rules of the Supreme Court expressly state that this Court will consider only questions raised in the petition for certiorari and the brief of the petitioner, except for "plain error." Rule 23 reads:

> 1. The petition for writ of certiorari shall contain * * *
>
> (c) The questions presented for review * * * *Only the questions set forth in the petition* or *fairly comprised therein will be considered by the court.*

Rule 40 reads:

> 1. Briefs of an appellant or petitioner on the merits * * * shall contain * * *

[9] These footnotes were in the section of the brief (p. 199) entitled "The Findings of the Board are Based on Incompetent and Discredited Evidence and on Misrepresentation of the Evidence."

(d)(1) The questions presented for review * * *

2. The phrasing of the questions need not be identical with that set forth in the jurisdictional statement or the petition for certiorari, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. *Questions not presented according to this paragraph will be disregarded, save as the court, at its option, may notice a plain error not presented.* [Emphasis added.]

Despite the power of the Court to notice "plain error," it has almost invariably refused to consider issues not properly presented. Thus, the Court stated in *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 177, that "[O]ur consideration of the case will be limited to the questions specifically brought forward by the petition." Accord, *e.g.*, *Crown Cork & Seal Co.* v. *Ferdinand Gutmann Co.*, 304 U.S. 159; *National Licorce Co.* v. *National Labor Relations Board*, 309 U.S. 350; *Trailmobile Co.* v. *Whirls*, 331 U.S. 40. The only apparent exceptions are when the Court finds that the error is so plain that no difficult legal or factual issues are involved. See *Sibbach* v. *Wilson & Co.*, 312 U.S. 1. In any event, the rules make clear that the only issues which can be considered are those properly presented to the Court unless the Court itself chooses to notice other issues. In the instant case the Court found no such "plain error" involving the production of the F.B.I. reports. Moreover, in this case the failure of the petitioner to include the question in its petition for certiorari or in

its brief on the merits was not due to oversight since the issue had previously been raised in the court of appeals. See *Trailmobile* v. *Whirls, supra.* It is thus clear that petitioner, having deliberately decided not to raise the issue before this Court for its own reasons, waived any claim it had.

A court on remand can consider any question left open by the mandate which has not been decided by the appellate court. *In re Sanford Fork and Tool Co.,* 160 U.S. 247; *Christoffel* v. *United States,* 214 F. 2d 265 (C.A. D.C.), certiorari denied, 348 U.S. 850. But this authority does not justify consideration of issues which have not been properly retained in the case. In *Christoffel* v. *United States, supra,* the court stated (*id.,* p. 267):

> The questions now pressed are untimely. The case has been submitted twice before to this court, on appeal and on petition for rehearing, and has been before the Supreme Court. In none of these proceedings was any one of the matters now presented asserted as error. Upon examining each of them we conclude that in these circumstances none constitutes the kind of error which we ought now to consider.

And see *Ballard* v. *United States,* 329 U.S. 187, 190, where this Court indicated that a party cannot raise a claim, after a remand by this Court when the same party, as petitioner, has failed to present the issue to the Court. Accord, *Raydure* v. *Lindley,* 268 Fed. 338, 341 (C.A. 6).

The alleged error in the instant case is similar to that in *Christoffel* in which the defendant also alleged that evidence had been wrongly excluded. Although here the issue had been raised (but not argued)

before the court of appeals, it was deliberately not raised before this Court. Petitioner, having failed to retain the issue in the case, cannot be allowed to save error and thereby prevent final decision on all the issues.[10]

A. THE BOARD ACTED WELL WITHIN THE SCOPE OF ITS PROPER DISCRETION IN REFUSING TO STRIKE ALL OF WITNESS BUDENZ' TESTIMONY ON THE BASIS OF RECORDINGS AND NOTES OF HIS INTERVIEWS WITH THE F.B.I.

Petitioner contends (Br. 128–139) that the Board and court below erred in refusing to strike all the testimony of the Attorney General's witness Budenz. Petitioner reasons as follows: it was the fault of the Government that recordings and notes of Budenz' interviews with the F.B.I. relating to the Starobin and Childs-Weiner matters were not produced by the Government, upon petitioner's motion, when Budenz was

[10] The court of appeals rejected this contention as to the Gitlow memoranda (R. 2659; see *infra*, pp. 302–310) and presumably would have rejected it as to the other production issues as well. The court held that a remand "for further proceedings in accordance with this opinion," "or a general unqualified remand, means that the appellate court and trial court are to reconsider the case on all other points" (*ibid.*). We submit, however, that this view is inconsistent with *Christoffel* and *Ballard* and would encourage litigants to save error. Moreover, the court suggested that, if petitioner had failed to state these issues as a question presented in its petition for review and brief in the court of appeals on the original review, it would have been waived and therefore could not be raised again on remand (R. 2659–2660). While the court below said that the Government's position would burden the Supreme Court "with a plethora of "questions presented" (R. 2659), it can hardly be said that petitioner failed to raise all available contentions because of self-denial. Its original petition urged thirteen issues, most of which comprehended numerous lesser questions.

being cross-examined at the original Board hearing; these documents show that Budenz lied about these two important issues; since by the time these documents were produced Budenz was too sick to undergo cross-examination, petitioner was deprived by the Government of the opportunity of demonstrating that all of Budenz' testimony was equally perjurious; therefore, the Board should have struck all of Budenz' testimony, not just that relating to the two matters. In the circumstances of this case, this claim has no merit.

1. Louis Budenz, who held important positions in the Communist Party from 1935 to 1945, including the editorship of the *Daily Worker,* testified for the Attorney General at the original Board hearing. His direct examination lasted almost two days and he was exhaustively cross-examined for five days (R. 2298; see R. 1114–1199). His testimony included eight pages of direct examination and thirty pages of cross-examination relating to the Starobin letter, and two pages of direct examination and ten pages of cross-examination on the Childs-Weiner conversation. This testimony is set forth in full in the Appendix, *infra,* pp. 316–322, 327–347.

During cross-examination of Budenz at the original hearing, petitioner moved for the production of any F.B.I. reports of interviews with Budenz concerning the Starobin letter and the Childs-Weiner conversation, but the Board denied the motions (R. 1185, 2277). Following the first remand by this Court, the Board again denied similar motions (R. 2217–2218, 2225). Subsequently, the court of appeals affirmed

the denials of these motions on the ground that there did not appear to be any such "statements" as defined in 18 U.S.C. 3500 (R. 2664–2666), although it remanded the case to the Board on another issue (R. 2679).

In response to a petition for rehearing filed by petitioner, the Board filed with the court of appeals an affidavit of counsel for the Attorney General stating that, on January 28, 1958, "in the process of preparing replies to petitioner's petition for rehearing * * *," he requested the F.B.I. to furnish affidavits by the Bureau agents, who conducted the interviews at which Budenz discussed the Starobin letter and Childs-Weiner conversations, setting "forth the circumstances under which the * * * interviews referred to were conducted" (R. 2685–2686); that the purpose of the affidavits was to answer petitioner's motion since Budenz had testified "that he had orally reported to the FBI on the subject here in issue and that his report on the so-called Starobin letter was made in the absence of a stenographer, with the interviewing agent merely taking longhand notes" (R. 2686); that on January 29, 1959, he "was informed that from December 6 to 12, 1945, * * * Mr. Budenz was interviewed by two Bureau agents, who took notes during the interviews (the first which the Bureau had with Budenz), but that, in addition, the interviews had been, without Budenz' knowledge, mechanically recorded on discs, which were still in existence" (R. 2686–2687); that he "was further informed that no subsequent interviews with Budenz, of which there had been many, had been electrically or mechanically recorded" (R. 2687); that the Starobin letter and the

Childs-Weiner conversations were among the wide range of matters discussed at the recorded interviews; and that "[t]he affiant had no knowledge, and upon information and belief neither Mr. Budenz nor any attorney who has participated in the preparation or presentation of this case to the Subversive Activities Control Board or to the courts had any knowledge, prior to January 27, 1958, of the existence of the aforesaid mechanical recordings * * *" (*ibid.*). The court thereupon enlarged the order of remand to include "statements," as defined by 18 U.S.C. 3500,[11] made by Budenz to the F.B.I. in regard to the Starobin and Childs-Weiner matters (R. 2694–2695, modified, R. 2696).

A member of the Board, sitting as an examiner considered the recordings *in camera* and excerpts dealing with the two matters were furnished to petitioner (R. 2387–2394). The member-examiner indicated that petitioner's request for the recall of Budenz for further cross-examination would be granted (R. 2388–2389). When a letter from Budenz' personal physician stated that cross-examination would imperil Budenz' health due to a heart condition, the member-examiner had Budenz examined by an independent heart specialist. The specialist stated in an affidavit that, because of an "extremely serious cardiovascular disease," cross-examination of Budenz "might seriously affect his health or cause his death. * * *

[11] Both the Board and the court below have assumed that 18 U.S.C. 3500, which in terms applies "[i]n any criminal prosecution brought by the United States," applies by analogy to the Board's proceedings (see, *e.g.*, R. 2390, 2694).

[E]ven the slightest amount of emotion could very well precipitate a serious outcome in [his] life" (R. 2389). The parties therefore agreed that Budenz was not available for recall (*ibid.*).

Petitioner then moved to strike all of Budenz' testimony and, in the alternative, moved, *inter alia*, (1) to strike Budenz' testimony as to the Starobin and Childs-Weiner matters, and (2) for an order directing production of the agents who participated in the December 1945 interviews with Budenz and directing them to bring their complete notes of the interviews (R. 2389). The member-examiner denied the motions except for the request to strike Budenz' testimony on the two matters. The Board then ordered the Government to produce all documents purporting to reveal oral or written communications on these matters. The Government produced four documents, portions of which related to the two matters. While contending that these four documents were not "statements" under 18 U.S.C. 3500, the Government agreed to their production, after irrelevant portions were excised, to remove the necessity of a Board determination of the issue (R. 2390). The pertinent excerpts were given to petitioner and received in evidence without objection.

As to the issue whether to strike Budenz' testimony, the full Board stated the question as "what is the fair thing to do in relation to his testimony, all circumstances considered. On the one hand, * * * there is lack of opportunity for further cross-examination in the light of the documents and, on the other, there is on the witness' part a lack of opportunity to be con-

fronted with any alleged inconsistencies in the documents" (R. 2391). After so stating the issue, the Board rejected petitioner's "assertion that on their face the documents produced show that Budenz' testimony on the Starobin and the Weiner matters was deliberately false" (*ibid.*). The Board then found that the Government was not responsible for Budenz' unavailability for cross-examination, that petitioner "had adequate opportunity, which was utilized" to cross-examine Budenz at the original hearing on his testimony other than on the Starobin and Childs-Weiner matters, that "[n]one of his other testimony was dependent upon, or inseparable from, his testimony on the Starobin and the Weiner matters," that much of Budenz' testimony was corroborated by other credited evidence, and that, although he was specific as to name, date, and place, none of the persons named were called by petitioner to refute his testimony (R. 2392–2393). The Board, therefore, concluded that "the preclusion of further cross-examination on the produced documents due to unavailability was not sufficient to constitute a material deprivation of cross-examination on his testimony as a whole" and that Budenz' testimony "is credible on the record as a whole" (R. 2392, 2393). Nevertheless, the Board decided that, "where, resolving all doubts in favor of the cross-examiner, any room is seen for further cross-examination * * *, the fair thing is to strike the testimony on the Starobin letter and the Weiner conversation" (R. 2393). On appeal, the court upheld this determination (R. 2703–2704).

2. Even if we accept as petitioner does (Br. 130) the general summary of the law on this issue in 5 Wigmore, *Evidence* (3d ed., 1940), § 1390, petitioner's contention is without merit. Wigmore first states that "[w]here the witness' *death* or *lasting illness* would not have intervened to prevent cross-examination but for the *voluntary act* of the witness himself or the party offering him—as, by a postponement or other interruption brought about immediately after the direct examination, it seems clear that the direct testimony must be struck out." (Emphasis in original). In all other circumstances, he continues, "the true solution would be to avoid any inflexible rule, and to leave it to the trial judge to admit the direct examination so far as the loss of cross-examination can be shown to him to be not in that instance a material loss." Such discretion in the trier of fact should apply *a fortiori* to administrative tribunals which are generally given far broader discretion in considering evidence before them than are the courts. Application of the standard suggested by Wigmore to the facts of this case shows clearly that the Board was acting well within the scope of its proper discretion.

*a.* As the Board found (R. 2391–2392), the Government was not responsible for any restriction of petitioner's opportunity to cross-examine Budenz. First, according to the affidavit submitted to the court of appeals on February 5, 1959—which petitioner has never challenged—neither Budenz nor government counsel knew that recordings had been made of Budenz' initial interviews with the F.B.I. The only records of any Budenz interviews known either to

Budenz or government counsel were notes taken by F.B.I. agents during the interviews. While these notes were ultimately produced voluntarily by the Government so that the Board would not be required to decide whether they came within the meaning of "statements" in the so-called Jencks statute, 18 U.S.C. 3500 (R. 2390), these notes were not "substantially verbatim recital[s] of an oral statement"—the notes being obviously far shorter than required for the length of their interview— and were not "signed or otherwise adopted or approved by" Budenz (18 U.S.C. 3500(e)). Second, even if the Government is deemed in some way responsible for not producing the recordings or the notes, this responsibility is only in the physical sense. The Government took a legal position which at the time, prior to the decision in *Jencks* v. *United States,* 353 U.S. 657, had respectable, and perhaps majority, support in the courts of appeals. See the Government's Brief in *Jencks* v. *United States,* No. 23, Oct. Term, 1956, pp. 26–32. And, third, even if the failure to produce at the time of Budenz' testimony could be said to be, in some sense, the fault of the Government, the direct interference with cross-examination was confined entirely to two factual issues—and Budenz' testimony as to these issues was subsequently struck.

It is possible, as petitioner contends, that petitioner could conceivably have shown by cross-examination on the basis of the recordings and notes serious inconsistencies which would affect the credibility of Budenz' other testimony. But we submit that the Board could properly determine the likelihood of this indirect loss to petitioner and was not com-

pelled to strike automatically all of Budenz' testimony. This is particularly true since, as we will show (*infra*, pp. 299–301), petitioner had the opportunity to test Budenz' credibility on the Starobin and Childs-Weiner issues far more fully than it did. Petitioner, either voluntarily or by its own fault, did not use the resources for impeachment which were available. In sum, the Board was free to decide the issue on the basis of "what is the fair thing to do * * *, all circumstances considered" (R. 2391).

*b.* The Board's determination that the unavailability of the documents to petitioner did not "constitute a material deprivation of cross-examination in his testimony as a whole" (R. 2392) is supported by the evidence. First, no showing or even substantial suggestion has been made that Budenz' testimony as to the Starobin and Childs-Weiner matters was perjured. Petitioner cross-examined Budenz intensively on these two issues using prior statements made by Budenz in a book which he had written and in testimony before congressional committees (*id.* see the Appendix, *infra*, pp. 319–322, 334–344), without showing any substantial discrepancies. Similarly, a comparison of the quotations from the recordings and notes [12] with Budenz' statement at the Board hearing shows no more than the usual discrepancies when a long and detailed story is told at widely separated intervals of time. The first interviews, which were transcribed on the re-

[12] All of Budenz' statements on these two issues including those before the Board, are set out in the Appendix, *infra*, pp. 316–353; some of these statements or portions of them are quoted in petitioner's brief (Br. 132–137).

cordings, have the most significant discrepancies in comparison with Budenz' testimony before the Board, in that many of the details were left out. But this is not surprising since these were Budenz' first interviews with the F.B.I. and therefore he was recounting all his experiences in the Party over a ten-year period. The subsequent interviews, which are reflected in the notes, were directed to more specific subjects and accordingly Budenz recounted the Starobin and Childs-Weiner episodes with greater precision. The Board therefore found that the documents did not show that Budenz' testimony on the Starobin and Weiner matters was deliberately false (R. 2391), and in affirming this determination, the court of appeals held, "the various accounts given by [Budenz] upon different occasions, under different questioning, of the Starobin and Weiner incidents bear a solid similarity in essentials and differ no more than truthful accounts under such conditions may well differ—indeed, if truthful, do differ—in details, in expressions of speech, and in passing emphasis" [13] (R. 2703).

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[13] Of course, even details and emphasis may have considerable bearing on the findings as to particular facts of a case. Thus, in regard to the Childs-Weiner incident, it may well be important to the trier of fact whether "Budenz took [a statement of Weiner] to mean that Weiner's source of supply was from foreign countries, particularly Russia" (F.B.I. interview of July 13, 1950 (R. 2367)) or Weiner himself said that "the channels of communication abroad had been broken for the time being, and perhaps could be established" and that Weiner meant "financial aid from Moscow" (testimony before the Board) (R. 1125, 1126). But such difference in detail can have no importance here since the findings based on this testimony have been stricken. And certainly such difference in detail has no substantial effect in impeaching the credibility of the witness on other matters.

[fn. cont'd]

Second, the challenged testimony relating to the Starobin and Childs-Weiner matters, even if it were inconsistent with Budenz' statements to the F.B.I., furnishes no basis for striking all of Budenz' other testimony. The challenged testimony related only to a small portion of Budenz' total testimony, comprising only some fifty pages (R. 2299) out of more than seven hundred on all matters. As the Board found, "None of Budenz' other testimony was dependent upon, or inseparable from, his testimony on the Starobin and the Weiner matters" (R. 2392). Since the possibility of showing perjury on the basis of the Starobin and Childs-Weiner recordings and notes was slight, the Board could fairly separate the testimony on which cross-examination was finished from Budenz' testimony on the two matters as to which petitioner had a right to further cross-examination. As to the former testimony, petitioner, having cross-examined Budenz for about five days after two days of direct examination, had substantially accomplished as much as it could with

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Petitioner claims that *Jencks* v. *United States*, 353 U.S. 657, establishes that "'only the defense is adequately equipped to determine the effective use' of a witness' prior statement for the purpose of impeachment" (Br. 131–132). This language was used, however, in requiring production of prior statements made to the Government by government witnesses—and such production was given petitioner here as to all the statements for which he asked at the original Board hearing. *Jencks* did not hold that testimony must be automatically struck because a witness has become unavailable for cross-examination on the basis of the witness' statements when the statements do not appear inconsistent with the witness' testimony—and *a fortiori* did not hold that, in such circumstances, all the testimony of the witness must be struck, including that on entirely different subjects from that of the statements.

regard to it. Since a cross-examination begun but unfinished suffices if its purposes have been substantially accomplished (5 Wigmore, *Evidence* (3d ed., 1940), § 1390; *Jaiser* v. *Milligan*, 120 F. Supp. 599, 604 (D. Neb.)), there was no need to strike Budenz' testimony except on the Starobin and Childs-Weiner issues.

Third, there is ample evidence that Budenz' other testimony was at least substantially correct. As the Board found, this testimony was in large measure corroborated "by other credited evidence, either documentary or oral" (R. 2393). As examples, the Board pointed to witness Lautner's testimony that references in petitioner's constitution concerning the upholding of American democracy and the Constitution are incompatible with Marxism-Leninism (R. 975, 979, 1153-1154, 2446-2448) and that Gerhardt Eisler actively participated in petitioner's activities in the 1940's[14] (R. 874, 969-970, 2526). And the Board further found that much of Budenz' other testimony was "inherently probable from the record and unrebutted" (R. 2393)—such as testimony that Party official Eugene Dennis stated at a meeting at the time of the Hitler-Stalin Pact that, if the United States joined Great Britain in a war against Hitler, petitioner should be prepared to turn the "imperialist" war into a civil war. This evidence is fully consistent with the Marxist-Leninist doctrine of turning imperialist war, *i.e.*, war between capitalist nations, into civil war if conditions are favorable (R. 2427-2428, 2554-2555,

[14] Witness Meyer and Kornfeder also corroborated the latter testimony (R. 321-322, 692-693).

2639). Thus, even if Budenz had lied as to the Starobin and Childs-Weiner incidents, the Board was not required to strike or discredit all his other testimony. As the court of appeals held (R. 2705)—after holding that the discrepancies did not indicate perjury (R. 2703-2704):

> [W]e know of no rule that the trier of facts is required to disregard all the testimony of a witness whom he finds to have testified falsely in one respect. He may do so, but he is not required to do so. Instructions to juries on the point are commonplace in the courtroom. Such instructions are always that the jury *may*—never that it *must*—disregard the testimony of a witness whom it believes to have testified falsely on a material matter as to which he could not be mistaken. A rule of law compelling the trier of facts to disregard all the evidence of such a witness would not only be a revolutionary doctrine in our jurisprudence but a wholly undesirable doctrine.

On this record, it was within the discretion of the Board, as an expert trier of facts, to credit Budenz' other testimony.

Last, and perhaps most important, petitioner has made no effort beyond its original extensive cross-examination of Budenz to show the falsity or inconsistency of Budenz' testimony either on the Starobin and Childs-Weiner matters or on his testimony in general. Joseph Starobin, who Budenz said was the author of the Starobin letter (R. 1136), was still an active Party member and presumably available at the time of the original Board hearings (1951–

1952). While he left the Party before the Board heard petitioner's motion to strike all Budenz' testimoney (1958–1959), there is no indication that he could not have been subpoenaed. Jack Stachel, who Budenz testified took the letter from Budenz' hands (R. 1136), was a member of the National Committee throughout this period—from before the original Board hearings to the present—and in 1951–1955 was in a federal prison after conviction for violation of the Smith Act. See *Dennis* v. *United States,* 341 U.S. 494. Therefore, he, like petitioner's witness Gates who was also in prison, was certainly available at that time. Similarly, Morris Childs and Robert Weiner, who Budenz testified were the two other persons besides himself who were present at the Childs-Weiner conversation (R. 1124–1125), were still available to the Party in 1951–1952 and Childs continued to be in 1958–1959—Weiner having previously died in 1954. As to Budenz' other testimony, the Board found that although he "was specific as to names, dates, and places, none of the persons named by him was called in rebuttal or denial of the events with which they were associated by the witness" (R. 2393).

It seems impossible to believe that petitioner, represented by able counsel, merely neglected to call these obvious and available witnesses with regard to important testimony of an allegedly perjurious witness. Rather, it seems that the reason these witnesses were not called is that, at the least, Budenz' testimony is substantially correct. In any event, petitioner did not attempt, either at the Board's original hearing or on remand, to demonstrate as best it

could that Budenz' testimony was mistaken or perjurious. We submit, therefore, that petitioner is in no position to ask this Court to order the striking of all of Budenz' testimony because one possible means of impeachment—cross-examination based on documents relating to other issues—became impossible.

In sum, we believe that the Board was not even required to strike Budenz' testimony as to the Starobin and Childs-Weiner issues since petitioner made no showing of any substantial discrepancy in Budenz' testimony on these issues. In Wigmore's words, petitioner suffered no "material loss" because of being unable to cross-examine Budenz on the basis of the particular documents which were not produced at the original hearing. Nevertheless, the Board, out of an abundance of caution, struck the findings on these two issues. But certainly the Board was acting within its proper broad discretion as an expert trier of fact in refusing to strike, under these circumstances, Budenz' testimony on entirely separate matters, much of which was corroborated or inherently probable. The Board was not compelled to strike this testimony merely on the faintest possibility that, if petitioner could have cross-examined Budenz on the Starobin and Childs-Weiner matters using the recordings and notes, it might have been able to show not merely inconsistency or forgetfulness but such serious perjury as to taint all the rest of his testimony; and the Board was particularly not compelled to strike this testimony when petitioner had failed to challenge Budenz' testimony either on the two issues, or his other testimony, by calling wit-

nesses who were readily available and could directly challenge Budenz' account of specific facts.

B. THE BOARD'S DENIAL OF PETITIONER'S MOTION TO ORDER THE PRODUCTION OF WITNESS GITLOW'S MEMORANDA TO THE F.B.I. IS NOT REVERSIBLE ERROR

Benjamin Gitlow, the General Secretary of petitioner from 1928 to 1929 (R. 2647), testified as a witness for the Attorney General. During his testimony he identified and explained a series of Party documents, including minutes of committee meetings, which he had kept during his Party membership and had subsequently given to the F.B.I. (R. 243–264, 1343–1421). During cross-examination of Gitlow, petitioner made a motion for the production of all the documents which petitioner had given the F.B.I., all memoranda prepared by Gitlow explaining these documents, and all other memoranda which either were written by Gitlow or were transcribed by the F.B.I. from oral statements made by him (see R. 2253–2258). The Board denied the motion (R. 2258, 128). After the remand by this Court, petitioner again moved for the production of the Gitlow memoranda and the Board again denied the motion (R. 2187, 2188–2189, 2225). The court of appeals affirmed on the ground that this Court's decision in *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, makes petitioner's exclusive remedy a motion for leave to adduce additional evidence under Section 14(a) of the Act [15] (R. 2660–2664). Petitioner then moved in the

[15] Petitioner is incorrect in saying that the court below held "that the Board had erred in denying petitioner's production" (Br. 140). The court in fact stated: "We do not consider

court of appeals under Section 14(a) for leave to adduce additional evidence (R. 2681–2685), but the court adhered to its earlier decision and held that "the denial of this claim for the production of that material was proper" (R. 2694). Petitioner renewed this contention in its latest appeal to the court below, which held that petitioner's belated motion under Section 14(a) "cannot cure procedural defects *nunc pro tunc* after an appellate court has passed upon his contentions * * *" (R. 2702).

Petitioner contends (Br. 139–141) that the Board's failure to order production of the Gitlow memoranda was erroneous. We submit, however, that, besides petitioner's failure to retain the issue in the case by raising it before this Court on its prior review (see *supra*, pp. 283–287), there are three additional reasons why the Board's action does not constitute reversible error.

1. The Board's order denying production was correct. Petitioner's motion called for the production of all documents Gitlow turned over to the F.B.I., all memoranda prepared by Gitlow explaining these documents, and all other memoranda he had given the F.B.I. (R. 2256). The large majority, however, of the materials included within the ambit of petitioner's motion were not and are not now properly producible. The only materials included within this motion which were producible under either *Jencks* v. *United States*, 353 U.S. 657, or the so-called Jencks statute, 18 U.S.C.

whether, if the motion to adduce were granted, the Government must then produce, inasmuch as this letter [sic] may involve questions of privilege, relevancy, etc." (R. 2663). Subsequently, the court held that the denial of production was proper (R. 2694).

3500,[16] are the explanatory and other memoranda "touching the events and activities as to which [Gitlow] testified at the trial" (353 U.S. at 668), *i.e.*, "relate to the subject matter of the testimony of the witness" (18 U.S.C. 3500(b)(c)).[17] But petitioner did not carve out of its general motion those memoranda to which it would have been properly entitled. In other words, petitioner's motion constituted, when considered as a whole, a fishing expedition. But this Court in *Jencks*, quoting its earlier decision in *Gordon* v. *United States*, 344 U.S. 414, 419, emphasized that "[T]he demand was for production of * * * specific documents and did not propose any broad or blind *fishing expedition* among documents possessed by the Government on the chance that something impeaching might turn up" (353 U.S. at 667; emphasis ours). There is certainly no more reason to allow such a fishing expedition in an administrative proceeding involving the hearing of testimony from numerous witnesses over a fourteen-month period.

2. Even if the Board's denial of petitioner's motion was erroneous, it constituted harmless error. Gitlow's testimony (as well as the documents he identified) related entirely to Party activities prior to his expulsion from the Party in 1929 (R. 216). But the evidence as to this period, as to both the "control" and

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[16] We assume, as did the court of appeals (R. 2694, 2696, 2703), that the Jencks statute may be said to be applicable to the Board's proceedings by analogy.

[17] The Party's own documents were not producible regardless of their relevance since they were not statements made by petitioner or approved by him. See 353 U.S. at 668, 672; 18 U.S.C. 3500(e).

"objectives" requirements of Section 3(3), is clear beyond any doubt. Thus, in its 1921 convention, petitioner adopted a resolution stating that it would "systematically" work "for the destruction of the bourgeois state and the establishment of the proletarian dictatorship based upon Soviet power" (R. 2138; see also R. 2459–2460). That same year, petitioner accepted the twenty-one "Conditions of admission to the Communist International" which required advocacy of the dictatorship of the proletariat, made the national Parties sections of the Communist International, and explicitly bound these sections to accept all resolutions of the Congress and Executive Committee of the International (R. 2139, 2461–2463; see *supra*, pp. 47–49).

Petitioner was required to accept these conditions as long as it remained a section of the International, which was until 1940. Therefore, the Board stated that "it can be found through the hundreds of official documents in evidence alone—the Communist Party began its history by voluntarily submitting to the control of the Soviet Union and adopting that nation's international program for the Communist movement" (R. 2644). The Board concluded that "[t]he only substantial issue of fact is whether upon the announcement in 1940 of its disaffiliation from the Communist International, the latter's dissolution in 1943, or thereafter, [petitioner] ceased its relationship with the Soviet Union or the world Communist movement" (R. 2643). Similarly, the court below held that "[n]o substantial dispute exists as to this area [prior to 1940] of the past" (R. 2138) and that "there is scarcely a dispute as to the period prior to 1940"

(R. 2148). And petitioner's factual argument in this Court is almost entirely based on the contention that, since its disaffiliation from the Communist International in 1940, it has not been a Communist-action organization as defined in the Act (see Br. 12, 20, 21, 22, 98, 99, 100, 101, 106, 108, 111, 117–118, 119, 120, 121–122, 124, 125).

Moreover, the pre-1929 character of the Party is not the crucial issue in this litigation.[18] The Board relied upon the pre-1940 evidence of the Party's character to establish that petitioner satisfied the Act's definition of a Communist-action organization in 1940 at the time of its disaffiliation from the Communist International; it then relied on subsequent evidence to show that neither disaffiliation nor any subsequent events up to the time of the Board's hearing had changed the Party's character. Obviously, the evidence is of increasing importance as it comes closer to the 1940 disaffiliation date. Therefore, except for petitioner's continuing adherence to the Communist International and its "conditions" of membership in 1921 which is undisputed, the pre-1929 evidence is distinctly of secondary importance.[19]

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[18] Compare petitioner's contention that the pre-1940 evidence and, indeed, the pre-1950 evidence is irrelevant (Br. 105-111). In its brief in the court of appeals after the remand by this Court, petitioner stated (p. 29, fn. 16):

"It is our view that petitioner was not controlled by the International and that the International was not controlled by the Soviet Union. But since we have always considered these questions too remote to be material, we introduced no evidence on the subject and do not now brief it."

[19] It is also significant that the explanatory memoranda were written by Gitlow in the early 1940's, well over ten years after

In *Rosenberg* v. *United States,* 360 U.S. 367, this Court held, under 18 U.S.C. 3500, that, if the erroneous denial of a motion to order production is harmless, the conviction need not be reversed. Since harmless error does not justify reversal under the Jencks statute in a criminal prosecution,[20] *a fortiori* it does not justify reversal when the statute applies only by analogy to impose rules of fairness for all parties in an administrative regulatory proceeding. As this Court said in *Kotteakos* v. *United States,* 328 U.S. 750, 761–762, the discrimination required in deciding whether an error is technical or substantial "is one of judgment transcending confinement by formula or precise rule. * * * In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of *stare decisis* by what has been done in similar situations. * * * Necessarily the character of the proceeding, what is at stake upon its outcome, and the relation of the error asserted

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the events occurred in the 1920's. The rationale of the *Jencks* case was, *inter alia*, that a witness' pre-trial reports of events might well be more reliable than his trial testimony, since "time dulls treacherous memory" (353 U.S. at 667).

[20] Several courts of appeals have also refused, in applying either the *Jencks* case or the statute, to reverse cases on the basis of harmless errors by the trial courts. See, *e.g., United States* v. *Sheba Bracelets,* 248 F. 2d 134 (C.A. 2), certiorari denied, 355 U.S. 904; *Simms* v. *United States,* 248 F. 2d 626, 629–630 (C.A. D.C.), certiorari denied *sub nom. Duncan* v. *United States,* 355 U.S. 875; *Padron* v. *United States,* 254 F. 2d 574, 576 (C.A. 5), certiorari denied, 358 U.S. 815; *Harris* v. *United States,* 261 F. 792 (C.A. 9), certiorari denied, 360 U.S. 933; *United States* v. *Rosenberg,* 257 F. 2d 760 (C.A. 3), affirmed, 360 U.S. 367.

to casting the balance for decision on the case as a whole, are material factors in judgment."

We submit that, applying these standards to this case, the error, if it be one, was clearly harmless. As the Board found, and the court below agreed, the Party's own documents, the validity of which petitioner does not challenge, establish on their face and by themselves the character of petitioner before 1940. Thus, it is as clear as human prognostication can be that impeaching the credibility of Gitlow could not possibly change the Board's ultimate determination.[21]

3. But even if petitioner were correct that the Board erred and that this error was prejudicial, this case is controlled by *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197. Under a provision in the National Labor Relations Act which is substantially the same as Section 14(a) of the Act at bar,[22] this Court recognizes that the action of the

[21] The dissent in *Rosenberg* based its position on the ground that, since "[t]his is not a case in which the statement erroneously withheld from the defense merely duplicated information already in the defense's possession," the defense was denied a letter written by a key government witness shortly before trial making statements which raised serious questions as to her memory of the events about which she testified in considerable detail at the trial" (360 U.S. at 376–377). Here, as we have shown, Gitlow is definitely not a key government witness in any sense. We believe that the facts here satisfy even the minority's strict rule that "an appellate court should order a new trial unless the circumstances justify the conclusion that a finding that such a denial was harmful error would be clearly erroneous" (*id.*, pp. 375–376).

[22] Section 14(a) states in pertinent part:

"If either party shall apply to the court [of appeals] for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is mate-

Board in refusing to allow the company to adduce additional "highly important" testimony "was unreasonable and arbitrary" (305 U.S. at 226). Nevertheless, the case was not reversed and remanded to the Board, because the company did not avail itself of the appropriate procedure by applying to the court of appeals for leave to adduce additional evidence as specified in the statute. Accord, *National Labor Relations Board* v. *Newport News Co.*, 308 U.S. 241, 249–250; *National Labor Relations Board* v. *Fairchild Engine & Airplane Corp.*, 145 F. 2d 214, 215 (C.A. 4); *National Labor Relations Board* v. *National Laundry Co.*, 138 F. 2d 589, 590 (C.A. D.C.); see *California Lumbermen's Council* v. *Federal Trade Commission*, 103 F. 2d 304 (C.A. 9). Similarly, petitioner here has failed to follow the applicable remedy under Section 14(a)—although it knew of the remedy as shown by a motion to adduce evidence as to the credibility of three of the Attorney General's witnesses made prior to the original court of appeals' decision (351 U.S. at 119–120)—and it is therefore now barred, whether or not the Board did in fact err.

Petitioner contends that *Consolidated Edison* is not applicable because "cross-examination * * * is not the introduction of additional evidence" (Br. 141). In actuality, however, cross-examination often produces additional evidence which the trier of fact considers in making its adjudication. The production orders petitioner requested here were preliminary to, and were integrated with, its attempt to adduce additional evidence on cross-examination showing either

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rial, the court may order such additional evidence to be taken before the Board * * *."

facts contrary to those stated by the witness or at least that the witness should not be believed. In fact, it is likely that the statements themselves—like the recordings and notes of Budenz' interviews with the F.B.I. (see *supra,* p. 291)—would have been introduced in evidence.

Petitioner also claims (Br. 141) that the court below erred in denying its subsequent motion under Section 14(a). If, however, failure to move to adduce additional evidence could be cured simply by making a subsequent motion, obviously the requirement has no meaning. Indeed, it would be far simpler merely to consider a question presented on appeal as in effect a motion to adduce additional evidence. But this possibility was before this Court in *Consolidated Edison* and was rejected.

Petitioner's difficulties with Section 14(a) clearly reflect the erroneous belief that this provision is merely a procedural technicality. Instead, it serves the useful purpose of allowing interlocutory relief in situations where the administrative agency's time and effort would often be wasted if appeal from the final order were the only remedy. And even if the injured party does not seek interlocutory relief—and Section 14(a) does not seem to compel it—the reviewing court can consider the motion to adduce evidence separately and expedite the remand to the administrative agency if the agency has erred. Nor is petitioner correct in stating (Br. 141) that the *Consolidated Edison* holding would produce multiple interlocutory appeals. Despite the existence of that decision for many years, such multiple appeals have not apparently resulted, probably because administrative agencies generally give parties before them great latitude in adducing evidence.

C. PETITIONER WAS NOT ENTITLED TO MOVE FOR PRODUCTION OF STATEMENTS MADE BY WITNESSES TO THE F.B.I. LONG AFTER THE WITNESSES HAD TESTIFIED AND THE ORIGINAL BOARD HEARING HAD ENDED

After the court of appeals' second decision, petitioner, on February 14, 1958, moved for the first time for the production of all recordings made of Budenz' interviews with the F.B.I., and all memoranda and notes made by the F.B.I. of these interviews, relating to the subject matter of his testimony before the Board [23] (R. 2688). The court denied the motion (R. 2694–2695, 2696). On December 29, 1958, petitioner moved before the Board for an order requiring "the production of all statements in the possession of the petitioner made by all of the Attorney General's witnesses on any matters to which their testimony in this proceeding relates" (R. 2338). After the Board denied the motion (R. 2345–2346), petitioner moved under Section 14(a) in the court of appeals for leave to adduce additional evidence (R. 2697). The court properly denied the motion (R. 2702–2703).

Petitioner clearly has no right to production, almost six years after the close of the Board hearing, of documents for the purpose of cross-examination. Conceivably, production would be available if a motion were directed to a limited number of documents and some particular need were shown. But petitioner has

[23] The latter half of this motion is clearly too broad under 18 U.S.C. 3500(e) for it includes statements which were not written or adopted by the witness and are not "a substantially verbatim recital of an oral statement."

merely made two blanket motions for all statements of Budenz and all statements of all the Attorney General's witnesses.[24] To grant such motions and allow cross-examination so long after the direct testimony would be seriously unfair to the Government and its witnesses even if it is assumed that, unlike Budenz, the other witnesses are still able to appear. Similarly, it would be unfair, if they were unable to appear, to strike their testimony because of petitioner's belated motion. And the requirement of an entire new round of cross-examination would merely add a new and lengthy delay to a seemingly endless litigation.

Petitioner suggests (Br. 142–144) that it realizes that the motions are seriously out of time by seeking to justify the delay on two grounds. First, petitioner claims (Br. 142–143) that it did not repeat its motions for production at the hearing because the Board had already established a rule denying such motions unless a prior showing of inconsistency was made. But regardless how fixed a position has been taken by a court or administrative agency, a litigant must make clear all exceptions to its rulings. This could have been simply done if petitioner had merely stated at some time during the hearings that it considered itself

[24] Under both *Jencks* v. *United States*, *supra*, and 18 U.S.C. 3500, petitioner would probably have been entitled to the documents stated in its motions (except for a portion of the Budenz motion (see *supra*, p. 311, fn. 23), if the motions had been timely.

entitled, as of right, to all relevant statements made by the Attorney General's witnesses to the F.B.I., and therefore the motion would not be repeated for subsequent witnesses. Moreover, if petitioner had actually intended to move for all the witnesses' statements until the Board's rulings required a showing of inconsistency, presumably petitioner would have attempted to show inconsistency between the testimony on direct examination and the witness' statements to the F.B.I. by thorough cross-examination of the Attorney General's witnesses on the subject of any prior statements. Yet, in many instances, petitioner failed even to attempt this.

Petitioner also contends that it was misled by Budenz' testimony and by the actions of the Board and the Government "into believing that there were no verbatim transcriptions of FBI interviews with Budenz" (Br. 143); thereby, it is alleged, petitioner was misled into failing to make motions for production of Budenz' statements other than those related to the Starobin and Childs-Weiner matters. While Budenz testified that he knew of no verbatim recording of his interviews with the F.B.I. (Tr. 14122),[25] we submit the record makes clear that petitioner was not misled in making any motions for production. Petitioner's motions as to Budenz' statements relating to the Starobin and Childs-Weiner matters asked for the production of all of Budenz' reports, not just verbatim transcriptions (R. 1185, 2277–2278). Moreover,

[25] Budenz in fact did not know of the recordings (R. 2687).

the motion as to the Starobin reports (Tr. 14125-14129) came after Budenz' testimony that he knew of no verbatim recordings (Tr. 14122). Thus, petitioner's motions were doubtless based in part on Budenz' testimony that F.B.I. agents took notes at the interviews (R. 2686). Thus, petitioner was seeking "reports" which it knew were in existence plus any other reports which might or might not exist. Government counsel in arguing against the motions claimed merely that petitioner had failed to lay a proper basis for the motions by establishing inconsistency between the witness' testimony and prior statements he had made (Tr. 14078–14079, 14130-14131); no claim was even suggested that the reports did not exist. And the Board simply denied the motions without inquiring as to the existence of any "reports." Moreover, despite Budenz' testimony that he knew of no verbatim recordings—including such recordings of his statements on the Starobin and Childs-Weiner matters—petitioner nevertheless renewed its motion before the Board on December 6, 1956, for "[a]ll reports and memoranda of statements made by the witness Budenz to the F.B.I. concerning" the Starobin and Childs-Weiner matters (R. 2217-2220, 2225). This motion was made over a year before the Government disclosed on February 5, 1958, by affidavit, the existence of the recordings of Budenz' initial interviews with the F.B.I. (R. 2685–2687). It is thus clear that petitioner was seeking not only verbatim records but all reports of Budenz relating to the two matters and that it continued to seek them

because there was no indication that such reports did not exist. Petitioner's failure to make similar motions for other reports of Budenz cannot be explained on any theory that it was misled. Petitioner simply and voluntarily failed to make timely motions when it should have, and it was too late to make them years after the close of testimony before the Board.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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SEPTEMBER 1960.

# APPENDIX

## 1. THE "CHILDS-WEINER CONVERSATION"

(*a*) *Budenz' Board testimony.*—Budenz' testimony before the Board on this subject on direct examination, given on April 9, 1952, was as follows (R. 1124-1126; Tr. 13817–13819):

> Q. Did you ever have occasion to come to New York with Morris Childs [the leader of the Communist Party in Illinois] in connection with the financing of the paper [the *Midwest Daily Record,* a Party newspaper of which Budenz was editor in 1939]?
>
> * * * * *
>
> The WITNESS: Yes, sir, on several occasions, and specifically in the year 1939, when we were trying to obtain more funds from the Communist Party.
>
> By Mr. PAISLEY:
>
> Q. What occurred on that occasion? A. We had a conference with Robert William Weiner who was then in charge of the Communist Party funds.
>
> Q. Was he an official of the Party? A. He has been treasurer of the Party and president of the International Workers Order, but he always has been in charge of the funds. He later became head of the publishing house, the New Century Publishers. But even during that period he was in charge of all the Party funds and supervision of all the Party financial affairs.
>
> Q. Did you and Morris Childs have a discussion with him with reference to the financing

of the Midwest Record? A. Yes, sir, this was one of the many discussions.

Q. Do you recall what was said? A. Yes, sir. When Weiner said that it was impossible for the Party to put any more money into the Midwest Daily Record, Childs asked him if we couldn't get some money from abroad.

Q. What did he say? A. He said that we could normally, but the channels of communication abroad had been broken for the time being, and perhaps could be re-established so money could come.

Q. Was the word "abroad" used or was there any discussion as to what "abroad" meant?

* * * * *

The WITNESS: That was the terminology which was used very frequently in the Communist Party.

By Mr. PAISLEY:

Q. Was it clarified to you by Weiner what he meant?

* * * * *

The WITNESS: It was not definitely stated what he meant, but that term had been used constantly in the Communist Party as a specific source or center.

* * * * *

Q. What did it mean to you, Mr. Budenz?

* * * * *

The WITNESS: It meant financial aid from Moscow, both because of this terminology and because of experience.

* * * * *

Budenz' testimony before the Board on cross-examination was as follows (R. 1180–1182; Tr. 14061–14070):

Q. You testified that in 1939 you made a trip from Chicago to New York with Morris Childs

to secure some money for the Midwest Daily Record. That was your testimony here? A. That is correct. It may have been the latter part of 1938, but it was in that period. My memory is that it was in early 1939. That is very correct. We had made several of those trips.

Q. Your memory isn't too good on dates, is it? A. Yes, it is good on dates, particularly some that stand out. But that was one of a series of trips made back and forth on this question. Weiner was out in Chicago on the money question, and Childs and I on several occasions were in New York on it.

Q. You testified that you and Childs conferred in New York? A. That is correct.

Q. And you conferred with one Robert Weiner? A. William Weiner, yes.

Q. That Childs asked Weiner if he couldn't get some money from abroad? A. That is correct.

Q. And your testimony here is that Weiner answered that he could normally but channels of communication abroad had been broken for the time being. Was that your testimony? A. That is right.

Q. You testified here that "abroad" meant financial aid from Moscow? A. That is correct.

Q. Mr. Witness, you have had occasion to write or testify about the sources and nature of the finances of the Communist Party in your two books, is that right? A. To some extent.

Q. You did write about that subject matter, did you not? A. Yes, I did.

Q. In your public testimony before various committees as well as in deportation proceedings and in court proceedings and in various other writings you have had occasion to discuss or narrate with reference to the source of Communist Party finances, have you not? A. Yes, sir.

Q. You testified this morning, did you not in one of the early questions I asked you, that you didn't say anything here that you hadn't said anywhere else publicly or that you hadn't written somewhere else publicly? A. That is my remembrance.

Q. That was just this morning. Do you remember being asked that question and making that answer? A. I say that was my remembrance this morning, that I had.

Q. You answered that question that you had not said anything here that you had not either published or about which you testified anywhere else, isn't that right? A. That was my remembrance.

Q. Publicly. Have you ever in any of your books or writings or in your published testimony related this alleged conversation between yourself, Childs and Weiner? A. It is my remembrance that I have somewhere. I certainly have told the Federal Bureau of Investigation about it.

Q. I didn't ask you about that. I didn't ask you what you told the Federal Bureau of Investigation. That is private. I asked where in your writings in your books which have been published or in your public testimony, where you have publicly testified and where the record of your testimony is available, have you testified relating this particular incident that you have related here that is alleged to have taken place between yourself, Childs and Weiner. A. I can't recall for the moment.

Q. You can't recall? Did you do it in your book, This is My Story? A. I don't think so.

Q. You don't think so. There you were telling your story, were you not? A. Well, I wasn't telling it in detail.

Q. Did you do it in your other book, Men Without Faces? A. I don't think I did. I am not sure.

Q. Did you do it when you testified at Foley Square? A. Well, I can't remember. I don't recall that that was brought up.

Q. Did you do it in your first public appearance before the Un-American Activities Committee? A. I am not certain about that. I say to you that I can't recall where I stated that. My remembrance is that I did state it in some testimony. It may have been that I am confusing that with information that I gave the Federal Bureau of Investigation.

Q. I am sorry, I didn't get that after "it may have been." A. I say my remembrance is that I did mention it in some public testimony. It may have been that I have been confusing it with the information that I have given the Federal Bureau of Investigation.

Q. When you say it may have been that you may have been confusing it with the information that you gave to the FBI, what you mean is that you might have given it to the Federal Bureau of Investigation but that you did not give it in any public testimony, is that right? A. That I may not have.

Q. That you may not have. A. Yes, I just can't recall the public testimony for the moment, although my remembrance is that I did testify to that in public testimony.

Q. Where? A. I can't recall for the moment.

Q. This is an important incident that you testified to here. You didn't write about it in This is My Story. You were editor of the Midwest Daily Record, weren't you? A. of the Midwest Record?

Q. Yes. A. Yes.

Q. And its financing was an important incident in your career as editor, was it not? A. Well, it was a problem for the whole Party in Chicago.

Q. But it was also your problem, too, as editor, in the capacity of editor? A. That is right.

Q. You made no mention of it in This is My Story? A. There are many things I left out of This is My Story?

Q. Did you mention it in the Foley Square trial? A. I wasn't asked about that at Foley Square.

Q. Did you mention it in the proceedings of the Teachers? There you testified as an expert, did you not?

* * * * * *

Q. In that proceeding you testified as an expert, supposed to have expert knowledge of the Communist Party, isn't that right? A. Yes, sir.

Q. Did you mention this particular incident in that proceeding when you testified as an expert, having full knowledge of the Communist Party?

* * * * *

Q. Did you testify about it in a proceeding before the Subcommittee on Immigration and Naturalization of the Committee on the Judiciary, 81st Congress, in May 1949? A. I don't know.

Q. Did you testify about finances in that proceeding? A. I did in part, yes.

Q. Didn't you make this statement? Page 240:

"The Party has a bigger treasury than you think. It can go out, and finance all the meetings, and it gets the money back, you understand."

Were you asked this question by the Chairman?

"Where does this treasury come from?"

And did you make this answer: "Of my own knowledge I can not say, but it certainly is supposed to come in part from Moscow."

Q. Did you give that answer. A. I may have.

• • • • •

Q. I will show it to you and ask you whether or not you did, starting here (indicating).

• • • • •

The WITNESS: Yes, sir, that is correct.

By Mr. MARCANTONIO:

Q. You did make that statement? A. That is of my own knowledge.

(*b*) *Prior statements.*—In the course of his initial series of interviews with the F.B.I. in December 1945, Budenz made several references to the financial problems of the Midwest Daily Record, including trips which he made to New York to raise money for it. He also mentioned Weiner's name in replying to a question by one of the interviewing agents as to whether he (Budenz) had any knowledge of "Soviet sources" of Party funds, but made no mention (so far as the recordings reflect) of the Childs-Weiner conversation or other conversation to which Weiner was a party. His pertinent statements were as follows:

Q. Now we'll get on to whatever you want to talk about. A. * * * * Well I'd say, of course, during the time I was in Chicago I was here in New York once a month on National Committee meetings or something else. The Record was in terrible condition. I had to come here and try to raise money all the time. [C.P. Ex. 97, R. 2358]

• • • • •

A. Now, I'll tell you what I thought I'd do, if you don't mind, make a little summary of my own for you of some things; I mean you indicated some subjects—now, for instance, on

finances—I have just been trying to wonder how I could help you on that. You see we did have financial problems, we had them at both the "Daily Worker" and the "Middlewest Daily Record" but in most of those cases, so as far as I can see, there's nothing there that's of any very great interest as far as I can see. * * * In regard to the supervision of funds—Oh—the "Middlewest Daily Record" I did tell Father Rowan once that I wished that I could see some of that Moscow money. I mean that, I was very sincere. I was so pressed there we went to the wall that I was trying to get some money very desperately. What did happen though, we did get some money for that paper from the National Office. Now, of course, where this money from the National Office comes, I have no particular means of knowing except the general reports given to the National Committee every so often—Mostly once a year which generally are published, by the way. So they don't tell much, you know.

Q. Have you ever seen any indication of funds coming from Russia or Soviet sources? A. The only indication would be is that in addition to Krumbein as Treasurer, Weiner still maintains a certain general supervisory control over finances.

Q. Weiner as well as Krumbein? A. That's right. Weiner acts something like Chairman of the Finance Committee. Now you know, he formerly was Treasurer until he got into technical difficulties and if anything would happen it would happen along that line. You see, there's no doubt that he's trusted financially as well as Krumbein. I mean Krumbein is treasurer and acts on the job and all that, but certainly Weiner has to be in on all big decisions. If you are going to make a big move for money from the National Office or anything like that, Weiner has to be consulted. Now, he doesn't sit in regularly, for example, on the

financial committee of the paper or anything like that. * * * [C.P. Ex. 100; R. 2361-2362]

* * * * *

Q. The Party, too, furnishes you money? A. Oh, I was going to say--they raise the big money. That's where the only possibility would be, see. That's where I could never tell. * * * [C.P. Ex. 100; R. 2362]

* * * * *

* * * I should say that if there is any money that comes from abroad—I don't know whether it is necessary, to tell you the truth, at least not for the publications, they get along pretty well. [C.P. Ex. 100; R. 2363]

* * * * *

* * * Now the only thing that I think is indicative is Weiner's position because I can't see any reason, never did, for Weiner's being a sort of a super, ahhh—that's just surmise, you understand. You must be very careful on that. But I can't see why he's a super financial person. See, unless there's something. [C.P. Ex. 100; R. 2364]

* * * * *

Q. Are there, to your knowledge, any foreign or Soviet funds available in this country to a particular known Communist or otherwise which can be used for the purpose of assisting the Party? A. No. None that I know of—very definitely. [C.P. Ex. 101; R. 2364]

On May 22, 1946 (R. 2343), as reflected in an F.B.I. office memorandum prepared by an agent and dated June 7, 1946, Budenz reported the Childs-Weiner conversation to the F.B.I. (C.P. Ex. 102; R. 2366):

> On the question of Soviet funds, Budenz stated that he could recall only one instance wherein it was indicated that the Soviet Union might be sending money to the United States

for the purpose of furthering the efforts of the Communists in disseminating propaganda. This instance occurred when Budenz was affiliated with the Daily Record, Communist organ in Chicago, Illinois. Budenz stated that his newspaper in Chicago was in extremely poor financial condition; that he went to New York to discuss the matter with Communist officials; that he met with Maurice Childs and William Weiner, on which occasion Childs said to Weiner, "Don't you soon expect a consignment from across the sea?" Weiner immediately changed the subject matter, indicating that he did not want to discuss the question of transmission of Soviet funds in the presence of Budenz, even though Budenz was a trusted Communist. Budenz concluded from the remark that was made that funds were actually being sent to this country at that time by the Soviet Union for propaganda purposes.

On February 26, 1947, as indicated in an F.B.I. intra-Bureau letter dated March 4, 1947, Budenz again reported the Childs-Weiner conversation to the F.B.I. (C.P. Ex. 105; R. 2371–2372):

Confidential Informant ND 402 [Budenz] recalled that back in 1939 or thereabout, when the Informant was connected with the Mid-west Daily Record, the Communist Party newspaper in the Mid-west, Childs was on the National Committee and was the District Organizer in the Mid-west, and was also probably on the Political Committee. The Daily Record was in a bad financial condition at the time and both Childs and Confidential Informant ND 402 were anxious to save it. They had a meeting with William Weiner, who controls the finances of the Party, in a restaurant in New York City. Childs suggested that Weiner try to get some money from Moscow to finance the paper. Weiner stated that he had temporarily lost his contacts in Moscow, hence, he could not do any-

> thing. Confidential Informant ND 402 stated that prior to Childs requesting Weiner to aid the paper, the paper had been given fifty thousand dollars. Confidential Informant ND 402 did not know where this money came from.

On June 9, 1949, Budenz gave the following testimony before a Congressional committee concerning the Communist Party's "treasury," without mentioning the Childs-Weiner conversation (Hearings before the Subcommittee on Immigration and Naturalization of the Senate Committee on the Judiciary, 81st Cong., 1st Sess., on S. 1832, p. 240):[1]

> Mr. BUDENZ. * * * The party has a bigger treasury than you think. It can go out, and finance all the meetings, and it gets the money back, you understand.
>
> The CHAIRMAN. Where does this treasury come from?
>
> Mr. BUDENZ. Of my own knowledge I cannot say, but it certainly is supposed to come in part from Moscow. * * *

On July 13, 1950, as noted in an F.B.I. office memorandum prepared by a Bureau agent and dated August 2, 1950, Budenz again (for the third time) mentioned the Childs-Weiner conversation to the F.B.I. (C.P. Ex. 103; R. 2367):

> In regard to the transmission of funds between Russia, including the satellite countries, and the CP, USA, Budenz advised that he has no direct knowledge of such transmissions. However, he stated that he has always been under the impression that there was such transmissions as the Party needed much more money to carry on its operations than it could possibly raise from dues and its various fund drives.

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[1] For Budenz' cross-examination at the Board proceeding on his testimony before the Subcommittee, see *supra*, pp. 321-322.

In this connection reference is made to Bureau letter dated June 2, 1950 instructing to question Budenz regarding a "secret or conspiratorial fund," mentioned in his book "Men Without Faces", and operated by William Weiner and William Browder. Budenz stated that the terms "conspiratorial fund" and "secret fund" are his own terminology. Budenz advised that he had once been informed by William Browder that large sums of money was maintained in bank accounts for Party operations and that Browder had told him this money, at times, totalled a million dollars. Budenz doesn't know if this money was available to the Party, being held in reserve for Moscow or earmarked for various Communist organizations. He stated that this fund was operated by Browder, William Weiner, Lemuel Harris and Jack Childs. Further, that while he was in the Party, particularly during the time he was editor of the Mid-West Daily Record, in Chicago, he had a conversation with Weiner and Mort Childs, CP officials in Chicago at the time, in regard to funds and Childs asked that funds be advanced him by Weiner from the reserve fund and Weiner advised that he didn't have any at that time as his communication system had temporarily broken down. Budenz took this to mean that Weiner's source of supply was from foreign countries, particularly Russia.

### 2. THE "STAROBIN LETTER"

(*a*) *Budenz' Board testimony.*—Budenz' testimony before the Board on this subject on direct examination, given April 9, 1952, was as follows (R. 1135–1137):

Q. Did the Daily Worker have any representatives or correspondents covering that conference [the 1945 San Francisco conference at

which the United Nations was organized]? A. Yes, sir.

Q. Who were they? A. Frederick Vanderbilt Field and Joseph Starobin.

Q. Were they members of the Communist Party, USA? A. Yes. Mr. Field was a member of the Communist Party and also had written a column for the Daily Worker for some time and was active in Far Eastern affairs for the Communist Party. Joseph Starobin at that time was foreign editor of the Daily Worker.

Q. Did you from time to time receive communications from either of them? A. Yes, sir. We steadily received communications, both letters and also we received of course their news reports and comments.

Q. Do you recall any particular communications from Starobin? A. Yes, I do recall a special delivery communication addressed to the editorial board, care of my attention.

Q. Did you receive it yourself? A. Yes, sir, I received it and opened it.

Q. Did you read it? A. In part, yes.

Q. What were the circumstances? A. I opened this letter from San Francisco, which was a statement that D. Z. Manuilsky [a former general secretary of the Communist International; at the time in question, the representative of "the Ukraine," U.S.S.R., to the San Francisco conference (Tr. 13840)]—

* * * * *

Q. Yes. Give us the physical surroundings. You said you opened the letter. A. I received the letter at the Daily Worker and was reading it when Jack Stachel [the representative of the Communist Party Political Bureau who dealt with the affairs of the *Daily Worker* (R. 1163)] came in.

Mr. ABT: May we have the date, Mr. Chairman?

The WITNESS: It was some time in May 1945. I think it was between the first week in May and May 22. I place that because of certain events. I was reading the letter and I had got partly through when Stachel came in and I said to him, "Look at this important communication we received from Starobin." He glanced at it and said, "Oh, I must take this to the ninth floor immediately." And he took it from me and went upstairs with it, and I never saw it after that, the rest of it.

By Mr. PAISLEY:

Q. Did you try to see it after that? A. No, I didn't make any effort. That is not the way Communists act.

Q. What do you mean by that, Mr. Budenz? A. Things that are referred to the ninth floor, unless the ninth floor refers them back to you you leave it to their discretion.

Q. How much of this letter did you see? A. I saw the beginning of it.

Q. How was it addressed? A. It was addressed to the Editorial Board, my attention as the Managing Editor.

Q. How much of the contents do you now recall?

* * * * *

The WITNESS: In this letter Mr. Starobin stated that D. Z. Manuilsky upon his arrival in San Francisco had expressed indignation at the fact that the American Party had not criticized the American leaders, that is, in the government, more severely, and that The American Party should observe more carefully the guidance and the counsel of the French Communists.

Budenz' testimony before the Board on cross-examination was as follows (R. 1182–1185; Tr. 14094–14125):

Q. You testified that the United Nations conference in San Francisco began some time in February 1945 and ran over until March.

Wasn't that your testimony? A. I think I meant that it was going on in May. I made a slip of the tongue there about March. I know it was in the early part of that year and in the spring.

Q. Let's see exactly what you said, and if there is any modification you want to make, you may make it at that time. At page 11788, line 3:

"Question: Do you recall the conference in San Francisco when the United Nations was being organized?

"Answer: Yes, I do.

"Question: Approximately when was that?

"Answer: That was in the early part of 1945. I think it began some time in February. I wouldn't be absolutely certain. It ran over into March."

Q. That was your testimony, was it not? A. Yes, it was. I had May in mind.

Q. So instead of March you intended to say May? Is that your testimony? A. That is right. Of course even that was an approximation.

Q. So the only change you want to make here is that it ran over into May rather than into March? A. Well, the thing is that that is an approximation. I know that it was in the early part of that year and that it was taking place in May.

Q. So you say it began in the early part of the year, as you say here, in February, is that right? A. That may be too early. The exact month I haven't in mind. It may have been in April. As a matter of fact, it was in the early part of the year. I can recall now about Roosevelt's death. That assists me in the remembrance of the event. It was probably around April.

Q. As a matter of fact, the United Nations conference opened in San Francisco according

to the World Almanac, which I have before me, on April 25, 1945. A. That is probably correct.

Q. Do you accept that date? I will show you the World Almanac. A. Yes. I say Roosevelt's death refreshes my memory on that. It was not yet in session when he died.

Q. So your recollection of the date when the conference opened was incorrect on direct examination? A. Yes. I was giving an approximate time.

Q. You testified that the Starobin letter was received by you in May 1945, is that right? A. I testified it was received in May because it was received after Manuilsky arrived and before the Duclos article was printed or made public.

Q. Let's see exactly how you fixed that time, from your own language, 11789, line 22: In answer to a question by Mr. Paisley. The question in line 17:

"Question: Yes. Give us the physical surroundings. You said you opened the letter.

"Answer: I received the letter at the Daily Worker and was reading it when Jack Stachel came in."

Now line 21:

"Mr. Abt: May we have the date, Mr. Chairman?"

Then did you give this testimony?

"It was some time in May 1945. I think it was between the first week in May and May 22. I place that because of certain events," and so on.

Q. Did you give that testimony? A. That is right.

Q. As to the dates. Can you fix the date any more exactly? A. No, I can not.

Q. You said it was a very short time after Manuilsky arrived. A. That is my impression. It was in that period that I mentioned.

Q. It was your impression. A. It was in that period I mentioned. That is the best I can give.

Q. Between the first week in May and May 22? A. Yes.

Q. So it was shortly after Manuilsky's arrival. That is the way you place it? A. That is the way I remember it, yes.

Q. Manuilsky arrived on May 6, is that right? A. That is what I understand, yes.

Q. That was your testimony? A. Yes.

Q. I beg your pardon. A. Yes, that is my understanding.

Q. So the letter must have been received nearer to May 6 than to May 22. A. I can't be specific, Counsellor. I remember the period and I remember the letter and I remember as much as I have told you of it, but the exact date I don't recall.

Q. Except that you placed it immediately after Manuilsky's arrival. A. Yes. "Immediately" is of course a relative word. It doesn't mean the next day or several days afterwards.

Q. At any rate you fixed the time with respect to the receipt of the letter—you relate it to the arrival of Manuilsky. A. That is right.

Q. So the arrival of Manuilsky is what focuses your attention as to the date of the receipt of the letter? A. Yes, in part, and also I know that it was before the Duclos letter was published.

Q. Was the letter in longhand? A. No, sir. It was typewritten.

Q. Can you give us an idea about how many pages it was? A. It was several pages.

Q. How many? A. I think about three or four. I can't remember the number any more. It was more than one page.

Q. Do you recall whether it was crowded, single spaced or double spaced. A. I don't remember. I think it was single spaced.

Q. On yellow sheets or white sheets? A. White sheets of paper, so far as I remember.

Q. What is that? A. So far as I remember it was on a white sheet of paper.

Q. It is your recollection that it was white sheets. You are not certain? A. No, I am not certain, but I think it was.

Q. Was it hotel stationery? A. No, it was not.

Q. What stationery was it? A. I don't recall, Counsellor.

Q. Was it Daily Worker stationery? A. I think it was, but it may have been plain stationery.

Q. You think that it was but it may have been plain stationery? Can you tell us which it was? A. No, I can not.

Q. You have testified that you read partly through the letter when Stachel took it from you? A. That is correct.

Q. How long had you been reading it when Stachel took it from you? A. Oh, I had just begun to read it a very short time when he came in. We were supposed to have a conference.

Q. Was Stachel in the room when you opened the letter? A. No, he wasn't.

Q. But just as you opened it he came in? A. He came in shortly after I opened it. I was opening a number of letters.

Q. You say that you had read about one-third of the letter when Stachel took it from you? A. I think so.

Q. You have so testified here? A. Yes, about one-third of the letter. I judge that.

Q. So you had not gotten as far down as the signature, had you? A. I looked through. I knew it was from Joe Starobin. It said it on the outside. I also looked through to see who it was from.

Q. And you read one-third of the letter? A. That is right.

Q. You testified here that your recollection of the contents of what you read was as follows: Transcript 11791, line 22:

"In this letter Mr. Starobin stated that D. Z. Manuilsky upon his arrival in San Francisco had expressed indignation at the fact that the American Party had not criticized the American leaders, that is, in the government, more severely, and that the American Party should observe more carefully the guidance and the counsel of the French Communists."

A. That is right.

Q. This is not the first time you have given testimony in public regarding this letter, is it? A. No, sir.

Q. What was the first time that you testified about this letter in public? A. I know I testified at Foley Square.

Q. As a matter of fact, you testified the first time about this letter in a public appearance before the Un-American Activities Committee on November 22, 1946, did you not? A. I don't recall that.

Q. You don't recall whether that was the first time that you testified about this letter or is it that you don't recall testifying about this letter on that occasion? A. I don't recall that I testified about the letter on that occasion.

Q. You also wrote about the letter in your book, This is My Story, did you not? A. I may have.

Q. You may have. Do you recall whether you did or not? A. I don't recall specifically, but I believe I did.

Q. Your book appeared in 1947, did it not? A. That is right.

Q. When in 1947? A. March, March 17.

Q. Had you completed the manuscript before you testified before the Un-American Activities on November 22, 1946? A. I am not sure. I had to have some revisions, editorial and otherwise.

Q. Let's look at the preface of the book and see if that refreshes your recollection. On page XIII. I call your attention to the date of the preface there and see if that refreshes your recollection, Fordham University, October 11, 1946. A. Yes, but there were changes made in there later. I can't say definitely that——

Q. Yes. I am talking about the first manuscript. A. The first manuscript? Oh, yes,, it was ready before.

Q. It was ready before. A. That is right.

Q. So this date, October 11, 1946, fixes the fact that the manuscript had been completed by you prior to your testimony in November 1946. A. That was the original one.

Q. Exactly, the original one. A. Yes.

Q. Mr. Witness, after you wrote this preface and after you had completed the original manuscript did you make any changes with reference to this particular letter? Let me put it this way: Did you make any changes in that portion of the book which dealt with this particular letter, the Manuilsky letter? A. That I do not know. I know I made changes in the book.

Q. You made changes in the book. A. That is right.

Q. But you say that you don't recall whether or not you made any changes in the book that dealt with this particular letter? A. No, I don't recall that.

Q. You don't recall at all. As a matter of fact, you are not sure at this stage whether or not you mentioned that letter in the book, are you? A. I felt that I had, but I wasn't certain.

Q. But you are not certain? A. That is right.

Q. And at this very moment are you certain whether or not you mentioned this incident in your book? A. I am not certain. I remember the Allen-Stachel debate, but I don't remember the letter particularly.

Q. You don't remember whether or not you made reference to this letter in your book? A. That is right.

Q. In preparation for your testimony here did you review your book on the subject of the Manuilsky letter? A. No, I had no time.

Q. In preparation for your testimony here did you review your testimony before the Un-American Activities Committee on this subject of this letter? A. I did not. I didn't review any previous testimony except that which I have told you about, the things that I reviewed with Mr. Paisley. I didn't have the time to do so.

Q. Mr. Witness, at this point do you recall what you said in your book, if anything, about this Manuilsky letter? A. No, I do not. I haven't looked at the book for a considerable period of time.

Q. Maybe I can help your recollection. Did you write in substance that the Starobin letter said that Manuilsky said that the Party should observe more carefully the guidance and the counsel of the French Communists? A. Yes, that is right.

Q. Your answer is yes, you recall so writing? A. That I know that I have written that somewhere.

Q. I am asking you do you know whether you wrote that in your book. A. No, I don't know.

Q. But you testified here that that is what the letter said? A. That is right.

Q. According to your testimony here, you remember what the letter said but you don't recall whether or not you so mentioned it in your book?

* * * * *

The WITNESS: That is correct. There are certain things that are fastened in your memory. You know that from experience, Counsellor. The full contents of the material I read I haven't given to you, but I have given you the substance of it.

By Mr. MARCANTONIO:

Q. But omitting having written it in your book. As a matter of fact, did you write in your book that the Starobin letter made any reference to the French comrades? Yes or no. A. I do not recall.

Q. Then I will see if I can refresh your recollection by reading from your own book. A. Very good.

Q. Did you make this statement in your book? I am reading from page 278 of your book entitled This is My Story:

"To a very inner group there had been a hint, of course, that the Soviet views were about to change. The most sensational by-product of the San Francisco conference was never published: the whispered orders of D. Z. Manuilsky, boss of the Communist International, to the American Party via the French Comrades. We got wind of this at the Daily Worker through a letter from Joseph Starobin, foreign editor of the paper, sent post haste from the conference scene in California. Manuilsky's indirect command did not censor Browder in any way, but it did bluntly order that Stettinius must be fought. However, this was supposedly in order to forward the pledge of Teheran—and so it was conveyed to us. There was not the slightest indication that Manuilsky intended any such drastic operation within the Party as Browder's political execution, though sharpshooting against the United States officials was not exactly the way Browder had talked. Naturally, the Daily Worker leaped to follow the Manuilsky command and increased its slurs and shouts against the Secretary of State."

Did you write that statement? A. I said here via the French Comrades.

Q. That is through the French Comrades. That is what you said, right? A. That was

involved in the matter. That didn't necessarily require that I put in everything that was in the letter there. I mentioned the French Comrades there.

Q. I didn't ask you whether it was necessary or what was necessarily required. I asked you whether or not that is your writing. A. That is correct, Counsellor, but the French Comrades were mentioned there, Manuilsky is mentioned there, Starobin's letter is mentioned there.

Q. Yes, we will come to what is mentioned and what is not mentioned. Let me ask you these preliminary questions: Did you write about that letter anywhere else in your book? A. I don't know.

Q. You don't know. Can you tell us by looking at the index whether or not you wrote about this letter anywhere else? A. Yes, I can tell you from the index.

(Witness examining book.)

The WITNESS: That is, if the index is accurate.

Mr. MARCANTONIO: I don't know whether the index is accurate or not. It is your book. You ought to know.

The WITNESS: I would have to go through it. Manuilsky and Starobin are only mentioned once.

By Mr. MARCANTONIO:

Q. Will you accept our representation that that is the only place in the book that you mentioned that letter? A. Oh, if that is what you wish, Counsellor, I can do so.

Q. As a matter of fact, you may amine the book during the recess at any time and if we are inaccurate about that, you will tell us so.

* * * * *

Q. You say you don't remember your testimony before the UAC, the Un-American Activities Committee, on this subject? A. No, not in detail.

Q. You don't remember whether you testified about it or not, do you? A. I don't know.

Q. I will try to refresh your recollection on that by showing you your testimony. At page 34 did you make this statement:

"As a matter of fact, right on the eve of the Browder business Joseph Starobin, the foreign editor of the Daily Worker, wrote a very indiscreet letter to the editorial board of the Daily Worker, from whence it was snatched and immediately travelled to the ninth floor. And in that letter he said toward the end of the San Francisco conference, that the French Comrades, who were used largely to beat the Americans, asserted that there should be more of an attack upon Stettinius by the American Communists. He added that this was 'likewise the opinion of Comrade Manuilsky.' This letter was very quickly taken by Stachel and it travelled to the ninth floor and disappeared. This was an instance before Browder's deposition showed how things were going."

Did you make that statement? A. Yes.

* * * * *

Q. As a matter of fact, the American Communist Party had criticized American Government leaders before May 6, 1945, when you say Manuilsky arrived in this country, hadn't it? A. Yes, sir, they had.

Q. Did the Daily Worker publish any such criticisms? A. Yes, the Daily Worker had.

* * * * *

Q. I show you Exhibit CP-67 for identification, an article by Earl Browder contained in the Daily Worker of May 3, 1945. In that article Mr. Browder states the following:

"The first week of the San Francisco Conference has inescapably raised the ugly question whether the policy of FDR is being abandoned in favor of the policy of Arthur Vandenberg. One thing is certain: America has suf-

fered a severe moral setback. Whether this is the result of fumbling incapacity, or is a fundamental change of the course may still be debated. What is already beyond debate is the fact that the spirit of FDR did not guide the American delegation's role in the first steps of the United Nations conference."

That was an attack, was it not——A. A criticism.

Q. —on the policy of the United States leaders? A. It was a criticism of Vandenberg.

Q. It was a criticism, was it not? A. It was a criticism.

Q. Of the delegation? A. Of the tendency in the United Nations delegation, yes.

Q. Then under the article we find the following, do we not:

"The answer can not be given in empty words and declamations. It can only be given in deeds. The deed of sponsoring fascist Argentina has an inexorable logic which can only be overcome by equally decisive deeds in the opposite direction. Time is of the essence. America stands at the crossroads."

A. That is correct.

Q. So the whole tenor of the article was one of criticism of the American delegation to the United Nations, was it not? A. That is right.

Q. On the same page we have an article by Joseph Starobin, isn't that correct? A. Yes.

Q. The same person who you say sent that letter? A. That is right.

Q. In that article, Mr. Starobin also makes criticism of the policy and conduct of the United States delegation to the United Nations, does he not? A. Yes, sir. It says Mr. Hull had discussed it with them.

* * * * *

Q. Mr. Witness, you testified before the Un-American Activities Committee that the Starobin letter was received toward the end of the San Francisco conference, is that correct? A.

That was based on my memory. I may have been incorrect about the estimate.

Q. What is that? A. I say it was during that period that I mentioned.

Q. Your testimony before the Un-American Activities Committee—I will read it again—reads as follows:

"And in that letter he"—meaning Starobin—"said toward the end of the San Francisco conference—."

Q. So in that testimony you fixed the receipt of the letter or the sending of it, as toward the end of the San Francisco conference. A. That was not necessarily accurate. As I said, that was an oral statement made on a great number of subjects, with very quick preparation. I could have been mistaken in that. I don't say that I was, but I could have been mistaken.

Q. You say now that it was not necessarily accurate? A. No, it isn't necessarily accurate, due to the nature of the way in which the statement was prepared and presented, that is, so far as exact dates are concerned or exact events. It was in this period.

Q. The San Francisco conference ended when? A. I do not recall that.

Q. Approximately? A. I do not recall.

Q. Again, I call your attention to the World Almanac, which gives the date of the conference from April 25 to June 26, 1945. Does that refresh your recollection as to the ending of the conference? A. I accept this as correct.

Q. You accept it as correct.

When you testified before the Un-American Activities Committee, that was just about 18 months after this incident took place. A. Yes. I had no material available to consult. I made an oral presentation which, as I say, was prepared very hurridly, and to my surprise became a presentation rather than a series of questions.

Q. If, as you testified here might have been the case, the Starobin letter was received immediately sometime after May 6, that would have been toward the beginning of the conference rather than toward the end? A. Yes, that is correct.

Q. You testified here that the Duclos article appeared in the World Telegram around May 20 or May 22? A. Along in there. That is the way I remember it.

Q. That is the way you remember it? You remember that? A. Well, I do, because of the time that we had to put it in the Daily Worker. I think we put it in the Daily Worker, that is, so far as I can recall, about May 24, but I may be a little incorrect about the exact date.

Q. So your testimony before the Un-American Activities Committee that the Starobin letter was received toward the end of the San Francisco conference, which we now agree ended on June 26, would place your receipt of the Starobin letter after the World Telegram story? A. That was incorrect. That was inaccurate.

Q. So now you say definitely that your testimony before the Un-American Activities Committee was inaccurate on that score? A. In that respect, yes, that is correct.

Q. Is there anything else with reference to that testimony which you gave before the Un-American Activities Committee on this subject that you would now say is incorrect? A. I didn't say on the subject. I merely mentioned about the dates, the periods.

Q. So I am asking you, is there anything else on that subject besides the date on which you gave testimony to the Un-American Activities Committee which you would say was inaccurate? A. No, I wouldn't say it was inaccurate.

Q. What would you say? A. I would say it was approximately correct, that is, there are different phrasings of the same statement.

Q. Approximately correct? A. Yes.

Q. So the only thing you now say is definitely inaccurate is the matter of the dates?

* * * * *

The WITNESS: May I see the statement, counselor?

Mr. MARCANTONIO: I am showing the witness page 34 of his testimony before the Un-American Activities Committee in November, 1946.

The WITNESS: It is not substantially inaccurate. The phrasing may be added to, because the French comrades were mentioned in that way.

By Mr. MARCANTONIO:

Q. I am not talking about the French comrades. We have gone over that. I am asking you about the date. A. Oh, about the date.

Q. Yes. A. Oh, the date. The date was not at the end of the San Francisco conference. I was in error there. I was considering the period, and the point of the matter is, as I say, this was an oral presentation, and I knew it was in connection with the San Francisco conference, that is all.

Q. You knew it was in connection with the San Francisco conference, but you said in this testimony here, toward the end of the San Francisco conference. A. That is right.

Q. So when you said the end, did you mean toward the beginning, after the beginning, toward the middle, or toward the end. A. I was inaccurate there.

Q. You were inaccurate? A. Yes. I knew it was in connection with the San Francisco conference.

Q. But inaccurate as to whether it was toward the beginning or toward the end. A. That is right. I made a mis-estimate of the time. I had in mind that the conference was concluding in May.

Q. It is now seven years after that incident, and when you testified before the Un-American Activities Committee it was only 18 months after that incident. Prior to your appearance before the Un-American Activities Committee, did you tell the FBI about the Starobin letter? A. That, I wouldn't recall.

Q. You don't recall that. You spent 100 hours with the FBI, or more, you said, before you went there? A. Yes, but the FBI asked me a very great number of questions, and I answered their questions.

Q. But the Manuilsky business and the Starobin letter——A. I may have told them, counselor. I say I do not recall. The thing is that——

Q. May I complete my question, please? A. Yes.

Q. The Starobin letter and the Manuilsky incident were supposed to be quite important in this setup that you got up against the Communist Party, was it not? You now say you don't recall whether you gave it to the FBI? A. I don't recall the time. The FBI asked me a great number of questions. Undoubtedly if it were in my book, I must have given it to the FBI. The point of the matter is that the FBI particularly at that period, and as a matter of fact this has been the general practice, asked me questions. I do not rush out and volunteer a lot of information, as a rule.

Q. But didn't you regard it as an important incident? A. Oh, sure it was important.

Q. As a matter of fact, you described it in your book, "This is My Story," as--and I quote your language—"the most sensational by-product of the San Francisco conference." Did you not so describe it? A. That, I think, was correct.

Q. Being sensational, you say you don't remember whether you gave it to the FBI or not

prior to your appearance before the Un-American Activities Committee?

* * * * *

Q. Did you give it to them after your appearance before the Un-American Activities Committee? When I say "them," I mean the FBI. A. I am satisfied I gave it to the FBI. I couldn't say definitely, but the FBI question me about everything I write and say, and also about many other things. They question me, and I answer their questions.

Q. Were your answers reduced to writing? A. As a matter of fact, I do know now, since you mention it, that I did give this to the FBI.

Q. In writing? A. No, not in writing.

Q. Was it taken down by a stenographer. A. No, not by a stenographer. They never do that except in rare cases.

Q. Was a report written up and then shown to you afterwards? A. No, that never happens.

Q. So all you did was simply have an oral conversation about this incident? A. Yes, that is all.

Q. What did you say? A. That is all.

Q. Was it recorded? A. I judge so. It was taken down.

Q. It was taken down? A. Yes. I mean, it wasn't by a stenographer, but by an FBI agent.

* * * * *

Q. Was it taken down in shorthand or longhand, or what? A. Longhand.

Q. When? A. That I don't know. The reason I recall it, counselor, if I may say so, is because in connection with my book, everything that was in my book was gone over by the FBI, either before or after its publication.

Q. Let's get that straight now. Everything that was in your book was gone over with the FBI either before or after its publication? A. When I say "gone over," I mean the information was given to them.

Q. Is that right, given to the FBI? A. Right.

Q. Was your report to the FBI about the Starobin letter the same as your testimony before the Un-American Activities Committee? A. I cannot recall now, counselor. I have given report after report to the FBI. I have answered questions they have asked me, and there have been many, many questions.

Q. Can you tell us whether or not the date that you gave them as to the receipt of the letter with respect to the beginning or the end of the conference, was the same as you gave to the Un-American Activities Committee? A. No, I can not.

Q. Or did it follow your description of the incident in "This is My Story"? A. I think it probably followed the description of the incident in "This is My Story," although there may have been more factors to it than that. I know, as I say, that the various items covered in the book were gone over with the FBI either before or after the book was published.

Q. Let me ask you this question specifically, if you remember: Did you tell the FBI that the Starobin letter was received toward the end of the San Francisco conference? A. I do not recall that. I do not recall their questioning me about the details of the matter. That is, I can not recall the details as presented to them.

Q. Do you recall whether or not you told the FBI that Starobin wrote that it was the French Comrades who said there should be more of an attack by the American party on Stettinius? A. I told them, yes, that, and that that was what Manuilsky said, also.

Q. You remember telling them just that? A. I don't remember specifically, but I know I gave them the substance of this material that we have had before us, that is——

Q. Do you remember specifically whether or not you told them that Starobin wrote that it was the French comrades who said that there

should be more of an attack by the American party on Stettinius? Did you specifically give that report to the FBI? A. I gave the report that this flowed from Manuilsky. I don't know the exact phraseology in which I made it. I also referred to the French comrades.

Q. But you don't know whether you specifically made this statement? A. Oh, I couldn't remember that today, no.

(*b*) *Prior statements.*—In the initial series of interviews with the F.B.I. in December 1945, Budenz was questioned concerning the circumstances under which the short-lived "collaborationist policy" of the Communist Party, under Earl Browder, ended and whether the "instructions relative to this change of policy" may have come from Manuilsky. Budenz mentioned in this connection the "dispatches" which the Party received from Starobin during the period of the San Francisco conference, but made no mention (so far as the recordings which were made of these interviews, without Budenz' knowledge, reflect) of the Starobin letter. His pertinent statements were as follows (C.P. Exs. 99A, 99B; R. 2359–2360):

Q. Now this collaborationist policy (few unintelligible words) this tactic continued on through the November 1944 election, continued on through the rest of the winter and spring of 1945. and apparently it continued up to the time when the San Francisco conference was convened. In fact up until about the second week of the conference when we voted to allow Argentin to enter and at the same time we excluded the Lublin Poles. Is that when the policy ended? * * * A. Well, whether that was the time or not, it was in San Francisco that a great deal of the—ah—I mean when, when it was clear from the—you see Fields and Staro-

bin were in San Francisco, and it was clear from their dispatches—from their private communications sent from Starobin to us, which were very lengthy and disturbed, that we were already attacking the United States and that was pretty early, I should say. I don't know whether it was when Argentina came up. It may have been advance information as to the discussions about it, you see, but at any rate I remember these long reports that came by air-mail special delivery and some were even in wire form, various of these reports, but most of them were by air mail special delivery.

Q. Now, Starobin isn't a big enough man, we certainly feel, to establish that change in policy? A. Oh no, no, no. In fact he isn't even well thought of as a foreign editor today. He's considered to have too many personal slants, you know. * * *

Q. Do you think then that the instructions relative to this change of policy that Starobin and Fields must have received came from the Russian delegation? Oh, you said maybe Manuilsky, the Ukrainian delegate? A. Sure, sure, I mean—after all, they got the atmosphere there. In fact I mentioned Manuilsky very much, because definitely he is a figure in the CI.

Q. He certainly is. A. He used to lay down the law like a general, you know, to his troops. He was there as the Ukrainian President or something.

On May 22, 1946 (R. 2343), as reflected in the F.B.I. office memorandum prepared by an agent and dated June 7, 1946, Budenz reported the Starobin letter to the F.B.I. (C.P. Ex. 102; R. 2365–2366):

When I inquired of Budenz as to the media utilized by the Soviets in getting messages to this country concerning any alteration in the plan, line, or in general international Communist policies, he, in addition to referring to the

sources mentioned above,[2] described the following incident which will serve to throw some light on this question.

Budenz recalled that, within a few days after the United Nations Conference on International Organization was convened at San Francisco, the Communist Party in this country reversed its policy completely with regard to the question of supporting the United States. Budenz advised that this reversal in policy, as evidenced so completely in the Daily Worker, was predicated upon receipt of a lengthy letter which was addressed to Budenz at Party Headquarters in New York City by Joseph Starobin, who was then representing the Daily Worker at UNCIO In San Francisco. In this letter, which was considered so highly confidential that Budenz was not permitted to retain it in his office overnight, Starobin advised that "the French comrades have the line and the support of the Soviet Union—and the French comrades blasted Stettinius and the United States Delegation, and therefore Starobin directed that the Party in this country should immediately blast Stettinius and the United States Delegation." Budenz stated that in this letter Starobin inferred that he and/or his associates at the Conference had conferred with Manuilski regarding this question, and that the changed policy was predicated upon Manuilski's instructions as well as on advice received from French Communists at UNCIO.

On November 22, 1946, Budenz referred to the Starobin letter while testifying before the House Committee on Un-American Activities (Hearings before the Committee on Un-American Activities, House of

[2] The sources referred to were the newspapers *New Times*, *Pravda*, and *Izvestia*, the Bulletin of the Soviet Embassy, Stalin's speeches, "Statements by Dimitrov," and "Statements by Manuilski" (C.P. Ex. 102; R. 2365).

Representatives, 79th Cong., 2d Sess., on H. Res. 5, p. 34:) [3]

> * * * As a matter of fact, right on the eve of the Browder business, Joseph Starobin, the foreign editor of the Daily Worker wrote a very indiscreet letter to the editorial board of the Daily Worker, from whence it was snatched up and immediately traveled to the ninth floor. And in that letter he said toward the end of the San Francisco Conference, that the French comrades, who were used largely to beat the Americans, asserted that there should be more of an attack upon Stettinius by the American Communists. He added that this was "likewise the opinion of Comrade Manuelsky [*sic*]." This letter was very quickly taken by Stachel and it traveled to the ninth floor and disappeared. This was an instance, before Browder's deposition showed how things were going.

In March 1947, Budenz published a book, *This Is My Story,* in which he again mentioned the Starobin letter: [4]

> To a very inner group there had been a hint, of course, that the Soviet views were about to change. The most sensational by-product of the San Francisco conference was never published: the whispered orders of D. Z. Manuilsky, boss of the Communist International, to the American Party via the French Comrades.

---

[3] The cross-examination at the Board proceeding concerning this testimony focused on the *time of receipt of* the letter. When it was called to Budenz' attention that the San Francisco Conference began on April 25, 1945, and ended on June 26, 1945, Budenz admitted that the time of receipt of the letter given by him in his Un-American Activities Committee testimony ("toward the end of the San Francisco Conference") was mistaken, since the letter was in fact received nearer the beginning of the conference than the end (see *supra*, pp. 340–344).

[4] The manuscript for the book had been completed in or about October 1946 (Tr. 14102). For Budenz' cross-examination on this subject at the Board hearing, see *supra*, pp. 33[illegible]–338.

> We got wind of this at the Daily Worker through a letter from Joseph Starobin, foreign editor of the paper, sent post haste from the conference scene in California. Manuilsky's indirect command did not censor [*sic*] Browder in any way, but it did bluntly order that Stettinius must be fought. However, this was supposedly in order to forward the pledge of Teheran—and so it was conveyed to us. There was not the slightest indication that Manuilsky intended any such drastic operation within the Party as Browder's political execution, though sharpshooting against the United States officials was not exactly the way Browder had talked. Naturally, the Daily Worker leaped to follow the Manuilsky command and increase its slurs and shouts against the Secretary of State.

On March 24, 1949, Budenz again referred to the subject letter in testifying as a government witness in *Dennis* v. *United States,* 341 U.S. 494. His pertinent testimony was as follows (Supreme Court Record, No. 336, Oct. Term, 1950, pp. 3511–3512, 3514–3515):

> Q. While Mr. Starobin and Mr. Fields were in San Francisco did you receive any communications from either of them? A. Yes, sir. I received several communications but one specifically from Mr. Starobin.
>
> Q. And the one specific one from Mr. Starobin, how was that addressed? A. That was addressed to the Editorial Board of the Daily Worker, my attention.
>
> Q. When you received that letter did you do anything about reading it? A. I began to read it, yes, sir.
>
> Q. And who was present when you began to read it? A. Jack Stachel.
>
> * * * * *
>
> Q. Can you recall when it was that you received it? A. It was—it was in between the

time that D. Z. Manuilsky of the Ukraine Delegation arrived in San Francisco——

* * * * *

Q. Well—— A. It was in May of that year.

Q. Do you remember the date? A. Not the specific date. It lay between the time that D. Z. Manuilsky——

* * * * *

A. (Continuing) It lay between the arrival of D. Z. Manuilsky of the Ukraine Delegation in San Francisco and the publication of the Jacques Duclos articles attacking Earl Browder.

* * * * *

Q. I think you said that you read part of the letter and the defendant Stachel was there? A. That is correct. I was reading the letter when he entered the room.

Q. And what happened after he entered the room? A. I had read a portion of the letter and showed him that portion which I had read and he snatched the letter up and said he had to take it upstairs to the 9th floor.

Q. Where were you when you were reading this letter? A. In the offices of the Daily Worker, the managing editor's office.

Q. After Mr. Stachel took the letter from you to the 9th floor did you ever see it again? A. No, sir, I did not.

Q. Will you tell the Judge and the jury what your best recollection of what was in the letter is?

* * * * *

A. The letter up to the point where I had read it stated that Comrade Manuilsky was indignant at the American Party for not having criticized American officials more severely and particularly the Secretary of State and that French comrades had been given the commission to instruct the American comrades as to how to act in these matters. That is not the exact verbiage

of this letter but that is a summary of the letter up to the point where I had read it.

Q. You said that the French comrades had been instructed to tell the American comrades?

* * * * * * *

A. That the French comrades had been instructed to advise the American comrades of these matters.[5]

---

[5] Although Budenz told the examining attorney in the course of his cross-examination in the original proceeding before the Board in this case that he had "testified [about the Starobin letter] at Foley Square [*i.e.*, at the *Dennis* trial]" (Tr. 14101), the attorney did not cross-examine him concerning his *Dennis* testimony.

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Supreme Court, U.S.
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OCT 3 1960
JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1960

**No. 12**

COMMUNIST PARTY OF THE UNITED STATES,
*Petitioner,*

*vs.*

SUBVERSIVE ACTIVITIES CONTROL BOARD,
*Respondent.*

## SUPPLEMENTARY APPENDIX TO BRIEF FOR *AMICI CURIAE*

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Respondent.

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# Supreme Court of the United States

**October Term, 1960**

**No. 12**

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,

*Petitioner,*

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD.

**On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## REPLY BRIEF FOR PETITIONER


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COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,
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SUBVERSIVE ACTIVITIES CONTROL BOARD.

---

**On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## REPLY BRIEF FOR PETITIONER

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### I. The Registration Provisions and the First Amendment

A. Respondent defends the Act as a reasonable means of dealing with an evil which "is one of the gravest that could befall the nation" (Br. 93). The evil is described (Br. 94) as "the threatened destruction, through force, violence and deceit, of our constitutional form of government, the loss of our national independence and of our cherished liberties, and the passing of the nation under the domination of a ruthless foreign dictatorship."

Our principal brief (pp. 28-33) showed that the Act cannot be justified on this ground because sections 3(3) and 13(e) authorize the issuance of a registration order against, and the outlawry of, an organization which does not practice or incite to force, violence or other illegal means, but seeks to achieve its socialist objective peaceably. As we further showed (*ibid.*), the order against petitioner was issued and

affirmed without evidence or findings, of any such conduct by petitioner.

Respondent replies to our showing with self-contradictory arguments. When it defends the constitutionality of the Act, it insists (Br. 104) that section 3(3) authorizes the issuance of registration orders only against organizations "whose *present activity* is for the purpose of advancing the objectives of the World Communist movement, including * * * the overthrow of the Government of the United States by illegal means" (emphasis in original). But when respondent defends the order of the Board, it argues (Br. 261), "Section 3(3) requires proof, however, only of the organizations' objectives, not as to its particular methods." Accordingly, it urges (*ibid.*) that "the objectives requirement is satisfied by proof that an organization operates in order to establish a Communist totalitarian dictatorship" without proof that the organization practices or incites force, violence or other unlawful means for the attainment of its goal.

Respondent cannot have it both ways. If the Act authorizes the issuance of a registration order without proof that the accused organization uses or incites to illegal means, it unquestionably violates the First Amendment and due process. If the Act requires such proof, the order of the Board must be set aside because the Board did not find, and on the evidence could not have found, that this requirement was satisfied.[1]

B. In defending the Act, the respondent, as we have seen, includes in the evil to which the Act is addressed, "the

[1] Respondent states (Br. 262) that "even if proof of force and violence is necessary, it is amply shown in the record before the Board," citing its discussion of the "allegiance" criterion, Br. 248-53. As this discussion shows, the "proof" consisted entirely of excerpts from the literature of Marxism-Leninism and the conclusory opinion testimony of informer witnesses. This evidence does not by any stretch establish incitement to violent overthrow, and the Board found no such incitement. See Pet. Br. 32.

passing of the nation under the domination of a ruthless foreign dictatorship" (Br. 94). But in defending the Board's order, the respondent contends (Br. 262) that the Act does not require proof that an accused organization seeks to establish in this country a government subservient to a foreign power.[2]

Hence, by the Government's own argument it again appears that the Act's restraints on assembly and expression are not predicated on the existence of the evil it is supposed to remedy.

C. In defending the Act, respondent emphasizes the gravity of the evil by stating that it involves a "group controlled or dominated by a foreign country or foreign organization" (Br. 94). And respondent quotes the observation of the court below that "antipathy * * * to interference on the part of a foreign government, is a basic policy in this nation" (Br. 94-95).

But in defending the Board's order, respondent construes the foreign control component of section 3(3) to mean nothing more than voluntary agreement with Soviet policies (Br. 253-56). Furthermore, respondent admits (Br. 235, ftn. 84) that the Board made no finding of Soviet directives to petitioner after 1940,[3] and it cannot contradict our showing (Pet. Br. 99-100) that there is no evidence of any significant Soviet contacts with petitioner after that date.

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[2] Respondent states (Br. 263) that "even if Section 2(6) is construed as requiring proof of this additional objective, the evidence provides such proof." The "proof" consists of a far-fetched inference from counsel's interpretation of Marxist texts. Jugoslavia and China demonstrate that the inference has no foundation in reality. Moreover, the Board itself drew no such inference, and its findings negate the element of subservience (see Pt. Br. 104).

[3] In the light of this admission, we are unable to understand why respondent endorses the statement of the court below that the foreign control component is satisfied, "If the Soviet Union directs a line of policy and an organization voluntarily follows the direction" (Br. 256). If this be the test, it was not satisfied, there being no finding (or evidence) of a Soviet direction since 1940 at the latest.

Under respondent's construction of the Act, therefore, it appears that the Act requires no proof of "interference on the part of a foreign government" in the affairs of this country, or of foreign control of an accused organization in any realistic sense.[4] In this respect too, therefore, respondent's own argument shows that the restraints of the Act cannot be justified as being addressed to the claimed evil. Instead, the restraints are imposed for nothing more than an ideological agreement which is fully protected by the First Amendment.

D. Respondent asserts that the Act imposes only an indirect and incidental restraint on First Amendment rights. Accordingly, it is said (Br. 104-07) that the Act need not conform to the clear and present danger doctrine or to the principles of *DeJonge* v. *Oregon*, 299 U. S. 353; *Herndon* v. *Lowry*, 301 U. S. 242; *Yates* v. *United States*, 354 U. S. 298; and *Thomas* v. *Collins*, 323 U. S. 516. (See Pet. Br. 28-44.)

The argument rests on two premises. The first is that the Act is a simple disclosure statute having far less serious consequences on speech and association than criminal statutes (Br. 100-02, 105). This premise is obviously unreal to the point of being fanciful, for reasons which are stated in our principal brief (pp. 26-28)[5] and which respondent makes no attempt to rebut.[6]

The second premise is that "speech is not the basis for requiring the organization to register" (Br. 105). This premise is contradicted by section 13(e)(2), making "non-

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[4] Any more exacting interpretation of foreign control would, of course, require that the Board's order be set aside for the lack of findings and evidence on the subject (see Pet. Br. 98-102).

[5] See also the amicus briefs: National Lawyers Guild, pp. 4-13; individual amici, pp. 8-12; American Civil Liberties Union, pp. 6-7.

[6] For the same reasons, respondent's citation of cases dealing with non-invidious, non-discriminatory, genuine disclosure statutes (Br. 88-91, 174, 179-83) is beside the point as to both the registration and labelling requirements.

deviation" one of the standards of Board decision; by the respondent's insistence that the foreign control component of section 3(3) is satisfied by agreement with Soviet views; and by the fact that both the Modified Report and respondent's brief rely almost exclusively on Marxist-Leninist literature for the "proof" that petitioner is a Communist-action organization.

E. Respondent seeks to fortify its view that the Act is a simple disclosure statute by urging the Court to view the registration requirement in isolation from the sanctions which the Act imposes on organizations ordered to register and on their members (Br. 85-86). The proposal is clearly unsound.

The Act provides that once a registration order becomes final, two sets of consequences follow automatically. First, the organization and its officers are under a duty, enforceable by criminal penalties, to file a registration statement. Second, the organization and its members incur onerous disabilities and liabilities. The latter penalties are not imposed for failure to register, but are operative *whether the organization registers or not.* No further action is required to put them into effect. Like the registration requirement, they are direct and immediate consequences of the order. It was an immaterial matter of draftsmanship that Congress attached these consequences to the order by force of the Act, instead of directing the Board to write them into the order, as in the case of the registration requirement.

It is manifestly impossible to assess the impact of the order without considering all its consequences, including the sanctions which it automatically triggers. Furthermore, once the sanctions become operative, as they will when the registration order becomes final, they will have an immediate, devastating effect upon the organization even before any attempt is made to enforce them. Their *in terrorem* presence will force members of the organiza-

tion to resign, compel financial supporters to withhold contributions, deprive the organization of an audience for its views, and outlaw it.

## II. The Sanctions and the First and Fifth Amendments

### A. Labelling

Respondent asserts that the Act's invidious labelling requirement "imposes no censorship" because the content of the matter mailed or broadcast "is immaterial" (Br. 173). But obviously a restraint of expression regardless of content is a more flagrant abridgment of speech and press than a restraint based on content. It is only on the basis of content (as where there is obscenity, fraud, or incitement to insurrection) that Congress has any power to abridge speech and press (Pet. Br. 38-39).[7]

Petitioner also contends (Br. 173) that the labelling provisions do not impose censorship because the ensuing restraints "are entirely social, not legal," being the product of public reaction. This argument was rejected by *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449, 463.

Respondent argues that the invidious label may be required in order to inform the public that an organization advocating legitimate reforms actually has an ulterior

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[7] Cf. President Eisenhower's advice to the Dartmouth graduates of 1953: "Don't join the book burners. * * * Don't be afraid to go in your library and read every book as long as any document does not offend our own ideas of decency. That should be the only censorship. How will we defeat communism unless we know what it is? What it teaches—why does it have such an appeal for men? * * * Now we have got to fight it with something better. Not try to conceal the thinking of our own people. They are part of America and even if they think ideas that are contrary to ours they have a right to have them, a right to record them and a right to have them in places where they are accessible to others. It is unquestioned or it is not America." *N. Y. Times*, June 15, 1953.

motive for championing such good causes (Br. 175-179). The mere statement of the proposition is enough to refute it. It is a novel theory that bad motive alone justifies an exception to the First Amendment. If Congress may restrain speech which threatens no substantive evil simply because of the speaker's bad intentions, then the First Amendment is meaningless. See also amicus brief of American Civil Liberties Union, p. 7.

Respondent's argument that Congress may protect the mails and broadcast channels against fraudulent communications (Br. 181-82) is irrelevant. Since the Act's labelling requirements apply regardless of content, they restrain non-fraudulent matter protected by the First Amendment. Similarly, the fact that Congress can compel a non-invidious identification of broadcast sponsors (Resp. Br. 183-84) does not support a power to restrain speech by requiring an invidious identification.

**B. The Other Sanctions**

1. Respondent justifies the Act's sanctions as reasonable exercises of Congressional power in areas within the federal jurisdiction. If this were true, the sanctions would meet the test of due process, but not necessarily the more stringent clear and present danger test of the First Amendment. The member sanctions must be justified under First Amendment standards because they are imposed solely for the exercise of, and heavily deter, the right of association.

The fact is, however, that the Act's sanctions do not even satisfy the reasonableness requirement of due process. Respondent's argument to the contrary comes down to the proposition that if there is a danger (or if Congress has declared one), Congress may hurl an H-Bomb in its general direction, on the "reasonable" theory that no matter what else is slaughtered the peril will be eliminated.

Thus respondent argues that since Congress can forbid federal employees from engaging in partisan politics, it can

forbid them and employees of private "defense facilities" from making contributions to petitioner for legitimate uses which have nothing to do with partisan politics (Br. 186-87). Since Congress can guard defense facilities against sabotage and espionage, it can exclude from employment at such facilities members of petitioner even if they have no desire, tendency, or opportunity to engage in sabotage and espionage (Br. 190-94). Since *Douds* held (we think incorrectly) that Congress can, as a means of preventing political strikes affecting interstate commerce, put pressure on unions to remove Communists from leadership positions, Congress can prohibit Communists from holding non-leadership union employment having nothing to do with strike policy or interstate commerce (Br. 194-98). Since Congress can prevent persons from travelling abroad to commit espionage, it can prevent Communists from travelling abroad for such innocuous purposes as collecting a legacy, studying ancient ruins, or comforting a dying parent (Br. 198-201). Since Congress can revoke naturalizations obtained by fraud, it can revoke naturalizations by inventing an irrational presumption of fraud (Br. 203-04). None of this is good law. See *Butler* v. *Michigan*, 352 U. S. 380, 383.

2. Respondent asserts that the member sanctions do not affect innocent persons because they apply only to those who remain members with knowledge or notice that the organization has been condemned after an administrative hearing and judicial review. It scoffs at the notion "that it is not permissible to impose sanctions on a member if he does not agree * * * with the formal finding made by the Board and upheld by the courts" (Br. 205-06).

Respondent is wrong. A person cannot constitutionally be branded and discriminated against as a loyalty and security risk merely because he is so stubborn (as well as courageous and possibly right) as to disagree with an estimate of the Board and the courts. Otherwise he is punished for nothing more than non-conformity.

This is established by *Adler* v. *Board of Education*, 342 U. S. 485, and *Wieman* v. *Updegraff*, 344 U. S. 183. The statute involved in *Adler*, like the Act, provided for a hearing to the organization and judicial review. Nevertheless, in upholding the statute, the Court stated (at 494-95, emphasis supplied):

> "Membership in a listed organization found to be within the statute *and known by the member to be within the statute* is a legislative finding that the member by his membership supports the thing the organization stands for, namely, the overthrow of government by unlawful means. We cannot say that such a finding is contrary to fact or that 'generality of experience' points to a different conclusion. Disqualification follows therefore as a reasonable presumption from such membership and support. Nor is there here a problem of procedural due process. *The presumption is not conclusive but arises only in a hearing where the person against whom it may arise has full opportunity to rebut it.*"

According to respondent, the only element in the quoted text that is necessary to satisfy due process is that the organization be "found to be within the statute." Its argument eliminates the other two elements which the Court recognized as indispensable—knowledge by the member that the organization is (not was found to be) of the objectionable kind, and an opportunity to the member to rebut the presumption of disqualification arising from such knowing membership.

Respondent misinterprets our reliance on *Adler* (Br. 208). We did not cite *Adler* for the proposition that the member must be permitted to relitigate the character of the organization. What we said (Pet. Br. 52), and what *Adler* holds, is that a finding that an organization is disloyal cannot, consistently with due process, conclusively establish the disloyalty of its members. The members must be allowed an opportunity to rebut any presumption of dis-

loyalty arising from membership before sanctions can be imposed upon them. Since the Act provides no such opportunity, it violates due process.[8]

Respondent misreads *Wieman* in representing that it applies only to former members (Br. 206-07). The test oath it struck down related to both present membership and membership within the preceding five years. The decision was squarely based on the oath's failure to allow for the absence of scienter and made no distinction between present and past members *Wieman* itself stated (at 188) that it was decided "in the context of" three decisions (*Adler; Garner* v. *Board of Public Works*, 341 U. S. 716; *Gerende* v. *Board of Supervisors*, 341 U. S. 56) which established scienter as a constitutional requisite. Yet two of these cases (*Adler* and *Gerende*), involved only present membership.

Respondent's theory that organizational membership *ipso facto* makes an individual a security risk is particularly terrifying because it justifies sanctions imposed not only on members of the petitioner and other organizations proscribed under the Act, but also on the many others who artificially and unwittingly acquire "membership" in petitioner by the operation of section 5 of the Communist Control Act.

## III. The Privilege Against Self-Incrimination

Respondent contends (Br. 108-12) that this issue is premature until petitioner's officers personally claim their privilege. According to respondent, the officers and all members of petitioner's governing body (Br. 115, ftn. 36)

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[8] The sanctions are invalid for the additional reason that they are imposed on the members notwithstanding the fact that an organization may be found to be a Communist-action organization without proof that it engages in illegal advocacy or criminal activity (see Pet. Br. 29-32).

should assert their privilege "on the registration form required to be filed with the Attorney General" (Br. 110). This ignores the fact that such an assertion of the privilege is itself an incriminating admission, made, moreover, to the government's chief prosecutor (see Pet. Br. 48).

Respondent's refusal to recognize this fact blinds it to the applicability of *Boyd* v. *United States*, 116 U. S. 616, which decisively refutes all of respondent's arguments. As respondent points out (Br. 110-11), the statute considered in *Boyd* presented a suspected tax evader with the alternative of (1) producing his books to refute the charges against him or (2) suffering the charges to be taken as confessed. As respondent states (Br. 111), "In the context of such a statute, a claim of privilege would have been quite meaningless." It was for this reason, as respondent observes, that the Court voided the statute without reference to the doctrine that the privilege must be asserted if it is to be availed of. For the same reason, the Court did not permit the statute to survive for application to cases in which the privilege might be waived.

The alternative with which the registration order confronts petitioner's officers is even less satisfactory than that in *Boyd*. The officer must choose between making an incriminating admission by signing a registration statement or making the same admission by claiming his privilege not to sign the statement. Here an assertion of the privilege would be worse than "quite meaningless." It would itself be incriminating. Hence, as in *Boyd*, the principle that the privilege must be claimed in order to be relied upon is inapplicable.

Respondent's blind spot also appears in its argument that, "Even assuming that a claim of privilege will be made and must be honored, this would make the order to register at most unenforceable, not void" (Br. 119). This argument proceeds on the same fallacious premise that petitioner's officers must claim the privilege in order to

have it honored. As we have seen, however, there is no place other than this proceeding in which their privilege can be honored. And the only way in which that can be accomplished is by holding the registration order invalid in this proceeding.

The situation here is identical with that presented in *Boyd* where, as respondent states (Br. 111), "The statute was held void as *necessarily* conflicting with the privilege." The Act and the registration order must be held void for the same reason.[9]

## IV. The Predetermination of Facts Essential to the Finding that Petitioner Is a Communist-Action Organization

Respondent acknowledges that the existence and nature of a world Communist movement as described in section 2 are not "subject to litigation in a particular proceeding under the Act" (Br. 131). Simultaneously, it recognizes that the existence of a world Communist movement as described in section 2 is "crucial" to making "the Act operative against petitioner" (Br. 129). It contends, nevertheless, that this legislative predetermination does not violate due process on the ground that the existence and nature of the world Communist movement are legislative, not adjudicative, facts. The former it describes as "general conclusions which support the policy of a particular law." The latter are facts, "which, on proof in adversary litigation, bring a specific person or organization within the purview of the legislation, or otherwise make the general terms of the legislation specifically applicable." (Br. 130.)

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[9] Respondent's arguments (Br. 112-19, 121-25) that the privilege is not available to petitioner's officers because of the rule with regard to association records (*United States* v. *White*, 322 U. S. 694) and because the officers may have waived the privilege, are fully answered in our principal brief, pp. 46-47, 49-50.

The findings in section 2 were, of course, intended to "support the policy of" the "particular law." The difficulty, however, is that Congress did not stop there. Instead, it made liability under the Act dependent on the existence of the same "facts," which are only found legislatively. It did this by incorporating in section 3(3) the findings of section 2 as assumptions of fact which must be accepted by the Board and reviewing courts.

As the analysis in our principal brief shows (pp. 56-59), and as elementary common sense demonstrates, the existence, nature and objectives of a world Communist movement as defined in section 2 are indispensable factual elements to a conclusion that a particular organization (1) is controlled by the government or organization which controls that movement, and (2) operates to advance the objectives of that movement. Accordingly, the presence of these elements is a fact necessary to bring an organization "within the purview of the legislation" and to "make the general terms of the legislation specifically applicable." Respondent's brief makes no attempt to disprove our analysis. It merely offers an *ipse dixit* that the existence and nature of the world Communist movement are not adjudicative facts.

The hypothetical analogy suggested by respondent (Br. 131, ftn. 42) does not help its case. If indeed Congress should enact legislation authorizing an administrative agency to prohibit types of business activity found on the basis of evidence to deepen "the" world-wide economic depression, due process would require that a respondent in a proceeding before the agency be permitted to prove that there was in fact no depression which its activities could deepen. What impresses respondent about this analogy is the inefficiency of a system which would permit countless respondents to relitigate the same basic question. But the point is that Congress does not legislate such gaucheries. When Congress enacts economic legislation to alleviate a depression, it does not make the existence of a depression

the foundation of the administrative findings, even though it may be the reason for the enactment. Instead, it authorizes the administrative agency to make findings as to whether certain practices deemed harmful by Congress are being employed, such as unfair competition, wage cutting, price-cutting, etc.[10]

It is only in the Act that Congress has incorporated legislative findings into the ultimate standard to be applied by the administrative agency. It is only in the Act that elements essential to the determination of liability are facts found by Congress and removed from adjudication.

This legislative predetermination was not impelled by a need to avoid such wasteful relitigation as that contemplated by the Board's hypothetical analogy. For Congress intended that only one organization, the petitioner, should be charged as a Communist-action organization. But Congress knew that it had already enacted legislation prohibiting the seditious and insurrectionary conduct described in section 2 and requiring foreign agents to register. It also knew that the Attorney General had been unable to make out a case against petitioner under these statutes. The problem to which the authors of the Act addressed themselves was how to dispense with the embarrassing necessity of proving their accusations against petitioner. That is why the Act was passed, and that is why the legislative predetermination was made (Pet. Br. 67-71).

For the same reason, the authors of the Act also found it necessary to coerce an administrative determination of the other facts essential to guilt. It did this in section 2 by making findings on the identical subjects which were ostensibly to be determined by the Board (Pet. Br. 60-61). Respondent makes no attempt to defend this aspect of the legislative predetermination.

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[10] The legislation may also, of course, be of temporary duration or subject to termination by a joint resolution or presidential proclamation declaring the end of the emergency.

The demonstration in our principal brief that the Act is an expedient to dispense with proof of guilt is corroborated and further documented by respondent's own description of the background and legislative history of the Act (Br. 50-56, 61-65).[11]

## V. The Necessarily Biased Board

Respondent does not dispute our demonstration (Pet. Br. 74-78) that the Board was under compelling pressure to decide against petitioner in order "to sustain its *raison d'etre*" (Resp. Br. 134), and that the members of the Board had a personal, official and financial stake in the result. Instead, respondent misstates our contention as "charging that the structure and scheme of the Act are such that it would be impossible to staff the Board with members who would not enter upon their duties with the intention of violating their oaths of office" (Br. 134). The issue has nothing to do with violations of oaths of office. What due process requires is that the tribunal be free from pressures and inducements to decide against a litigant. Violation of the oath of office is a standard for impeachment, not for disqualification.[12]

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[11] Respondent's description also supports our contention that the Act is a bill of attainder (Pet. Br. 63-72).

[12] We believe that the discussion in our principal brief (pp. 72-74, 79-95) makes it unnecessary for us to reply to respondent on the remaining constitutional issues.

## VI. The Misconstruction and Misapplication of the Act[13]

### A. Reliance on Evidence of Discontinued Practices

Respondent (Br. 266) accepts as accurate our summary (Pet. Br. 106-08) of the post-Act evidence on which the Board relied. Respondent concedes that the "evidence as to petitioner's post-1950 activities might, perhaps, not independently prove it to be a Communist-action organization," but claims that it "is at least sufficient to show that petitioner's character has not substantially changed" (Br. 268-69).

The only items of post-Act evidence which respondent deems worthy of mention (Br. 266-67), and which, accordingly, must be those which it considers to show a lack of "change", are: (1) the so-called "non-deviation" evidence, which establishes only that the petitioner and the Soviet Union agree on international questions (Pet. Br. 111-17); (2) petitioner's acknowledged adherence to the principles of Marxism-Leninism; and (3) the fact that prior to 1940 some of petitioner's officers had held positions in the Communist International and visited the Soviet Union.

This confirms our demonstration that the Board's order rests on nothing more than petitioner's exercise of First Amendment rights and on practices which, if ever engaged in, were discontinued long prior to the enactment of the Act.

### B. The 13(e) Criteria

1. Respondent seems to concede that the findings of the Board under three of the criteria ("financial aid," "instruction and training," "reporting") do not lend sup-

[13] We do not consider it necessary to add here to our demonstration that the Board and the court below erroneously interpreted and applied the foreign-control and objectives components of section 3(3). See on the subjects Pet. Br. 96-104 and *supra*, pp. 2-4.

port to the Board's order. It seeks to convey the impression that the Board placed little or no reliance on the findings under these criteria, stating that "the Board did not mention its subsidiary findings" on these and the stricken "secrecy" standard "in making its ultimate determination" (Br. 232-33, ftn. 83).

But the fact is that the Board, when making its ultimate determination, did not mention any of its 13(e) findings (R. 2644). Yet it is clear that it relied on all of them as grounds for deciding against petitioner, including the three findings which respondent now disparages. Accordingly, it appears from respondent's brief that the order must be set aside because it is based in part on impermissible grounds.

2. Respondent supports application to petitioner of the "directives and policies" criterion solely on the grounds that petitioner adheres to Marxism-Leninism (Br. 236-40). Respondent states (Br. 240) that "following the principles of Marxism-Leninism * * * is in effect acting pursuant to the directives of the Soviet Union." The Modified Report made no such finding, and there is no evidence to support such a ludicrous interpretation of Marxist literature. On the contrary, as respondent elsewhere concedes (Br. 235, ftn. 84), the Modified Report found no Soviet directives to petitioner after 1940.[14]

3. Respondent justifies the Board's application of the "non-deviation" criterion on the grounds that (a) three of the views involved abrupt reversals of position and (b) four of the views were shown to have been adopted by the Soviet Union before they were adopted by petitioner

[14] Respondent states, citing the Modified Report, that Lautner "testified that Marxism-Leninism requires the complete subservience of all Communist Party organizations, including that in the United States, to the Soviet Union" (Br. 239). This is a complete invention, as can be seen by examining the Lautner testimony which the Board's Annotated Report cites to that effect. See R. 1854, ftn. 1, and R. 973-74. See also Pet. Br. 121.

(Br. 242-45). But these instances cannot justify the Board's reliance on views on 40 other international questions which did not involve abrupt reversals and which were not shown to have been first adopted by the Soviet Union. (See Pet. Br. 111-17.)

4. In our principal brief we described all the evidence on which the Board relied under the "discipline" criterion. The inescapable conclusion from our summary was that the Board misapplied 13(e)(6) by utilizing petitioner's self-adopted internal disciplinary practices to "prove" that petitioner's officers and members were under foreign discipline (Pet. Br. 121-22).

Respondent's brief (pp. 245-48) does not dispute the accuracy of our summary of the evidence on which the Board relied. Nor does it explain how instances of internal discipline can have anything to do with the foreign "discipline"-test of section 13(e)(6).

Moreover, the Board's application of the "discipline" standard contradicts the interpretation advanced by it to refute the charge that the standard irrationally permits an organization to be condemned on the basis of the attitude of an unrepresentative or dissenting minority of its members. Respondent states (Br. 147-48):

> "But the possibility of that result does not negate the propriety of the inquiry, which is into 'the extent to which' the organization's leaders and members are under foreign discipline * * * it is the *degree* * * * which the Board is directed to consider. If the evidence is equivocal or insignificant * * * the record will so show. It cannot merely be assumed that Congress intended the Board to be governed—or that the Board was governed—by trivial evidence or evidence having no real probative force with respect to the ultimate issue."

The Board, however, in applying the "discipline" standard (R. 2528-38) made no finding as to, and did not consider,

the "extent" or "degree" of the foreign discipline. And it clearly was "governed" by trivial evidence which had no probative force with respect to the criterion or to the ultimate issue..

5. Our principal brief (pp. 123-24) showed that the Board's finding on "allegiance" was inconsistent with *Schneiderman* v. *United States*, 320 U. S. 118. Respondent distinguishes *Schneiderman* on the ground that "the relevant literature" in that case "had been published prior to 1927" (Br. 250). But the Modified Report did not distinguish between the earlier and the later literature, nor does respondent indicate what the later literature added to the earlier. Moreover, one of the two "later" works to which respondent refers (Br. 251) is not "later" at all. Stalin's *Foundations of Leninism* was considered in *Schneiderman* (at 150-51) under its earlier title, *The Theory and Practice of Leninism*. Indeed, *Schneiderman* (at 151, ftn. 38) quotes from *Foundations* an excerpt quoted by the original Report (R. 718-19) and cited by the Modified Report (R. 2632).[15]

## VII. The Insufficiency of the Evidence

Respondent urges the Court not to review the evidence (Br. 227-28). It is evident from the opinions below, it says, that the Court of Appeals "made a fair assessment of the record on the issue of the sufficiency of the evidence" (Br. 228). The facts are to the contrary.

Respondent primarily relies on the length of the court's discussion of the evidence in its original opinion (Br. 226). The original opinion, however, was based on a record which was tainted by the testimony of Matusow, Johnson and Crouch, now expunged. Moreover, the present record dif-

[15] For the reasons stated in the text, respondent is also wrong in arguing (Br. 260) that *Schneiderman's* discussion of the "dictatorship of the proletariat" is out-dated.

fers from that examined in the original opinion in other respects. Thus the Board struck the testimony of Budenz on the Starobin and Wiener matters (Pet. Br. 129), and rejected significant testimony of still other witnesses on which it had previously relied (R. 2383, 2549 ftn. 84, 2602 ftn. 109, 2511 ftn. 67). The findings of the Modified Report were likewise changed in important respects from those of the original Report. For example, the original Report found that petitioner currently receives and conforms to directives from the Soviet Union (R. 78-79). Yet, as we have seen, respondent itself now acknowledges (Br. 235 ftn. 84) that the Modified Report makes no finding of Soviet directives to petitioner after 1940.

The respondent's reliance on the second opinion of the Court below is also misplaced. Respondent represents (Br. 226) that this opinion "again considered the evidence before the Board." But the fact is that the court below itself stated in its explanatory memorandum of April 11, 1958, that it did not intend on its second review to affirm the Board's findings (Ops. 123).

This leaves the third and final opinion as the only "assessment" of the present record and findings. There the Court's discussion of the evidence consisted of one short paragraph (Ops. 131), plus one sentence (Ops. 125) asserting that "we have examined the Modified Report [not the evidence] in the light of these averments and think the findings are amply sufficient." The one-paragraph summary shows that the Court below did not fairly assess the record, that it misunderstood the requirements of the Act, and that the Board's order is not supported by the evidence (Pet. Br. 101).

That the court below did not fairly assess the record also appears from its handling of the concept of foreign "control." In its original opinion, the court held the evidence sufficient without giving any interpretation of the term "control." In its second opinion, after petitioner

pointed out that there was no evidence of any means by which the Soviet Union could or did exert compulsion on petitioner, the court explained (we think wrongly) that "control" includes a *voluntary* following of Soviet directions (Ops. 94). On the third review, accordingly, petitioner emphasized that there was no evidence or Board findings of any post-1940 Soviet directions which petitioner could follow, even voluntarily. The answer supplied by the third opinion was that "control" is satisfied by nothing more than adherence to the "cause of Communism" out of "intellectual affiliation" (Ops. 131-32).

Nor should the Court be deterred from considering the sufficiency of the evidence by respondent's ominous references (Br. 221-22) to the size of the administrative record. A study of the hearing record is unnecessary to determine the evidence issue. The opinion below and the Second Modified Report show on their face that the evidence is insufficient (Pet. Br. 126-27). For this reason our evidentiary discussions have almost without exception accepted the Board's evidentiary findings, loaded though they are. Our approach has been to show that these findings do not support the Board's intermediate and ultimate findings.[16]

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[16] Moreover, the hearing record was artificially swollen by the indiscriminate admission of thoroughly remote and irrelevant evidence offered by the Attorney General. This explains why, despite the "14,000 typewritten pages of testimony" (Br. 221), the Modified Report acknowledges that "the really vital part of [the Attorney General's] case is documentary evidence, which to a considerable extent needs relatively little oral illumination" (R. 2409; ftn. 2). The unstricken testimony selected for printing occupies approximately 900 printed pages.

## VIII. The Failure to Remand Upon Striking the Finding on "Secret Practices"

A. Respondent (Br. 276-80) urges the Court to review the evidence on "secret practices" and reverse the holding below that the Board's finding on the subject was not supported by the evidence. It seems clear, however, that as to this finding the court below did fairly assess the record. The court's determination was originally made (Ops. 73-74) on a record which included a mass of evidence on the subject, adverse to petitioner, which was later expunged or discredited. The court affirmed its ruling in its final opinion, correctly stating (Ops. 126), "No new evidence on the point has been added."

Furthermore, respondent's contention that the court below was wrong seems to rest entirely on its interpretation of "the 'Marxist-Leninist Classics' * * * and the official publications of the Comintern" (Br. 277). There is no evidence that petitioner shares or follows this interpretation.

B. Respondent charges (Br. 280) that the court below committed an error of law by holding "that the evidence must show that the practices were *either* intended to further Party objectives *or* were intended to protect its members." Contrary to this assertion, the court expressly stated that "the two purposes may well overlap" and "both purposes could exist together" (Ops. 74). Nevertheless, the court concluded (*ibid.*):

> "In a doubtful situation such as that on this point, we strike the finding as to purpose * * * On this point we conclude simply that a defined purpose is not shown."

C. Respondent attempts to distinguish *N. L. R. B.* v. *Virginia Electric & Power Co.*, 314 U. S. 469, by saying that it was unclear from the record on just what evidence the

administrative findings were based (Br. 283, ftn. 81). The Court, however, there specifically stated (at 479) that it was remanding the proceedings for administrative redetermination because, "it appears that the Board rested heavily on findings with regard to the bulletin and the speeches, the adequacy of which we regard as doubtful." Again the Court said (at 476):

> "But here the Board's conclusion that the Independent was a company-dominated union seems based heavily on findings which are not free from ambiguity and doubt. We believe that the Board, and not this Court, should undertake the task of clarification".[17]

Respondent's reliance on *N. L. R. B.* v. *Newport News Co.*, 308 U. S. 241 (Br. 282), is misplaced. For there the Court stated (at 244), "The Board's subsidiary findings of fact are not the subject of serious controversy," and it found (at 251) that the order of the Board was supported by "the uncontradicted facts."

## IX. The Refusal to Strike Budenz' Testimony

A. Respondent argues that the government was not responsible for the failure to produce the Budenz recordings at a time when he was available for cross-examination because "neither Budenz nor government counsel knew" that the FBI recordings had been made (Br. 293). But (1) the FBI knew of the recordings, and (2) government counsel would have learned of their existence if he had not objected to petitioner's production demand and if the Board had not sustained him.

Respondent also seeks to avoid the government's responsibility on the grounds that the government's position

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[17] Respondent's comments regarding other cases (Br. 283, ftn. 8) indicate nothing more than that the *Chenery* principle, which we urge, has been applied in a variety of factual situations.

had at the time "respectable, and perhaps majority, support in the courts of appeal" (Br. 294). This statement is incorrect.[18] Even if it were true, it would not absolve the government. It would be obviously unfair to prejudice one party because of the other party's mistake, even if the mistake were made in good faith. And where it is uncertain whether prejudice has resulted, fairness requires that the doubt be resolved against the party making the mistake. This is the whole point of the rule that where, in Wigmore's words (Pet. Br. 130), the tendering party has "responsibility of any sort" for the deprivation of cross-examination, all of the witness' testimony must be stricken without the need for showing that the deprivation was a material loss.

B. Respondent argues (Br. 295-98) that the deprivation of cross-examination was not a material loss. It acknowledges, however, that "petitioner could conceivably have shown by cross-examination on the basis of the recordings and notes serious inconsistencies which would affect the credibility of Budenz' other testimony" (Br. 294). The existence of that possibility in itself made the deprivation a material loss, requiring that all of Budenz' testimony be stricken even without regard to the government's responsibility for the deprivation (see Pet. Br. 131).[19]

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[18] Prior to *Jencks* v. *United States*, 353 U. S. 657, the commonly held view was that the prior statements of a witness must be produced to the tribunal and made available to the cross-examiner if *in camera* inspection showed that they were inconsistent with the testimony. See e.g., *United States* v. *Krulewich*, 145 F. 2d 76; *United States* v. *Simonds*, 148 F. 2d 177; *United States* v. *DeNormand*, 149 F. 2d 622; *Boehm* v. *United States*, 123 F. 2d 791; *Crosby* v. *Pacific S. S. Lines*, 133 F. 2d 470; *United States* v. *Schneiderman*, 106 F. Supp. 731; *United States* v. *Lebron*, 222 F. 2d 531. Yet the Attorney General objected to petitioner's motions for *in camera* inspection of the Budenz statements, and the Board sustained him (R. 2187-89, 2217, 2225).

[19] Respondent minimizezs the possibility of discrediting Budenz on the ground that his testimony and statements show "no more than the usual discrepancies" (Br. 295). This assertion flies in the face of the facts (see Pet. Br. 132-39).

Respondent also contends (Br. 298) that "there is ample evidence that Budenz' other testimony was substantially correct." The Modified Report itself recognizes, however, that there are serious questions as to the credibility of Budenz' testimony on at least three important items in addition to the Starobin and Weiner matters (R. 2527, ftn. 73, 2592, ftn. 100, 2620, ftn. 120). In each case the Board credited Budenz.

## X. The Refusals to Require Production of Witnesses' Statements

### A. The Gitlow Memoranda

1. Respondent contends (Br. 303-04) that petitioner's demand for the Gitlow memoranda was over-broad because it was not limited to the portions relating to matters about which the witness had testified. But neither the Board nor the court below assigned this as a ground for refusing to order production of the memoranda. Petitioner, therefore, was not accorded a fair opportunity to make a more limited demand before the Board. Moreover, petitioner's motion for leave to adduce additional evidence was limited to those portions of the memoranda which related to the subject matters of Gitlow's testimony (R. 2797). Finally, even if petitioner's original demand was too broad, that would not justify the denial of production of those portions of the memoranda to which it was entitled.

2. Respondent argues (Br. 304) that the refusal to produce the Gitlow memoranda was harmless error because Gitlow's testimony was unimportant. But since neither the Board nor the court below so characterized it, there is no basis for concluding that they did not give significant weight to the testimony. On the contrary, the Modified Report relied on Gitlow's testimony to support findings that it considered highly material to the result (see Pet. Br. 139). Nor can respondent's contention be reconciled with the fact that Gitlow testified for eight full days on

direct examination and that the Attorney General introduced 119 exhibits through him (Tr. 1674-2530). The argument, therefore, is one more instance in which respondent as a litigant seeks to escape the consequences of error by denigrating testimony on which it relied as a tribunal. This it may not do. *Communist Party* v. *S. A. C. B.*, 351 U. S. 115, 123.

**B. The Statements of Budenz and the Other Witnesses**

Respondent claims that it would be unfair to the government to compel production of the statements of its witnesses six years after the close of the Board hearing (Br. 311-12). But if the Attorney General had not urged, and the Board adopted, an erroneous proposition of law, the documents would have been produced while the witnesses were on the stand.

Furthermore, respondent seems to acknowledge (Br. 312-13) that production would now be required if petitioner had repeated its motions *ad nauseam* after Board rulings had made repetition futile, or if petitioner had made the superfluous statement that it would not indulge in the repetition. We know of no rule requring lawyers to engage in such pettifoggery to preserve the rights of their clients.[20]

Respectfully submitted,

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[20] We do not understand, and therefore do not reply to, respondent's answer (Br. 313-15) to our argument (Pet. Br. 143) that we were misled by Budenz, the Board and government counsel into believing that there were no verbatim statements of Budenz. Judge Bazelon, the one member of the court below who seems to have considered the matter, found that we were misled (R. 2696-97).

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IN THE

# Supreme Court of the United States

October Term, 1960

No. 12

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,

*Petitioner,*

—v.—

SUBVERSIVE ACTIVITIES CONTROL BOARD,

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

## BRIEF OF THE NATIONAL LAWYERS GUILD AS *AMICUS CURIAE*

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## BRIEF OF THE NATIONAL LAWYERS GUILD AS *AMICUS CURIAE*

### The Interest of the National Lawyers Guild

The National Lawyers Guild is a national bar association formed in 1937, as it then stated,

> "to bring together all lawyers who regard adjustments to new conditions as more important than the veneration of precedent, who recognize the importance of safeguarding and extending the rights of workers and farmers upon whom the welfare of the entire nation depends, of maintaining our civil rights and liberties and our democratic institutions, and who look upon the law as a living and flexible instrument which must be adapted to the needs of the people."

Since its formation the National Lawyers Guild has consistently sought to arouse the talents and energies of the legal profession in the solution of the urgent problems facing American democracy. In this task it has attempted to make a contribution on numerous controversial issues of domestic and foreign policy; and it has on many occasions undertaken the defense of unpopular causes where it conceived important legal principles to be at stake. As a result, it has experienced at first hand some of the official and unofficial pressures that have sought to curb the activities of liberal groups in this country.

The National Lawyers Guild therefore appreciates the opportunity, made possible by the consent of the Solicitor General and counsel for petitioner, to present its views on the far-reaching issues involved in this case. It does so from the standpoint, not of the Communist Party which is ably represented here, but of liberal lawyers deeply concerned with the impact of the legislation under review upon the civil liberties of the whole nation. It will attempt to present to the Court certain considerations from the vantage points of attorneys who have participated in the defense of those civil liberties and who have seen modern repressions at work.

Our views will be restricted to one of the more significant constitutional issues: the validity of the registration provisions of the Internal Security Act under the First Amendment.

## Summary of Argument

The registration provisions of the Internal Security Act are designed, and would in practice operate, to destroy or hopelessly cripple any organization forced to register. They were thus intended to, and would in fact, prohibit altogether normal and legitimate political activities carried on by such organizations. Furthermore, the impact

of the registration provisions carries far beyond the Communist Party and its immediate environs; it seriously restricts freedom of expression throughout the entire population.

It is not within the power of government under the First Amendment to prohibit a political association from engaging in the normal and legitimate forms of political activity. This is true even though such association engages in other activities that are illegitimate, or even though such association is controlled by an organization that engages in illegitimate activity. This principle was enunciated in *DeJonge* v. *Oregon*, 299 U. S. 353, and has been confirmed by subsequent decisions. It is compelled by the fundamental theory of the First Amendment and is essential to effective realization of that theory.

The asserted justifications of the registration provisions do not warrant any departure from the *DeJonge* principle. The fact that an organization is promoting the interests of the world Communist movement or is ideologically influenced from abroad is not ground for suppressing the activities of that organization. Moreover, the registration requirements cannot be justified as mere disclosure provisions incidental to accomplishing some other valid governmental objective, or as designed to improve the functioning of the democratic process. They are an end in themselves and they operate to wholly prohibit legitimate political activity.

Nor can the registration requirements be justified as necessary to prevent fraud or deceit in political activity. Even if such regulation were consistent with the First Amendment, the restrictions here go far beyond this point and are invalid under the decision in *Talley* v. *California*, 362 U. S. 60.

**The registration provisions of the Internal Security Act, on their face and as applied in this case, violate the constitutional right of freedom of political expression as embodied in the First Amendment.**

This Court has, in the past two terms, struck down three attempts by state governments to destroy or hamper freedom of expression through the device of broad disclosure requirements. *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449; *Bates* v. *City of Little Rock*, 361 U. S. 516; *Talley* v. *California*, 362 U. S. 60. This case involves a similar effort by the Federal government to eliminate expression of unpopular ideas by means of exposure and similar sanctions. But the effort here goes further than in any of the prior cases and raises even more serious issues under the First Amendment.

We confine our discussion to two major aspects of the problem. First we undertake to analyze, in terms of present political realities, the actual operation of the registration provisions, not only as they affect the Communist Party but as they have an impact on freedom of expression generally. Our conclusion is that these provisions operate, and were intended to operate, to prevent those organizations required to register from carrying on normal and legitimate political activity; and that the legislation seriously restricts freedom of political expression throughout the entire country. We then consider the basic constitutional issue raised by this state of facts,—whether the government has power to prohibit political organizations from engaging in such legitimate political activity, where it is alleged that one of such organizations is also engaged in other illegitimate conduct.

**A. The operation of the registration provisions.**

1. **In their actual working the registration provisions operate to destroy, or at least hopelessly cripple, any organization required to register.**

**(a)**

The first and overwhelming fact is that any organization forced to register under the Internal Security Act is

officially branded as a disloyal, traitorous and alien group, its members marked as political and social outcasts. By the terms of the Act such an organization and each member is stigmatized as part of a movement dedicated to "treachery, deceit, infiltration * * *, espionage, sabotage, terrorism" (§ 2(1)); which exercises its "control over the people through fear, terrorism, and brutality" (§ 2(2)); whose objective is to set up a totalitarian dictatorship which will be "subservient" to a foreign power (§ 2(6)); and whose followers "repudiate their allegiance to the United States, and in effect transfer their allegiance" to a foreign country (§ 2(9)). This is not simple registration as a lobbyist, or as a spender of campaign funds, or as the owner of a newspaper, or even as a taker of bets. It is registration under a brand that evokes the most bitter emotional response and results in the severest popular sanctions.

Moreover, the branding is accomplished through official proceedings that add greatly to its impact. Formal charges are filed by the Department of Justice; a highly publicized hearing is held, at which dramatic testimony of informers and undercover F. B. I. agents is produced; formal findings are issued by a governmental agency labelled "Subversive Activities Control Board"; the decision is reviewed by the courts in a proceeding which, though limited, creates an impression of judicial approval and adds the prestige of judicial sanction. Once the organization has registered all communication with the public must be stamped with the official brand, thus constantly recreating and reinforcing the original stigma in the public mind.

Furthermore, this process of branding as a public enemy is directed not only against organizations but against individuals. In the case of a "Communist-action" organization the Act requires a listing in the Department of Justice files, open to public inspection, of each member with his address (§§ 7(d), 9). In the case of "Communist-

front" organizations the same result is accomplished through the requirement in the Attorney General's regulations that the source of all funds be given, including the names and addresses of all donors; this compels the listing of all dues payments and hence of all members.[1] Thus every individual member of an organization required to register finds his own name publicly recorded with the Department of Justice as a traitor to his country.

The Act is thus designed to place a badge of infamy upon specified organizations and individuals. Such official branding, by the powerful and authoritative state, has proved an overwhelming sanction in the past. It is perhaps even more effective in modern society. Present day systems of mass communication, pressures for conformity, and methods of opinion manipulation make the ancient punishment of public infamy one of the state's most destructive controls over political expression.[2]

It is scarcely likely that any organization which seeks the support of public opinion in the arena of political controversy could withstand such an attack today. This is particularly true of the alleged "Communist-front" organizations which do not have the degree of resistance to state attack that a more battered and hardened "Communist-action" organization might be expected to have. But even a "Communist-action" organization could hardly be expected to survive except as an underground group.

**(b)**

The registration provisions involve more than stamping with a badge of infamy. An integral part of the

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[1] 28 Code of Fed. Regs. § 11.203; Form ISA-1, Item 4.

[2] For an account of the use of infamy as an official sanction against political and other dissent, see Mitchell Franklin, *The Encyclopedists' Origin and Meaning of the Fifth Amendment*, 15 Law. Guild Rev. 41 (1955). An early account of the force of public opinion in the United States appears in de Tocqueville, Democracy in America (Bradley ed., 1945) vol. 1, pp. 263-70.

scheme imposes other consequences which make membership in a registered organization intolerable.

In the first place, members of registered organizations become obvious and exposed candidates for criminal prosecution. The government has procured numerous indictments under the Smith Act for "knowing" membership in the Communist Party. Moreover any member of a registered organization would run a risk of prosecution under Section 4(a) of the Internal Security Act—a provision which makes it unlawful, subject to a prison sentence up to ten years, "to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship". And the danger of prosecution is greatly enhanced by Section 5 of the Communist Control Act of 1954, which establishes startlingly broad standards for proof of membership or participation in the Communist Party (68 Stat. 777; 50 U. S. C. § 844).

Members of registered organizations become, in effect, publicly nominated for criminal prosecution under these or other laws. Their names are prominently displayed, their guilt has already been officially announced, the pressures for invoking criminal action are aroused and focused upon them. At least so most members could reasonably believe and fear.

Thus continued membership in a registered organization becomes an immediate hazard. Only resignation, or perhaps recantation, offers hope of salvation. New membership is unthinkable.

**(c)**

Registration also brings with it a further series of official deprivations. No member of a registered organization may, because of that membership alone, hold any non-elective government position (§ 5(a)). No member of a "Communist-action" organization may hold any employ-

ment, whether related to classified material or not, in any defense facility (§ 5(a)); members of "Communist-front" organizations must disclose such membership in applying for a job in a defense plant (§ 5(a)) and, under present security systems, would almost certainly be denied employment.[3] No member of a registered organization may apply for or use a passport (§ 6); he is thus denied the right to travel beyond the borders of the United States. If recently naturalized, he may be subject to denaturalization; if an alien he is excludable, deportable and ineligible for naturalization (§§ 22, 25; now incorporated in 8 U. S. C. §§ 1182, 1251, 1424, 1451).

Moreover, registration exposes an individual to countless other Federal, state and local laws, regulations, restrictions and harassments directed against "subversive activities". Any person holding membership in a registered organization automatically becomes an obvious target—an easy mark—for one or more Federal, state or local investigating committees. He would almost certainly be barred from teaching in public schools or state universities. If drafted, he would be subject to ignominious disabilities. He would run serious risks of being denied admission to, or ousted from, a profession. In some states he would be denied unemployment compensation. In Indiana he could not become a professional boxer. And so on. See Gellhorn, *Individual Freedom and Governmental Restraints* (1956), pp. 129-30.

It is quite true that a member of an organization might be subjected to these restrictions and harassments even if the Act did not provide for registration. But registration intensifies and magnifies the whole process. It focuses public attention on the individual and makes application of the restrictions automatic, inevitable and overwhelming.

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[3] See, *e.g.*, Subversive Activities Control Act of 1950, Report of the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws to the Committee on the Judiciary, U. S. Senate, 84th Cong., 1st Sess. (1955) p. 5.

**(d)**

Nor would the difficulties confronting a member of a registered organization end with official sanctions. He would be equally subject to restrictions and pressures of private individuals and groups. Many an employer would refuse him a job. Work in the movie, radio, television industries, or in many industrial plants, would not be open to him. Few, if any, private school or universities would tolerate him. Many organizations would deny him admission or expel him. His social life in the community, and that of his wife and children, would be strained and tense, or worse. See Brown, *Loyalty and Security* (1958), ch. 5 and 7.

It is quite true, here also, that these restrictions and pressures exist apart from the registration provisions. But again the registration provisions, with their brand of a scarlet letter would train an official spot-light upon individuals which would enormously increase their vulnerability. Or at least—and the result is the same—most persons would reasonably feel so.

**(e)**

Another serious source of danger to leaders and members, and prospective leaders and members, of organizations required to register grows out of the penalties imposed for failure to register, false registration, and the like. On their face these provisions may seem nothing more than routine enforcement measures. But taken in context they constitute a tangle of legal traps, ready to be sprung by zealous prosecuting officials.

The leadership of an organization compelled to register, for example, finds itself in a precarious position. If the organization, by a mere majority vote, decides not to register then the president, vice-president, treasurer and every member of the governing board become subject to a swift and relatively simple prosecution, culminating in prison terms up to five years for each day the failure to register

continues.[4] If the organization decides to register then the above officers must furnish within thirty days after final order, and annually thereafter, elaborate, detailed and exact information on every sum received and expended by the organization for the last year, all evidences of debt, and an account of all liabilities.[5] A "Communist-action" organization must furnish a complete list of all members during the preceding year with their addresses and aliases (§ 7(d)). Every organization must also "make and keep current all bookkeeping and other financial records relating to registrant's activities, including cancelled checks, bank statements, and records of income and disbursements, showing names and addresses of all persons who have paid moneys to the registrant or who have received moneys from the registrant, the specific amounts so paid or received, and the purpose for which any item was expended."[6] A "Communist-action" organization must in addition "make and keep current such books and records as will disclose the names and addresses of the members of the registrant, the officers and employees of the registrant, and the names and addresses of persons, other than members, officers or employees, who actively participate in the activities of the registrant."[7]

By the 1954 amendment the registration statement must also include a listing of all printing presses and other duplicating machines "which are in the possession, custody, ownership, or control of the Communist-action or Communist-front organization or its officers, members, affiliates, associates, group, or groups in which the Communist-action or Communist-front organization, its officers or members have an interest" (§ 7(d)(6)).

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[4] Internal Security Act, § 7(b); 28 Code of Fed. Regs. § 11.205.

[5] Form ISA-1, Instruction 6 and Items 4-10.

[6] 28 Code of Fed. Regs. § 11.204(a).

[7] 28 Code of Fed. Regs. § 204(b).

The registration forms provided by the Department of Justice give prominent display to the Federal statute which provides up to five years' imprisonment for anyone who "knowingly and wilfully falsifies, conceals or covers up • • • a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry."[8] Voluntary associations in the political field, possibly with the exception of the Communist Party, notoriously operate in a loose and amateurish fashion. The probability of discovering mistakes in the elaborate data required to be filed or kept is high. True, the statutes punish only "knowing" or "willful" errors. But these terms are broadly construed by the courts and in any event present an issue for the jury, very likely an unfriendly one. Nor can the leadership of a registered organization count upon forbearance or mercy from the Department of Justice.[9] As a result, the leadership finds itself extremely vulnerable to criminal prosecution with cumulative penalties. Faced with such possibilities it takes a most courageous or indifferent person to assume responsibility for the leadership of any organization which might at some time be faced with an order to register.

Similar dangers face persons who are or contemplate becoming members of organizations likely to be compelled to register. Every member of a "Communist-action" organization is liable to cumulative penalties if he fails to register individually after the organization itself refuses to register or does not register his name (§ 8). Since it is most unlikely that the Communist Party would register, this

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[8] 18 U. S. C. § 1001, reprinted on Form 1SA-1. See also Internal Security Act § 15(b).

[9] Note, for example, the five unsuccessful proceedings against Harry Bridges, the abortive prosecution of Owen Lattimore, and the groundless indictment of Val Lorwin.

provision subjects all its members to an immediate prosecution in which the only issue would be the question of membership. Such procedure enables the government to avoid the long trials which have characterized Smith Act prosecutions and to conduct prosecutions of alleged Communist Party members on a mass production basis. When one takes into account the hopelessly broad and vague standards of Section 5 of the Communist Control Act, detailing the type of evidence upon which a jury may find Communist Party membership, the risks to any member of a registered organization become apparent.

(f)

The registration provisions of the Internal Security Act impinge not only upon the leadership and members of organizations subject, or possibly subject, to the Act, but also upon all relations of the organization with the community in which it attempts to function. As already stated, a registered organization must file an itemized account of all funds received, including the date, the source from whom received, and the amount; a list of all payments, to whom each was made, the amount, and the purpose for which it was made; and a statement of all evidences of debt and all liabilities. This information must be kept up to date by annual reports. It is open to public inspection at the Department of Justice. In addition, books and records must be kept, including the names and addresses of all persons "who actively participate" in the activities of a "Communist-action" organization. These are available to the Department of Justice, legislative investigating committees, or any public authority with subpoena power.

The result is that every action of a registered organization involving a financial transaction—in effect most important actions it takes—is revealed to a hostile press and public. The name of every individual or group contributing financial support, or having any financial dealing, is

mercilessly exposed to all the public and private pressures that generate around unpopular causes. In addition, every person who can be said to "actively participate" in the affairs of a "Communist-action" organization finds his conduct recorded for inspection by every governmental authority with subpoena power. These facts should be considered particularly in the light of the vague provisions of Section 4(a), subjecting to criminal prosecution any person who "substantially contributes" to the establishment of a totalitarian dictatorship, and of Section 5 of the Communist Control Act, establishing criteria for proof of "membership" or "participation" in the Communist Party.

Under such circumstances, no matter what the leadership and members did, a registered organization would find itself effectively throttled. Financial support would be largely cut off. Meeting places would be hard to find. Speakers would be reluctant to appear. Even business dealings—such as obtaining the services of a printer—would be seriously curtailed. No political organization could function under such conditions. Inevitably it would find itself isolated and impotent.

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From all the above our only conclusion can be that the registration provisions of the Internal Security Act, though ostensibly framed as a simple disclosure regulation, operate in practice to destroy, or at the least permanently and hopelessly cripple, any organization compelled to register. The government's argument that they constitute mere disclosure of information, similar to lobbying or newspaper registration, must be regarded as disingenuous.

In *N.A.A.C.P.* v. *Alabama*, the Court declared: "Inviolability of privacy in group association may in many circumstances be indispenable to preservation of freedom of association, particularly where a group espouses dissident

beliefs." 357 U. S. at 462. The circumstances of this case present a clear situation where enforcement of the statute's exposure provisions makes impossible "preservation of freedom of association".

2. The registration provisions are designed and operate to eliminate the normal and legitimate activities carried on by organizations compelled to register.

The second basic feature of the registration provisions of the Internal Security Act is that they are primarily designed and operate to suppress, not illegitimate political activity, but the normal and legitimate activity customarily carried on by political associations.

It is necessary at this point to indicate briefly what we mean by "illegitimate" and "legitimate" political activity. We are concerned with methods for achieving political goals, not with the goals themselves. Certain methods, or types of activity, are clearly illegitimate as contrary to the basic principles of the democratic process. Such activity includes treason, sabotage, espionage, creating insubordination in the armed forces, corruption of public officials, the use of force and violence, and similar conduct. In view of *United States v. Dennis*, 341 U. S. 494, we may add, though we disagree, advocacy of force and violence. On the other hand certain types of activity, which may be carried on by the same organization which engages in illegitimate activity, are clearly recognized as legitimate and proper within the democratic framework. Such activity includes all the normal operations of a political association in attempting to persuade by peaceful means a majority of the community to its point of view. At times the dividing line between legitimate and illegitimate activity may be unclear or debatable. With that we are not concerned at this point. The important fact is that the two types of activity are broadly distinguishable and may be carried on by the same organization.

The Communist Party, alleged to be a "Communist-action" organization, has been charged in Section 2 of the Act and elsewhere with engaging in certain illegitimate activity, principally advocacy of the use of force and violence. We are not concerned here with the validity of that charge and, for the purposes of our argument, it may be admitted. So far as appears from Section 2 and other sources it is not asserted that "Communist-front" organizations engage, or at least normally so, in any form of illegitimate activity. Be that as it may, the fact is clear from the record, and is not open to dispute, that organizations subject to the Act do engage in substantial and important legitimate activity. They hold meetings, write and distribute pamphlets, attempt to buttonhole legislators, and pursue a thousand other activities of the kind that is characteristic of voluntary associations in a democratic society.

The registration provisions operate to suppress this legitimate political activity. Moreover, that suppression is not merely an incidental effect of an effort to eliminate illegitimate activity, but rather is the direct and primary objective of the legislation.

**(a)**

In the first place, as just pointed out, the Act operates to destroy, or hopelessly cripple, any organization compelled to register. The effect is not to punish, or eliminate, some specific illegitimate activity—indeed the "Communist-front" organizations are not even charged with such activity—but to end the life of the organization altogether or to reduce it to impotence. Thus, as the Act goes into operation, a large and significant sector of political activity, carried on by perfectly legitimate methods, is wiped out.

**(b)**

Equally important, registration is required of an organization, not upon a showing that it has engaged in any form of illegitimate activity, but under standards which are

fully applicable to an organization engaging only in wholly legitimate activity.

An organization must register as a "Communist-action" organization if the Board finds that the organization is (1) "substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement"; and (2) "operates primarily to advance the objectives of such world Communist movement" (§ 3(3)). Plainly direction, domination or control of an organization by a foreign government or foreign organization does not mean that the organization is engaging in illegitimate activity. It may or it may not be, depending upon what it does. But surely much legitimate activity is carried on in the United States under the direction, domination or control of foreign governments and foreign organizations.[10]

As to the second half of the standard—advancing the objectives of the world Communist movement—Section 2 asserts that such objectives are "to establish a Communist totalitarian dictatorship in the countries throughout the world" (§ 2(1)). Plainly this could be done by wholly legitimate methods.

It is true that Section 2 also asserts that the objectives of the world Communist movement are to be attained "by treachery, deceit, infiltration into other groups * * *, espionage, sabotage, terrorism, and any other means deemed necessary" (§ 2(1)). But these are explicity designated as means not objectives; not all of them (*e.g.* deceit and infiltration) are necessarily illegitimate activity; and it is recognized, by adding "and other means", that the objectives are sought by legitimate as well as illegitimate activity.

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[10] The significance of "foreign control" as a ground for suppressing what is otherwise legitimate political activity is a question discussed *infra*, pp. 35, 38.

From all this it is plain that an organization can be ordered to register as a "Communist-action" organization without any proof whatever that it has engaged in any form of illegitimate activity.

This conclusion is confirmed by an analysis of Section 13(e). In this subsection the framers of the Act set forth eight categories of evidence the Board shall take into consideration in determining whether an organization is a "Communist-action" organization. The eight categories, while not designated as exclusive, were certainly intended to be the principal grounds, and sufficient by themselves, for such a finding. There is no reference in these eight categories to the use of force or violence, espionage, sabotage or similar illegitimate conduct. None of them contain even a suggestion that such illegitimate activity must be found before registration can be compelled.

What has just been said of "Communist-action" organizations is *a fortiorari* true of "Communist-front" organizations. The act defines a "Communist-front" organization as one which is (1) "substantially directed, dominated, or controlled by a Communist-action organization," and (2) "primarily operated for the purpose of giving aid and support to a Communist-action organization, a Communist foreign government, or the world Communist movement" (§ 3(4)). Under this standard an organization could be found to be a "Communist-front" without any showing that it had engaged in any illegitimate activity. Nor does Section 13(f)—which lists four categories of evidence which the Board shall consider in finding an organization to be a "Communist-front"—contain anything which requires a finding of such activity.

**(c)**

The application of the registration provisions by the Subversive Activities Control Board in this case confirms the fact that the existence of illegitimate political activity

is not a prerequisite to ordering an organization to register, even as a "Communist-action" organization. The findings of the Board—set forth in great detail—are not primarily concerned with whether the Communist Party has or has not used "illegal means", or, in our terminology, engaged in illegitimate political activity. The findings, grouped under the eight categories of Section 13(c), are directed towards establishing foreign control and advancement of the world Communist movement, irrespective of whether the methods are legitimate or illegitimate. References are made to the advocacy of force and violence, to false swearing, and to other illegitimate conduct. But these are subordinate factors in the result. In essence, the Board finds that the Communist Party is a "Communist-action" organization and orders it to register, not because it has engaged in specified illegitimate activity, but because it finds the Communist Party to be under foreign control and operated generally to advance the world Communist movement.

**(d)**

Further proof that the registration provisions are designed to prevent normal and legitimate political activity appears from an examination of the disabilities imposed by the Act upon registered organizations. These sanctions are applicable to any activity of the organization, quite apart from its character as legitimate or illegitimate. Thus under the labelling provision, all mail disseminated by the registered organization must be marked on the outside with the Communist label, and any radio program so designated, regardless of whether it contains seditious or other illegitimate material. The same is true with respect to the listing of printing and duplicating machinery. All communication is swept under the ban. Similarly all employment in defense plants is denied and all passports refused.

(e)

Finally, it should be emphasized that suppression of legitimate political activity is not merely incidental to, or a necessary part of, the suppression of illegitimate conduct. Quite the contrary, the elimination of legitimate political activity is the primary purpose of the registration provisions.

For the punishment and control of all serious forms of illegitimate activity adequate laws existed prior to the passage of the Internal Security Act. Treason, espionage, sabotage, insurrection, the use of force and violence, or conspiracy to commit any of them, were all subject to severe criminal penalties. Even advocacy of force and violence, and conspiracy so to advocate, were punishable under the Smith Act. These laws were all enforceable and enforced. They provided protection against all major forms of illegitimate political conduct. If any gaps existed they could readily have been filled by specific legislation. For such purposes the registration provisions were unnecessary.[11]

Furthermore, the system of registration is hardly an effective or appropriate method for dealing with espionage, sabotage, the use of force and violence, or the like. Apart from questions of self-incrimination, the device of registration is wholly unsuitable for coping with such conduct. Congress could scarcely have thought that it was. The object of the registration provisions was to get at conduct not subject to existing law. It was directed toward suppressing those activities of organizations found to be supporting the world Communist movement which were carried on through traditional and legitimate methods of peaceful political action.

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[11] For a summary of the applicable legislation see Thomas I. Emerson and David Helfeld, *Loyalty Among Government Employees*, 58 YALE L. J. 1, 27-8 (1948); Arthur E. Sutherland, Jr., *Freedom and Internal Security*, 64 HARV. L. REV. 383, 386-8 (1951).

3. **The impact of the registration provisions carries far beyond the Communist Party and its immediate environs; it seriously restricts freedom of expression throughout the whole liberal movement and indeed the entire population.**

Up to this point we have discussed the registration provisions primarily as they apply directly to organizations ordered to register. But it is even more important to consider the impact of these provisions as they affect the whole liberal movement, and, beyond that, the entire population. Even the briefest analysis makes clear that the registration provisions gravely impair the essential rights of free association and free expression throughout the country. Many of the factors here have already been pointed out, but certain matters should be emphasized.

In the first place, the standards as to what constitutes a "Communist-front" organization—both in Sections 3(3) and 13(f)—are so broad that any association or individual dealing with problems with which the Communist Party is also concerned, and not differing sharply from the Communist Party position on that problem, operates under the shadow of the Act and has reason to fear its possible application. "Direction, domination or control" by the Communist Party can be spelled out of the active participation in an organization of a relatively few individuals whose affiliations and views are not known to the members, or whose views differ on other issues than those which the organization is formed to promote. Or it may be inferred from the absence of difference between the Communist Party position and that of the organization on those matters with which the organization is concerned. The standard of "primarily operated to give aid and support" to the world Communist movement embraces almost any action which conforms to the current Communist Party position, or supports the constitutional rights of the Communist Party, or even is opposed to the orthodox government position on such matters as the recognition of Communist China. Indeed, an organization may find itself in trouble by advocat-

ing the same position that the government supports, as for example, in upholding the rights of Negroes and other non-political minorities. These standards, moreover, are applied under the relaxed rules of the administrative process, with only limited judicial review.

The impact of the broad standards is accentuated by the severity of the sanctions imposed. The dreadful effect upon a citizen of being officially branded as disloyal and a traitor, the disabilities imposed upon members of registered organizations, the dangers of being trapped in the criminal enforcement machinery, all operate to deter individuals from relations with associations dealing in controversial matters. Likewise, the effect of the Act in exposing individuals to the fierce public and private pressures that have marked our political life for the past decade is to drastically discourage both freedom of association and individual expression.

The result is that few individuals will care to run the risks involved in participating in controversial issues from a point of view opposed to government policy or consistent with a specific objective also endorsed by the Communist Party.

In the same way voluntary associations engaging in political activity—without which an individual citizen cannot hope to function effectively, and without which a democratic society cannot hope to maintain itself—are badgered, hampered and perhaps even destroyed. Leaders, particularly leaders of moderate temperament, will be hard to find. Individuals will fear to take the risk of joining unless they know all the other members, agree with every policy, and know in advance what action the association will take. Members will be forever suspicious of other members. The association itself must carry on a continuous investigation of all its members and conduct constant purges of left-wing elements. It must weigh every action or policy in the light

of possible accusations sure to arise if other organizations adopt a similar policy on the same issue. If an association is even charged by the Department of Justice with being a "Communist-front" organization it will immediately lose all influence and probably soon disintegrate. If an association is ordered to register and dissolves it will be a long time before other members and leaders will be bold enough to form another organization in the same field.

The impact of the registration provisions on the right of association is vividly illustrated by an article in the conservative *U. S. News and World Report*, published at the time of passage of the Act, giving the following advice to its readers:

"IF IN DOUBT, DON'T JOIN!

"For the person who wants to keep out of trouble in the future, this appears to be good advice:

"Be very careful about organizations joined. Avoid membership in anything that might turn out to be labeled a 'Communist-front' or a 'Communist-dominated' organization. Be equally careful about contributing to organizations. Make sure that any organization getting money from you may not have any possibility of a Communist tie.

"Watch out that your name is not on the list of sponsors of an organization not well known to you. It may even be important to make sure that your name is not on the mailing list of any organization that could turn out to be Communist controlled. The American habit of joining organizations needs now to be restrained." (U. S. News and World Report, September 22, 1950, p. 20.)

It may be suggested that the picture we have given is overdrawn and that administration of the Act will not be pressed to the point here indicated. But experience with similar legislation points the other way. There are forces in the administration of any law of this kind—the need

to arouse public opinion, the vested interests and ambitions in the machinery of prosecution, the political pressures engendered—which tend irresistibly to push such legislation to its outermost limits. Furthermore, it is not even necessary that the dangers be real; it is enough that they are felt so.[12]

Mr. Justice Frankfurter, referring to the conviction of the Communist Party leaders under the Smith Act, observed:

> "* * * it is self-delusion to think that we can punish them for their advocacy without adding to the risks run by loyal citizens who honestly believe in some of the reforms these defendants advance. It is a sobering fact that in sustaining the conviction before us we can hardly escape restriction on the interchange of ideas." (*Dennis* v. *United States*, 341 U. S. 494, 549.)

What is true of the Smith Act is immeasurably more significant in the Act now before the Court. This aspect of the Act's operation entails the gravest consequences of all. The present case technically involves only the Communist Party. Actually it reaches to the roots of the democratic process.

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[12] For an excellent description of the dangers to freedom of expression growing out of the registration provisions, see Zechariah Chafee, Jr., *The Registration of "Communist-Front" Organizations in the Mundt-Nixon Bill*, 63 HARV. L. REV. 1382 (1950). See also President Truman's message vetoing the bill which, as passed over his veto, became the Internal Security Act, 96 Cong. Rec. 15629-32; Note, *The Internal Security Act of 1950*, 51 COL. L. REV. 606, 607 (1951).

**B. It is not within the power of government under the First Amendment to prohibit a political association from engaging in the normal and legitimate forms of political activity. This is true even though such association engages in other activities that are illegitimate, or even though such association is controlled by an organization that engages in illegitimate activity.**

The constitutional issue that emerges from our analysis is a clear-cut and basic one. We have seen that the registration provisions, far from merely requiring the disclosure of information, would in practice operate to destroy or seriously cripple any organization ordered to register. We have also seen that the effect, and in fact the purpose, of these provisions is to eliminate all the normal and legitimate political activities of these organizations. The legislation is particularly crucial because of the effect it would have upon freedom of expression generally.

The issue presented to the Court, therefore, is this: Does the government have power, in view of the First Amendment's prohibition against infringement of freedom of political expression, to adopt measures which prevent a political association from engaging in all the usual types of political activity? Does such power arise from the fact that the organization is tainted with other, illegitimate, activity, or is controlled by a tainted organization?

**1. On its face the Act compels registration regardless of whether the organization has engaged in any illegitimate activity whatsoever, or is controlled by an organization that does. Such a requirement plainly violates the First Amendment.**

Nothing in the standards laid down by the Act for ordering registration require a finding that the organization has engaged in any illegitimate activity, or is controlled by an organization that does. The objective of establishing a totalitarian dictatorship does not, as we discuss in more detail later, make all activity directed to that end illegitimate. Similarly, as we also discuss later, direction of an

organization from abroad does not necessarily make all its activities illegitimate. Hence the requirement of registration can be imposed upon an organization whose only activity has been entirely within the framework of democratic procedures. This is strikingly true of organizations which may be found to be "Communist-front" organizations.

It should be emphasized, also, that the restraints imposed by the registration provisions do not relate only to one aspect of a political association's activities, such as its use of campaign funds. They operate to suppress *all* political activity, in any form, by the organization.

On their face, therefore, the registration provisions simply prohibit normal political activity. The sweep of these provisions is so broad, and their effect upon free expression so devastating, that the legislation must be declared on its face squarely in conflict with the First Amendment.

2. **Even if we assume that an organization required to register must be shown to have engaged in illegitimate activity, or to be controlled by another that does, it is still clear that the government cannot prevent that organization from engaging in legitimate activity.**

Although the Act itself does not require a showing of illegitimate activity, the arguments in support of the registration provisions rest upon the ground that this element is present. Consequently we will assume, for purposes of argument, that the Communist Party is engaging in certain forms of illegitimate political action, principally advocacy of the use of force and violence. We will assume, also, that certain other organizations are "directed, dominated or controlled" by the Communist Party in the narrowest sense of those terms.

Taking these assumptions, it remains clear that the government cannot, in spite of the illegitimate activity,

prohibit those activities of a political association which are normal and legitimate. This principle, which is implicit in democratic theory and essential in democratic practice, has been fully accepted and applied by this Court in prior cases.

The leading case is *DeJonge* v. *Oregon*, 299 U. S. 353. DeJonge was indicted and convicted for violation of the Oregon Criminal Syndicalism Law. This statute defined criminal syndicalism as "the doctrine which advocates crime, physical violence, sabotage or any unlawful acts or methods as a means of accomplishing or effecting industrial or political change or revolution." It went on to proscribe a series of offenses, including the advocating or teaching of criminal syndicalism, and presiding at or assisting in conducting any meeting of a group which advocated or taught the doctrine. Specifically, DeJonge was charged with assisting in the conduct of a meeting called by the Communist Party, alleged to be an organization advocating criminal syndicalism.

The meeting in question was a public one, conducted in an orderly manner. Its announced purpose was to protest against the conduct of the police in a local strike then in progress. Speeches were made on this and similar subjects. There was no advocacy or teaching of criminal syndicalism.

On the other hand, the meeting was called, organized and conducted by the Communist Party. The Court assumed, for purposes of the case, that the Communist Party was an organization that taught and advocated criminal syndicalism in violation of the Oregon statute. The first speaker "dwelt on the activities of the Young Communist League." DeJonge, the second speaker, was a member of the Communist Party "and went to the meeting to speak in its name." Communist literature, not advocating force or violence, was distributed at the meeting. DeJonge urged the purchase of this literature and also "asked those

present to do more work in obtaining members for the Communist Party." (299 U. S. at 359.)

The case thus presented the precise issue with which we are here concerned: Could the state validly prevent the Communist Party, which was guilty of advocating "crime, physical violence, sabotage or [other] unlawful acts or methods," from engaging in the normal political activity of holding an orderly meeting on an issue of public importance? This Court unanimously held not, and reversed the conviction of DeJonge.

Chief Justice Hughes, in a a memorable opinion, laid down the doctrine in the plainest terms. Referring to the rights guaranteed by the First Amendment, he said:

> "These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. *But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed.* The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press, and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government." (299 U. S. at 364-365; italics added.)

Speaking of the particular right there at issue—freedom of assembly—Chief Justice Hughes went on:

> "It follows from these considerations that, consistently with the Federal constitution, peaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable

> political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceful assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge." (299 U. S. at 365.)

It is true that the statute in the *DeJonge* case proscribed legitimate political activity by direct criminal sanctions. But it will hardly be suggested that the same repression can be lawfully accomplished by any other state sanction. As Chief Justice Vinson said in *American Communications Association* v. *Douds*:

> "We have been reminded that 'It is not often in this country that we now meet with direct and candid efforts to stop speaking or publication as such. Modern inroads on these rights come from associating the speaking with some other factor which the state may regulate so as to bring the whole within official control.' " (339 U. S. 382, 399, quoting Justice Jackson concurring in *Thomas* v. *Collins*, 323 U. S. 516, 547.)

And later Chief Justice Vinson added, in words peculiarly applicable to this case:

> "But as we have noted, the fact that no direct restraint or punishment is imposed upon speech or assembly does not determine the free speech question. Under some circumstances, indirect 'discourage-

> ments' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes. A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature." (339 U. S. at 402.)

No other case in this Court, as far as we are aware, has raised the issue as precisely as the *DeJonge* case. But in numerous other decisions this Court has taken particular pains to enforce the First Amendment's protection of legitimate political activity in situations where other activity was involved which was illegitimate and not subject to constitutional protection.

Thus in *Herndon* v. *Lowry*, 301 U. S. 242, Herndon was convicted under a Georgia insurrection statute which prohibited "any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State." The evidence showed that Herndon, a Communist Party organizer, had procured members for the Communist Party in Atlanta, and that he had in his possession Communist literature which stated that the Communist Party was based "upon the revolutionary theory of Marxism," referred to the need for "overthrow of * * * class rule in the Black Belt" as necessary for the "self-determination" of the Negroes, and contained similar references to the "revolutionary struggle for power." The Supreme Court reversed the conviction, Justice Roberts saying:

> "We are of opinion that the requisite proof is lacking * * *. His membership in the Communist Party and his solicitation of a few members wholly fails to establish an attempt to incite others to insurrection. Indeed, so far as appears, he had but a single copy of the booklet the State claims to be objectionable; that copy he retained. The same may be said with respect to the other books and pamphlets, some of them of more innocent purport. In these

> circumstances, to make membership in the party and solicitation of members for that party a criminal offense, punishable by death, in the discretion of the jury, is an unwarranted invasion of the right of freedom of speech." (301 U. S. at 259, 261.)

Other cases in which this Court has protected legitimate political activity, carefully separating it from illegitimate activity, include *Stromberg* v. *California*, 283 U. S. 359; *Schneider* v. *State*, 308 U. S. 147; *Hague* v. *C. I. O.*, 307 U. S. 496; *Thornhill* v. *Alabama*, 310 U. S. 88; *Taylor* v. *Mississippi*, 319 U. S. 583; *Schneiderman* v. *U. S.*, 320 U. S. 118; *Thomas* v. *Collins*, 323 U. S. 516; and *Kunz* v. *New York*, 340 U. S. 290. Compare *Milwaukee Publishing Co.* v. *Burleson*, 255 U. S. 407, with *Donaldson* v. *Read Magazine*, 333 U. S. 178, and *Summerfield* v. *Sunshine Book Co.*, 221 F. 2d 42 (D. C. Cir.) *cert. den.* 349 U. S. 921.

All of these cases involved infringement of the right to engage in one particular form of legitimate political activity. The present case goes far beyond this and suppresses the right to engage in all forms of legitimate activity.

In *American Communications Association* v. *Douds*, 339 U. S. 382, the Court took occasion to reaffirm the doctrine of the *DeJonge* case. The *Douds* case involved the validity of the non-Communist affidavit of the Taft-Hartley Act and the Court, by a narrow margin, upheld that particular restriction upon Communist Party membership. But even the majority was careful to point out—and the implication was clear that otherwise its decision would have been different—that the provision did not prevent all other forms of legitimate activity by the Communist Party. Chief Justice Vinson wrote:

> "Section 9(h) touches only a relative handful of persons, leaving the great majority of persons of the identified affiliations and beliefs completely free from restraint. And it leaves those few who are affected free to maintain their affiliations and beliefs sub-

> ject only to possible loss of positions which Congress has concluded are being abused to the injury of the public by members of the described group." (339 U. S. at 404.)

And Chief Justice Vinson later, pointing out the "crucial" fact that "the sole effect of the statute upon one who believes in overthrow of the Government by force and violence * * * is that he may be forced to relinquish his position as a union leader" (339 U. S. at 408), expressly adopted as an "apt statement of that principle" the words of Justice Jackson's concurring opinion:

> "The Act does not suppress or outlaw the Communist Party, nor prohibit it or its members from engaging in any above-board activity normal in party struggles under our political system. It may continue to nominate candidates, hold meetings, conduct campaigns and issue propaganda, just as other parties may. No individual is forbidden to be or to become a philosophical Communist or a full-fledged member of the Party. No one is penalized for writing or speaking in favor of the Party or its philosophy. Also, the Act does not require or forbid anything whatever to any person merely because he is a member of, or affiliated with, the Communist Party. It applies only to one who becomes an officer of a labor union." (339 U. S. at 408, 434).

The registration provisions, of course, do precisely what the Court held it was "crucial" that the Taft-Hartley Act did not do.

It should be particularly noted that the principle of the *DeJonge* case does not rest upon any application of the clear and present danger test. The Court in the *DeJonge* case did not rely upon or even mention that test. Nor was it invoked in this connection in the *Herndon* case. The reason is that any consequences arising from the legitimate activity repressed here, as in the *DeJonge* case—the holding of peaceful meetings, the support of candidates in elections,

the issuance of leaflets and books containing normal political discussion—cannot be "an evil that Congress has a right to prevent." If such normal political conduct could be considered as giving rise to an "evil", then there would be no meaning left to the First Amendment. Consequently the findings of Congress, the Board and the lower court with respect to clear and present danger are wholly irrelevant to the issue now before the Court. For that reason we do not attempt to discuss clear and present danger or undertake to distinguish the *Dennis* case on this point.

*A fortiori*, any test of "reasonableness," as employed in the lower court and urged by the government here, is inapplicable under the *DeJonge* rule. Surely Congress cannot restrict or suppress all the basic rights of lawful political expression on the part of any group under a theory that the restrictions are "reasonable." The same is true of the "balancing" test.

Finally, it should be added that the principle of the *DeJonge* case is compelled by the fundamental theory of the First Amendment and is essential to the effective realization of that theory in a practical democracy.

In broad terms the question, as presented to the Court under the assumptions we are now making, is whether First Amendment freedoms must be extended to groups whose ultimate aims or some of whose immediate methods are anti-democratic. The answer in democratic theory is that they must. It is true that Milton, the first to expound the modern theory of free speech, would have withheld its benefits from Roman Catholics:[13] But that qualification has been abandoned by most later advocates of the doctrine. A classic statement of the prevailing view is that of Justice Holmes:

> "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by

[13] John Milton, *Areopagitica* (Everyman's Library, 1927), p. 38.

the dominant forces of the community, the only meaning of free speech is that they should be given their chance to have their way." *Gitlow* v. *N. Y.*, 268 U. S., 652, 673.

The reasoning is that everyone in a democratic community should have equal rights to persuade others to his view, so long as he stays within the framework of democratic procedures. This does not prevent punishment of conduct in violation of that process; but it does require everyone to have access to those procedures. Only thus can a democratic society function and retain its vitality. All in such a society have a right to speak and a right to hear all points of view. The radical views of those who feel and act militantly are as important as the moderate views of those who would preserve the status quo. The suppression of any point of view not only hinders peaceful social change but gives no outlet to the militant group other than attempted violent destruction of the society which seeks to curb it.

Extension of the right of free expression to anti-democratic groups is likewise essential from a practical point of view. After all, who is to decide whether a particular group is anti-democratic or not? How are we to be sure the label will not be applied to all groups considered radical —Socialists, economic planners, and others? There are always strong pressures in a political community to carry such restrictions far beyond any original intention. They become weapons in a partisan political struggle, too readily and too often invoked, and ultimately the rights of all minorities are in jeopardy.

Suppression of the right of any group to freedom of expression cannot fail to exert an unhealthy effect upon the operation of a democratic community. It undermines the moral strength of what should be held as a fundamental principle and reduces that principle to a rule of political

manipulation. By a kind of Gresham's law, it drives out of circulation real freedom of expression and lessens its value to all.

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The application of the *DeJonge* principle to the case at bar cannot admit of doubt. The fact that the Communist Party may advocate the use of force and violence, or engage in other illegitimate activity, cannot provide grounds for requiring it to register, thereby repressing "peaceable assembly and a lawful public discussion," or other legitimate activity. As to "Communist-front" organizations their only connection with illegitimate conduct is that they are found to be "substantially directed, dominated or controlled" by the Communist Party. *A fortiori*, they cannot under the *DeJonge* rule be driven by government restrictions to impotence or collapse.

3. **The justifications for the registration provisions advanced in the Internal Security Act and by the government in argument here are wholly inadequate as reasons for not following the foregoing principles in this case.**

There remains to consider, briefly, whether certain justifications advanced in support of the Act give any reason for not applying the accepted rule in this case.

So far as appears, the framers of the Act had in mind two major reasons for attempting to suppress the legitimate activities of "Communist-action" and "Communist-front" organizations. Both are embodied in the definitions or standards of Section 3(3) and 3(4). One is that these organizations operate to "advance the objectives" of, or give "aid and support" to, the world Communist movement. The other is that "Communist-action" organizations are "substantially directed, dominated or controlled" by a foreign government or organization, and "Communist-front" organizations are "substantially directed, dominated or controlled" by a "Communist-action" organization. We will discuss these in turn.

### (a) Advancing the Objectives of the World Communist Movement

The objective of the world Communist movement, according to Section 2 of the Act, is the establishment of totalitarian dictatorships in various countries of the world, including the United States. To the extent that this objective is pursued through peaceful and democratic means —that is, by legitimate political activity—such action is protected by the First Amendment from government interference. This is simply one aspect of the proposition, already discussed, that rights under the First Amendment must be extended to anti-democratic groups.

The government is properly concerned with *methods* of political action. Thus, it has power to prevent any person from employing anti-democratic methods to obtain political goals. But it has no power to restrict political activities merely because they are directed toward achieving certain forms of political organization, however abhorrent. It cannot interfere with persons seeking to establish, by democratic methods, a form of government that is parliamentarian, socialist, communist, fascist or any other—democratic or not.

Hence the fact that organizations are "advancing the objectives" of, or giving "aid and support" to, the world Communist movement cannot be a justification for suppressing the legitimate activities of these organizations.

### (b) Foreign Control

We need not attempt to decide under what circumstances, if any, the existence of "foreign control" might empower the government to impose upon political expression restrictions which would otherwise be prohibited by the First Amendment. For it is clear, we submit, that the kind of "foreign control" envisaged by the Internal Security Act and found by the Board in this case cannot operate to change the *DeJonge* rule or justify suppression of all normal political activities.

The Act employs the terms "directed, dominated or controlled," and the Board couches its findings in the same language; but it is essential to consider carefully how those terms are used and how they are being applied. The character of the "foreign control" which stamps an organization as a "Communist-action" group becomes apparent from an examination of the standards embodied in Section 13(e). These authorize the Board to rely on such matters as the extent to which the activities of an alleged "Communist-action" organization are performed "to effectuate the policies" of a foreign government; the extent to which its views "do not deviate from those of such foreign government"; the extent to which it sends "representatives to any foreign country for instruction or training in the principles, policies, strategy, or tactics" of the world Communist movement; and the extent to which it "reports" to a foreign government.

It was on the basis of such considerations that the Board reached its conclusion concerning "direction, domination and control." It is to be noted that the Board found "no evidence of substantial financial aid subsequent to 1940 and none after 1944" (Modified Rep't, p. 163).

Of course, the degree of "foreign control" exercised over a "Communist-front" organization—where the "control" operates indirectly through a "Communist-action" organization—is even more remote and unsubstantial.

To say that by reason of "foreign control" of such a character a domestic organization can be prevented from engaging in legitimate political activity would strike at the heart of the First Amendment. Such a doctrine would give the government power to curb the legitimate activity of almost any organization with international affiliations. For most such organizations have relations with foreign counterparts and attempt to carry out policies determined at the international level. It would authorize government

control even over organizations formed to support the United Nations or its subsidiary groups. It would furnish the basis for state power over religious organizations with international affiliations, such as the Roman Catholic Church and the Zionist organizations whose rights also depend upon the First Amendment. It would apply in other areas—to scientific, cultural, recreational and vocational groups—thus in effect authorizing the repression of any free expression and association on an international scale. And it would endanger organizations with no international affiliatio of their own but which were influenced by or worked together with groups having an international character.

Surely the protection of the First Amendment cannot be so limited. To do so would be especially unfortunate at a time when relations between international groups are crucial to a solution of the grave problems that confront the world.

The fact is that any reason for interfering with First Amendment rights of organizations under "foreign control" is completely absent in the case of voluntary associations operating within the United States. Such associations are masters of their own decisions. Neither they nor their members are subject to any physical or police control from abroad. The organization operates under American laws, in an American environment, subject to everyday American customs, ideas and traditions, and it must secure the approval of American public opinion. Apart from financial contributions—a special issue, but not one involved here—the kind of "control" exercised by a foreign government or organization is ideological in character. The American association or individual can always withdraw. What is designated by the Act as "control", therefore, is in reality little more than ideological influence. Again, this is particularly true of so-called "Communist-front" organizations.

For these reasons, we submit, the argument based on "foreign control" cannot alter or qualify the principle of the First Amendment that political associations cannot be refused the right to engage in legitimate activity.

4. The registration provisions cannot be justified as mere disclosure provisions incidental to accomplishing some other governmental objective or designed to improve the functioning of the democratic process.

Under limited conditions this Court has upheld disclosure provisions as incidental to achieving some other valid governmental purpose or as eliminating a serious obstacle to the better functioning of the democratic process. Thus the statement of ownership required of users of the second class mailing privilege was held valid in *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288. Corrupt practices legislation was upheld in *Burroughs* v. *U. S.*, 290 U. S. 534. And in *U. S.* v. *Harriss*, 347 U. S. 612, the Court sustained the constitutionality of a narrow interpretation of the Federal Lobbying Act. Disclosure compelled in connection with the exercise of the legislative investigating power has also been upheld. *Barenblatt* v. *U. S.*, 360 U. S. 109, *Uphaus* v. *Wyman*, 360 U. S. 72.

These cases are not applicable here. In none of them did the disclosure requirement make impossible the exercise of freedom of association or expression. As already made clear, the design and effect of the registration provisions of the Internal Security Act is to prevent organizations from carrying on legitimate political activities at all.[14]

In other cases the Court has ruled that the serious impact of disclosure upon freedom of expression outweighed

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[14] In *Bryant* v. *Zimmerman*, 278 U. S. 63, a New York statute requiring registration of oath-bound societies was upheld as to the Ku Klux Klan. The question of preventing legitimate activities by the Ku Klux Klan was not at issue, however. And, in any event, the First Amendment problem was not explored.

the interest of the government in pursuing some other important objectives. Thus in *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449, the right of a state to regulate foreign corporations doing business in that state was held not to justify disclosure of N.A.A.C.P. membership lists. And in *Bates* v. *City of Little Rock*, 361 U. S. 516, the use of the taxing power did not warrant a similar disclosure. The same result, as to the legislative investigating power, was reached in *Watkins*, v. *U. S.*, 354 U. S. 178, and *Sweezy* v. *New Hampshire*, 354 U. S. 234.

The attempt to compel disclosure here goes far beyond the effort made in these cases. This is not a situation where the disclosure is imposed as incidental to carrying out the power to control foreign corporations, or the taxing power, or the legislative investigating power. Disclosure here is employed as an end in itself, as a means of suppressing legitimate political activity.

If it be claimed, contrary to all the facts outlined above, that the purpose of the registration provisions is merely to prevent deceit or fraud in the political process, then the issue is squarely governed by the decision in *Talley* v. *California*, 362 U. S. 60. Even assuming the power of the government to regulate the integrity of political discourse, the restrictions in this case carry immeasurably beyond that point. The provisions clearly fall under the ban of the *Talley* case and numerous other decisions which require that legislation impinging upon rights protected by the First Amendment must be narrowly framed to meet the specific abuse and must not "sweep within its orbit" a mass of other matters with which Congress has no power to concern itself. *Loveil* v. *Griffin*, 303 U. S. 444; *Schneider* v. *State*, 308 U. S. 147; *Thornhill* v. *Alabama*, 310 U. S. 88; *Cantwell* v. *Connecticut*, 310 U. S. 296; *U. S.* v. *C. I. O.*, 335 U. S. 106; *Burstyn* v. *Wilson*, 343 U. S. 495; *Staub* v. *City of Baxley*, 355 U. S. 313.

## Conclusion

The importance of the issues raised under the First Amendment can hardly be overstated. The legislation now before the Court infringes upon freedom of expression to a degree never before approached by an act of Congress. The Court must decide whether legitimate activities of voluntary associations can be curtailed and suppressed because the association is otherwise tainted or is influenced by a tainted organization. It must decide whether sweeping restrictions operating to harass free expression of the liberal movement and indeed the whole population will be sustained because they are ostensibly directed at the Communist movement. The case raises a further question of increasing significance in America—the extent to which a growing mass of non-criminal, indirect sanctions can be employed by government to vex and obstruct unorthodox but legitimate political activity.

We respectfuly submit that the issues and the times call for a firm adherence to the fundamental purposes that the First Amendment was designed to serve.

Respectfully submitted,

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# SUPREME COURT OF THE UNITED STATES

No. 12.--OCTOBER TERM, 1960.

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| Communist Party of the United States of America, Petitioner, *v.* Subversive Activities Control Board. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit. |

[June 5, 1961.]

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This is a proceeding pursuant to § 14 (a) of the Subversive Activities Control Act of 1950 to review an order of the Subversive Activities Control Board requiring the Communist Party of the United States to register as a Communist-action organization under § 7 of the Act. The Court of Appeals for the District of Columbia has affirmed the Board's registration order. Because important questions of construction and constitutionality of the statute were raised by the Party's petition for certiorari, we brought the case here. 361 U. S. 951.

The Subversive Activities Control Act is Title I of the Internal Security Act of 1950, 64 Stat. 987, 50 U. S. C. § 781 *et seq.* It has been amended, principally by the Communist Control Act of 1954, 68 Stat. 775, and certain of its provisions have been carried forward in sections of the Immigration and Nationality Act adopted in 1952, 66 Stat. 163, 8 U. S. C. §§ 1182, 1251, 1424, 1451. A brief outline of its structure, in pertinent part, will frame the issues for decision.

Section 2 of the Act recites legislative findings based upon evidence adduced before various congressional committees. The first of these is:

> "There exists a world Communist movement which, in its origins, its development, and its present prac-

tice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization."

The characteristics of a "totalitarian dictatorship," as set forth in subsections (2) and (3) are the existence of a single, dictatorial political party substantially identified with the government of the country in which it exists, the suppression of all opposition to the party in power, the subordination of the rights of the individual to the state and the denial of fundamental rights and liberties characteristic of a representative form of government. Subsection (4) finds that the direction and control of the "world Communist movement" is vested in and exercised by the Communist dictatorship of a foreign country; and subsection (5), that the Communist dictatorship of this foreign country, in furthering the purposes of the world Communist movement, establishes and utilizes in various countries action organizations which are not free and independent organizations, but are sections of a world-wide Communist organization and are controlled, directed, and subject to the discipline of the Communist dictatorship of the same foreign country. Subsection (6) sets forth that

"The Communist action organizations so established and utilized in various countries, acting under such control, direction, and discipline, endeavor to carry out the objectives of the world Communist movement by bringing about the overthrow of existing governments by any available means, including force if necessary, and setting up Communist totalitarian dictatorships which will be subservient to the most powerful existing Communist totalitarian dic-

tatorship. Although such organizations usually designate themselves as political parties, they are in fact constituent elements of the world-wide Communist movement and promote the objectives of such movement by conspiratorial and coercive tactics, instead of through the democratic processes of a free elective system or through the freedom-preserving means employed by a political party which operates as an agency by which people govern themselves."

In subsection (7) it is found that the Communist organizations thus described are organized on a secret conspiratorial basis and operate to a substantial extent through "Communist-front" organizations, in most instances created or used so as to conceal their true character and purpose, with the result that the "fronts" are able to obtain support from persons who would not extend their support if they knew the nature of the organizations with which they dealt. Congress makes other findings: that the most powerful existing Communist dictatorship has caused the establishment in numerous foreign countries of Communist totalitarian dictatorships, and threatens to establish such dictatorships in still other countries (10); that Communist agents have devised ruthless espionage and sabotage tactics successfully carried out in evasion of existing law (11); that the Communist network in the United States is inspired and controlled in large part by foreign agents who are sent in under various guises (12); that international travel is prerequisite for the carrying on of activities in furtherance of the Communist movement's purposes (8); that Communists have infiltrated the United States by procuring naturalization for disloyal aliens (14); that under our present immigration laws, many deportable aliens of the subversive, criminal or immoral classes are free to roam the country without supervision or control (13). Subsection (9) finds that in the United States individuals who

knowingly participate in the world Communist movement in effect transfer their allegiance to the foreign country in which is vested the direction and control of the world Communist movement. Finally, in § 2 (15), Congress concludes that

> "The Communist movement in the United States is an organization numbering thousands of adherents rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such preparations by Communist organizations in other countries have aided in supplanting existing governments. The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States."

Pursuant to these findings, § 7 (a) of the Act requires the registration with the Attorney General, on a form prescribed by him by regulations, of all Communist-action

organizations. A Communist-action organization is defined by § 3 (3) as

> "(a) any organization in the United States (other than a diplomatic representative or mission of a foreign government accredited as such by the Department of State) which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title; and
>
> "(b) any section, branch, fraction, or cell of any organization defined in subparagraph (a) of this paragraph which has not complied with the registration requirements of this title."

Registration must be made within thirty days after the enactment of the Act, or, in the case of an organization which becomes a Communist-action organization after enactment, within thirty days of the date upon which it becomes such an organization; in the case of an organization which is ordered to register by the Subversive Activities Control Board, registration must take place within thirty days of the date upon which the Board's order becomes final. § 7 (c). Registration is to be accompanied by a registration statement, which must contain the name of the organization and the address of its principal office; the names and addresses of its present officers, and of individuals who have been its officers within the past twelve months, with a designation of the office held by each and a brief statement of the functions and duties of each; an accounting of all moneys received and expended by the organization during the past twelve months, including the sources from which the moneys were received and the purposes for which they were

expended; the name and address of each individual who was a member during the past twelve months; in the case of any officer or member required to be listed and who uses or has used more than one name, each name by which he is or has been known; and a listing of all printing presses and machines and all printing devices which are in the possession, custody, ownership, or control of the organization or its officers, members, affiliates, associates or groups in which it or its officers or members have an interest. § 7 (d). Once an organization has registered it must file an annual report containing the same information as is required in the registration statement. § 7 (e). A registered Communist-action organization must keep accurate records and accounts of all moneys received and expended, and of the names and addresses of its members and of persons who actively participate in its activities. § 7 (f).

Section 7 (b) requires the registration of Communist-front organizations, defined as those substantially directed, dominated, or controlled by a Communist-action organization and primarily operated for the purpose of giving aid and support to a Communist-action organization, a Communist foreign government, or the world Communist movement. § 3 (4). The procedures and requirements of registration for Communist fronts are identical with those for Communist-action organizations, except that fronts need not list their non-officer members.[1] In case of the failure of any organization to

[1] By the Communist Control Act of 1954, 68 Stat. 775, the Subversive Activities Control Board is given jurisdiction to determine in proper proceedings, whether any organization is a Communist-infiltrated organization, defined as (A) an organization substantially directed, dominated, or controlled by an individual or individuals who are, or who within three years have been actively engaged in giving aid or support to a Communist-action organization, a Communist foreign government, or the world Communist movement, (B) which organization is serving or within three years has served as a means for giving aid or support to any such organization, gover-

register, or to file a registration statement or annual report as required by the Act, it becomes the duty of the executive officer, the secretary, and such other officers of the organization as the Attorney General by regulations prescribes, to register for the organization or to file the statement or report. § 7 (h). Any individual who is or becomes a member of a registered Communist-action organization which he knows to be registered as such but to have failed to list his name as a member is required to register himself within sixty days after he obtains such knowledge; and any individual who is or becomes a member of an organization concerning which there is in effect a final order of the Subversive Activities Control Board requiring that it register as a Communist-action organization, but which has not so registered although more than thirty days have elapsed since the order became final, is required to register himself within thirty days of becoming a member or within sixty days after the registration order becomes final, whichever is later. § 8. Criminal penalties are imposed upon organizations, officers and individuals who fail to register or to file statements as required:

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ment or movement, or for the impairment of the military strength of the United States or its industrial capacity to furnish logistical or other material support required by its armed forces. Evidentiary matters relevant to this determination are prescribed for the consideration of the Board. Communist-infiltrated organizations are not required to register with the Attorney General, but are required to label their publications mailed or transmitted through instrumentalities of interstate or foreign commerce, and their communications broadcasts, and are deprived of federal income-tax exemption, of certain benefits under the National Labor Relations Act as amended, etc.

Under § 13A (h), added to the Subversive Activities Control Act of 1950 by the Communist Control Act of 1954, 68 Stat. 775, 779, the provisions depriving labor organizations of National Labor Relations Act labor-union benefits apply to labor organizations determined by the Board to be Communist-action or Communist-front, as well as Communist-infiltrated, organizations. 50 U. S. C. §792a (h).

fine of not more than $10,000 for each offense by an organization; fine of not more than $10,000 or imprisonment for not more than five years or both for each offense by an officer or individual; each day of failure to register constituting a separate offense. Individuals who in a registration statement or annual report willfully make any false statement, or willfully omit any fact required to be stated or which is necessary to make any information given not misleading, are subject to a like penalty. § 15.

The Attorney General is required by § 9 to keep in the Department of Justice separate registers of Communist-action and Communist-front organizations, containing the names and addresses of such organizations, their registration statements and annual reports, and, in the case of Communist-action organizations, the registration statements of individual members. These registers are to be open for public inspection. The Attorney General must submit a yearly report to the President and to Congress including the names and addresses of registered organizations and their listed members. He is required to publish in the Federal Register the fact that any organization has registered as a Communist-action or Communist-front organization, and such publication constitutes notice to all members of the registration of the organization.

Whenever the Attorney General has reason to believe that any organization which has not registered is an organization of a kind required to register, or that any individual who has not registered is required to register, he shall petition the Subversive Activities Control Board for an order that the organization or individual register in the manner provided by the Act. §§ 12, 13 (a). Any organization or any individual registered, or any individual listed in any registration statement who denies that he holds office or membership in the registered organization and whom the Attorney General, upon proper request, has failed to strike from the register, may, pursuant to designated procedures, file with the Subversive

Activities Control Board a petition for cancellation of registration or other appropriate relief. § 13 (b).

The Board, whose organization and procedure are prescribed, §§ 12, 13 (d), 16, is empowered to hold hearings (which shall be public), to examine witnesses and receive evidence, and to compel the attendance and testimony of witnesses and the production of documents relevant to the matter under inquiry. § 13 (c), (d). If after hearing the Board determines that an organization is a Communist-action or a Communist-front organization or that an individual is a member of a Communist-action organization, it shall make a report in writing and shall issue an order requiring the organization or individual to register or denying its or his petition for relief. § 13 (g), (j). If the Board determines that an organization is not a Communist-action or a Communist-front organization or that an individual is not a member of a Communist-action organization, it shall make a report in writing and issue an order denying the Attorney General's petition for a registration order, or canceling the registration of the organization or the individual, or striking the name of the individual from a registration statement or annual report, as appropriate. § 13 (h), (i).

The party aggrieved by any such order of the Board may obtain review by filing in the Court of Appeals for the District of Columbia a petition praying that the order be set aside. The findings of the Board as to the facts, if supported by the preponderance of the evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material, the court may order such additional evidence to be taken before the Board, and the Board may modify its findings as to the facts, and shall file such modified or new findings, which, if supported by the preponderance of the evidence, shall be conclusive. The court may enter appropriate orders. Its judgment and decree shall be

final, except that they may be reviewed in this Court on writ of certiorari. § 14 (a). When an order of the Board requiring the registration of a Communist organization has become final upon the termination of proceedings for judicial review or upon the expiration of the time allowed for institution of such proceedings, the Board shall publish in the Federal Register the fact that its order has become final, and that publication shall constitute notice to all members of the organization that the order has become final. §§ 13 (k), 14 (b).

Section 13 (e) of the Act provides that

> "In determining whether any organization is a 'Communist-action organization', the Board shall take into consideration—
>
> "(1) the extent to which its policies are formulated and carried out and its activities performed, pursuant to directives or to effectuate the policies of the foreign government or foreign organization in which is vested, or under the domination or control of which is exercised, the direction and control of the world Communist movement referred to in section 2 of this title; and
>
> "(2) the extent to which its views and policies do not deviate from those of such foreign government or foreign organization; and
>
> "(3) the extent to which it receives financial or other aid, directly or indirectly, from or at the direction of such foreign government or foreign organization; and
>
> "(4) the extent to which it sends members or representatives to any foreign country for instruction or training in the principles, policies, strategy, or tactics of such world Communist movement; and
>
> "(5) the extent to which it reports to such foreign government or foreign organization or to its representatives; and

"(6) the extent to which its principal leaders or a substantial number of its members are subject to or recognize the disciplinary power of such foreign government or foreign organization or its representatives, and

"(7) the extent to which, for the purpose of concealing foreign direction, domination, or control, or of expediting or promoting its objectives, (i) it fails to disclose, or resists efforts to obtain information as to, its membership (by keeping membership lists in code, by instructing members to refuse to acknowledge membership, or by any other method); (ii) its members refuse to acknowledge membership therein; (iii) it fails to disclose, or resists efforts to obtain information as to, records other than membership lists; (iv) its meetings are secret; and (v) it otherwise operates on a secret basis; and

"(8) the extent to which its principal leaders or a substantial number of its members consider the allegiance they owe to the United States as subordinate to their obligations to such foreign government or foreign organization."

Similarly, § 13 (f) enumerates a set of evidentiary considerations to guide the inquiry and judgment of the Board in determining whether a given organization is or is not a Communist-front organization.

When an organization is registered under the Act, or when there is in effect with respect to it a final order of the Board requiring it to register, § 10 (1) prohibits it, or any person acting in behalf of it, from transmitting through the mails or by any means or instrumentality of interstate or foreign commerce any publication which is intended to be, or which it may be reasonably believed is intended to be, circulated or disseminated among two or more persons, unless that publication, and its envelope, wrapper or container, bear the writing: "Disseminated by

[the name of the organization], a Communist organization." Section 10 (2) prohibits the organization, or any person acting in its behalf, from broadcasting or causing to be broadcast any matter over any radio or television station unless the matter is preceded by the statement: "The following program is sponsored by [the name of the organization], a Communist organization." Under § 11 of the Act, the organization is not entitled to exemption from federal income tax under § 101 of the 1939 Internal Revenue Code, and no deduction for federal income-tax purposes is allowed in the case of a contribution to it. It is unlawful for any officer or employee of the United States, or of any department or agency of the United States, or of any corporation whose stock is owned in a major part by the United States, to communicate to any other person whom such officer or employee knows or has reason to believe is an officer or member of a Communist organization, any information classified by the President as affecting the security of the United States, knowing or having reason to know that such information has been classified. § 4 (b). It is unlawful for any officer or member of a Communist organization knowingly to obtain or receive, or attempt to obtain or receive, any classified information from any such government officer or employee. § 4 (c). When a Communist organization is registered or when there is in effect with respect to it a final registration order of the Subversive Activities Control Board, it is unlawful for any member of the organization, knowing or having notice that the organization is registered or the order final, to hold non-elective office or employment under the United States or to conceal or fail to disclose that he is a member of the organization in seeking, accepting, or holding such office or employment; and it is unlawful for him to conceal or fail to disclose that he is a member of the organization in seeking, accepting or

holding employment in any defense facility,[2] or, if the organization is a Communist-action organization, to engage in any employment in any defense facility. It is unlawful for such a member to hold office or employment with any labor organization, as that term is defined in § 2 (5) of the National Labor Relations Act, as amended, 29 U. S. C. § 152, or to represent any employer in any matter or proceeding arising or pending under that Act. § 5 (a) (1). It is unlawful for any officer or employee of the United States or of a defense facility, knowing or having notice that the organization is registered or a registration order concerning it final, to advise or urge a member of the organization, with knowledge or notice that he is a member, to engage in conduct which constitutes any of the above violations of the Act, or for such an officer or employee to contribute funds or services to the organization. § 5 (a) (2). When a Communist organization is registered or when there is in effect with respect to it a final registration order of the Subversive Activities Control Board, it is unlawful for a member of the organization, with knowledge or notice that it is registered or the order final, to apply for a passport, or the renewal of a passport, issued under the authority of the United States, or to use or to attempt to use a United States passport; and, in the case of a Communist-action organization, it is unlawful for any officer or employee of the United States to issue or renew a passport for any individual, knowing or having reason to believe that he is a member of the organization. § 6. Aliens who are members or affiliates of any organization during the time it is registered or required to be registered, unless they establish that they did not have knowledge or reason to believe that it was

[2] Under § 5 (b) the Secretary of Defense is authorized and directed to designate and proclaim a list of facilities with respect to the operation of which he finds that the security of the United States requires the application of the controls prescribed by the Act.

a Communist organization, are ineligible to receive visas, are excluded from admission to the United States, and, if in the United States, are subject to deportation upon the order of the Attorney General. Immigration and Nationality Act, §§ 212 (a)(28)(E), 241 (a)(6)(E), 66 Stat. 163, 185, 205, 8 U. S. C. §§ 1182 (a)(28)(E), 1251 (a)(6)(E).[3] No person shall be naturalized as a citizen of the United States who is or, with certain exceptions, has within ten years immediately preceding filing of his naturalization petition been, a member or affiliate of any Communist-action organization during the time it is registered or is required to be registered, or a member or affiliate of any Communist-front organization during the time it is registered or required to be registered unless he establishes that he did not have knowledge or reason to believe that it was a Communist-front organization. Immigration and Nationality Act, § 313 (a)(2)(G), (H), (c), 66 Stat. 163, 240, 241, 8 U. S. C. § 1424 (a)(2)(G), (H), (c). If any person naturalized after the effective date of the Act[4] becomes within five years following his naturalization a member or affiliate of any organization, membership in which or

[3] The proviso respecting alien members of Communist fronts is: "... unless such aliens establish that they did not have knowledge or reason to believe at the time they became members of or affiliated with such an organization (and did not thereafter and prior to the date upon which such organization was so registered or so required to be registered have such knowledge or reason to believe) that such organization was a Communist organization."

The provisions of § 212 (a)(29)(C) of the Immigration and Nationality Act, 66 Stat. 163, 186, 8 U. S. C. § 1182 (a)(29)(C), also exclude aliens who the consular officer or the Attorney General knows or has reasonable ground to believe probably would, after entry, join, affiliate with, or participate in the activities of an organization registered or required to be registered.

[4] Section 25 of the Subversive Activities Control Act of 1950 provided: "If a person who shall have been naturalized after January 1, 1951," etc.

affiliation with which at the time of naturalization would have precluded his having been naturalized, it shall be considered prima facie evidence that such person was not attached to the principles of the Constitution and was not well disposed to the good order and happiness of the United States at the time of naturalization, and in the absence of countervailing evidence, this shall suffice to authorize the revocation of naturalization. Immigration and Nationality Act, § 340 (c), 66 Stat. 163, 261; 8 U. S. C. § 1451 (c). Service in the employ of any organization then registered or in connection with which a final registration order is then in effect is not "employment" for purposes of the Social Security Act, 70 Stat. 807, 839, 42 U. S. C. § 410 (a)(17), and Chapter 21 of the Internal Revenue Code of 1954, 70 Stat. 807, 839, 26 U. S. C. § 3121 (b)(17), if performed after June 30, 1956.

Section 4 (f) of the Subversive Activities Control Act of 1950 provides that neither the holding of office nor membership in any Communist organization by any person shall constitute *per se* a violation of penal provisions of the Act or of any other criminal statute, and the fact of registration of any person as an officer or member of such an organization shall not be received in evidence against the person in any prosecution for violations of penal provisions of the Act or any other criminal statute. Section 32 provides:

> "If any provision of this title, or the application thereof to any person or circumstances, is held invalid, the remaining provisions of this title, or the application of such provision to other persons or circumstances, shall not be affected thereby."

## I.

This litigation has a long history. On November 22, 1950, the Attorney General petitioned the Subversive Activities Control Board for an order to require that the

Communist Party register as a Communist-action organization. The Party thereupon brought suit in the District Court for the District of Columbia, seeking to have the proceedings of the Board enjoined. A statutory three-judge court denied preliminary relief, *Communist Party of the United States* v. *McGrath*, 96 F. Supp. 47, but stayed answer and hearings before the Board pending appeal. After this Court denied a petition for extension of the stay, 340 U. S. 950, the Party abandoned the suit. Hearings began on April 23, 1951, and ended on July 1, 1952.[5] Twenty-two witnesses for the Attorney General and three for the Party presented oral testimony; 507 exhibits, many of book length, were received; the stenographic record, exclusive of these exhibits, amounted to more than 14,000 pages. On April 20, 1953, the Board issued its 137-page report concluding that the Party was a Communist-action organization within the meaning of the Subversive Activities Control Act, and its order requiring that the Party register in the manner prescribed by § 7.[6] Pending disposition in the Court of Appeals for the District of Columbia of the Party's petition for review of the registration order, the Party moved in that court, pursuant to § 14 (a),[7] for leave to adduce additional evi-

[5] During the course of proceedings befor the Board, the Party had again instituted suit in the District Court to enjoin continuation of the hearings because of alleged bias of the hearing panel and because of the Senate's failure before adjournment to confirm the nomination of one member of the Board, who consequently withdrew from the panel. This second injunction suit was dismissed on motion of the Board on February 15, 1952.

[6] S. Doc. No. 41, 83d Cong., 1st Sess.

[7] Section 14 (a) provides: ". . . If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material, the court may order such additional evidence to be taken before the Board and to be adduced upon the proceeding in such manner and upon such terms and conditions as to the court may seem

dence which it alleged would show that three witnesses for the Attorney General, Crouch, Johnson, and Matusow, had testified perjuriously before the Board. The Court of Appeals denied the motion and affirmed the order of the Board, one judge dissenting. *Communist Party of the United States* v. *Subversive Activities Control Board*, 223 F. 2d 531. Finding that the Party's allegations of perjury had not been denied by the Attorney General, and concluding that the registration order based on a record impugned by a charge of perjurious testimony on the part of three witnesses whose evidence constituted a not insubstantial portion of the Government's case could not stand, this Court remanded to the Board "to make certain that [it] bases its findings upon untainted evidence." 351 U. S. 115, 125.

On remand the Party filed several motions with the Board seeking to reopen the record for the introduction of additional evidence. These were denied. A motion in the Court of Appeals for leave to adduce additional evidence was similarly denied, except that the Board was granted permission to entertain a motion concerning the Party's offer to show that another of the Attorney General's witnesses, Mrs. Markward, had committed perjury with regard to a specified aspect of her testimony. The Board granted the Party's motion; hearings were reopened; Mrs. Markward was cross-examined. Motions by the Party for orders requiring the Government to produce certain documents relevant to the matter of her testimony were denied. On December 18, 1956, the Board issued its 240-page Modified Report. It found that Mrs. Markward was a credible witness, made new findings of fact, and, having expunged the testimony of Crouch, Johnson and Matusow, reaffirmed its conclusion that the

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proper. The Board may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings. . . ."

Party was a Communist-action organization and recommended that the Court of Appeals affirm its registration order. That court, while affirming the Board's actions in other regards, held that the Party was entitled to production of several documents relating to Mrs. Markward's testimony, and remanded. *Communist Party of the United States* v. *Subversive Activities Control Board*, 254 F. 2d 314. The scope of this remand was enlarged by subsequent orders requiring the production of recorded statements made to the F. B. I. by the Attorney General's witness Budenz, the existence of these recordings having become known to government counsel and to the Board only at this time. These statements related to Budenz's testimony at the original hearings concerning the "Starobin letter" and the "Childs-Weiner conversation." Motions pursuant to § 14 (a) seeking the production of other government-held documents—memoranda furnished to the Government by the Attorney General's witness Gitlow, and recordings made by the F. B. I. of interviews with Budenz—were denied.

On second remand, the documents specified by the orders of the Court of Appeals were made available to the Party. The hearing was reopened before a member of the Board sitting as an examiner. When the illness of Budenz made impossible his recall for cross-examination in connection with the documents produced, the examiner denied the Party's motion to strike all of Budenz's testimony, but did strike so much as related to the Starobin and Childs-Weiner matters. After re-evaluating the credibility of Budenz and Markward, and affirming the action of its examiner in striking only that portion of Budenz's testimony which concerned the Starobin letter and the Childs-Weiner conversation, the Board re-examined the record as a whole and issued its Modified Report on Second Remand—its findings of fact consisting principally of the findings contained in its first Modified Report, with a few deletions—again concluding that the

Communist Party of the United States was a Communist-action organization, and again recommending that its order to register be affirmed. The same panel of the Court of Appeals affirmed the order, at the same time denying the Party's motion under § 14 (a) for an order requiring production of all statements made by government witnesses and now in the possession of the Government, 277 F. 2d 78, the dissenting judge again dissenting in part. It is this decision which is now before us for review.

II.

The Communist Party urges, at the outset, that procedural rulings by the Board and the Court of Appeals constitute prejudicial error requiring that this proceeding be remanded to the Board. Before reaching the statutory and constitutional issues which this case presents, we must consider these rulings.

A. *The Board's Refusal to Strike All Testimony of the Witness Budenz.* At the original hearing before the Board, Budenz testified during almost two days on direct examination and five days on cross-examination. His testimony fills more than 700 pages. Of these, eight pages of direct and thirty pages of cross-examination relate to the Starobin letter; two pages of direct and ten pages of cross-examination relate to the Childs-Weiner conversation. Motions to require production of reports or statements by Budenz to the F. B. I. on these two subjects were denied at that time by the Board. After this Court's remand, the motions were repeated and again denied. The Court of Appeals affirmed the denial of the motions on the ground that there did not then appear to be in the possession of the Government any such reports or statements. Subsequent to the court's remand on other grounds, however, government counsel for the first time discovered in the F. B. I. files mechanical transcriptions of interviews with Budenz concerning the Starobin and

Childs-Weiner matters. Counsel reported this discovery to the Court of Appeals, which thereupon enlarged the scope of remand to require the production of all "statements," as defined in 18 U. S. C. § 3500, made by Budenz to the F. B. I. relating to these matters. The question of the propriety of these various rulings on the Party's motions for production is not now before us.

After an inspection of the F. B. I. recordings *in camera* by a member of the Board sitting as an examiner, excerpts relating to the Starobin letter and Childs-Weiner conversation were furnished to the Party. The Party sought to recall Budenz for further cross-examination in light of these statements. Upon receipt of a letter from Budenz's personal physician stating that, because of a serious heart condition, it would imperil Budenz's health to appear, the member-examiner caused an independent physical examination of the witness by a heart specialist. The specialist confirmed that cross-examination might seriously affect Budenz's health or cause his death, and counsel for the Government and the Party agreed that the witness was unavailable for recall. The Party then moved that all Budenz's testimony be stricken, on the grounds that its unreliability was shown by his prior statements and that cross-examination which, with the aid of the recordings produced, might permit the Party to discredit Budenz entirely, had been rendered impossible by delay for which the Government was responsible. The examiner denied the motion, but granted an alternative motion to strike so much of Budenz's testimony as concerned the Starobin letter and the Childs-Weiner conversation. The Board and the Court of Appeals have affirmed these rulings. The Party argues that they are error.

The "Childs-Weiner conversation" concerns an interview in New York at which Budenz, Childs and Weiner discussed the financing of the Midwest Daily Record, a Party newspaper then edited by Budenz. At the hearing before the Board, Budenz testified that Childs had asked

Weiner if money couldn't be got from abroad, and that Weiner replied that normally it might, but that the channels of communication had been broken for the time being, that perhaps they might be re-established so that money could come. Budenz testified that although it was not definitely stated what Weiner meant by "abroad," Budenz's familiarity with the term as used by Party members led him to believe that it meant "from Moscow." In the recordings produced by the Government made during a series of F. B. I. interviews in 1945, Budenz did not mention this incident, although he did advert to the financing problems of the Daily Record and to trips which he made to New York to seek funds for it. Asked whether he had seen any indication of funds coming from Russia, Budenz replied: "The only indication would be is that in addition to Krumbein as Treasurer, Weiner still maintains a certain general supervisory control over finances." Budenz explained that Weiner was "trusted financially," and again mentioned that Weiner's being "a super financial person" was "indicative" of the source of money. He did not relate any specific conduct of Weiner's which rendered his status "indicative." In an interview in 1946, as reported in an office memorandum prepared by an F. B. I. agent, Budenz stated that he "could recall only one instance wherein it was indicated that the Soviet Union might be sending money": this was the Childs-Weiner conversation in New York. Childs had asked Weiner, the memorandum stated, whether he didn't expect a consignment "from across the sea?"

> ". . . Weiner immediately changed the subject matter, indicating that he did not want to discuss the question of transmission of Soviet funds in the presence of Budenz, even though Budenz was a trusted Communist. Budenz concluded from the remark that was made that funds were actually being sent to this country at that time by the Soviet Union for propaganda purposes."

An F. B. I. document based on an interview with Budenz in 1947 describes the incident as follows:

> ". . . Childs suggested that Weiner try to get some money from Moscow to finance the paper. Weiner stated that he had temporarily lost his contacts in Moscow, hence, he could not do anything."

Finally, in a 1950 interview, as recorded in an office memorandum, Budenz related:

> ". . . Childs asked that funds be advanced him by Weiner from the reserve fund [large sums of money held in bank accounts "in reserve for Moscow" or earmarked for Communist organizations] and Weiner advised that he didn't have any at that time as his communication system had temporarily broken down. Budenz took this to mean that Weiner's source of supply was from foreign countries, particularly Russia."

The "Starobin letter" was an alleged communication from Starobin, a Daily Worker correspondent at the United Nations Conference in San Francisco in 1945, which Budenz had opened and of which he had read only a part before it was taken from him and transmitted to certain higher-ups at the Daily Worker. The letter was purportedly received at about the time of the appearance in a French Communist journal of an article by Jacques Duclos, severely criticizing the reorganization of the Communist Party of the United States as the Communist Political Association under Earl Browder in 1944, a reorganization apparently marked by an ideological shift away from the more revolutionary Marxist-Leninist principles, and toward a doctrine of peaceful Soviet-American coexistence. At roughly the same time, Budenz was instructed to reprint the Duclos article in the Daily Worker; shortly thereafter, the Communist Political Association was reconstituted as the Communist Party

U. S. A., Browder was ousted, and the Party, in the words of its new national chairman, William Z. Foster, "suddenly reverted to its basic Communist principles." Budenz testified at the hearing that "In this letter Mr. Starobin stated that D. Z. Manuilsky [a Ukrainian delegate to the conference and an important Communist figure] . . . had expressed indignation at the fact that the American Party had not criticized the American leaders, that is, in the government, more severely, and that the American Party should observe more carefully the guidance and the counsel of the French Communists." The F. B. I. recordings produced pursuant to the remand order of the Court of Appeals show that in 1945 interviews with the F. B. I., Budenz had spoken of "private communications sent from Starobin to us," in connection with the ideological shift which marked the end of the Browder "collaborationist" policy. He did not then speak specifically of the Starobin letter as he described it in his testimony. In response to a question by his F. B. I. examiner, Budenz agreed that Starobin himself was not an important enough figure to inaugurate a change of policy. This colloquy followed:

> "Q. Do you think then that the instructions relative to this change of policy that Starobin and Fields must have received came from the Russian delegation? Oh, you said maybe Manuilsky, the Ukrainian delegate? A. Sure, sure, I mean—after all, they got the atmosphere there. In fact I mentioned Manuilsky very much, because definitely he is a figure in the CI.
>
> "Q. He certainly is. A. He used to lay down the law like a general, you know, to his troops. . . ."

In 1946, Budenz reported to the F. B. I. that in a letter from the San Francisco Conference, Starobin advised that "the French comrades have the line and the support of the Soviet Union—and the French comrades blasted

Stettinius and the United States Delegation, and therefore Starobin directed that the Party in this country should immediately blast Stettinius and the United States Delegation.' Budenz stated that in this letter Starobin inferred [*sic*] that he and/or his associates at the Conference had conferred with Manuilski regarding this question, and that the changed policy was predicated upon Manuilski's instructions as well as on advice received from French Communists at UNCIO." Testifying in that same year before the House Committee on Un-American Activities, Budenz quoted the Starobin letter as relating that the French Comrades asserted there should be more of an attack upon Stettinius by the American Communists, and that this was likewise the opinion of Comrade Manuilsky.

In ruling on the Party's motion to strike all of Budenz's testimony because of his unavailability for cross-examination in light of these earlier statements, the Board took account not only of the similarities and variations of the witness's several accounts of the Starobin and Childs-Weiner matters, but also of Budenz's responses under extensive cross-examination on all subjects of his testimony at the initial hearing; of the substantial corroboration of Budenz's testimony by other evidence in the administrative record; and of the failure of the Party to attempt to rebut that testimony, which was specific and detailed. The Board found that the prior statements produced did not demonstrate, in the context of the "pertinent circumstances of record," that Budenz's Starobin and Childs-Weiner testimony was deliberately false, and also that, assuming *arguendo* such testimony were false, all Budenz's evidence would not thereby be discredited. It concluded that "the fair disposition of the question" was to strike Budenz's testimony only on the two subjects as to which failure of timely production of prior statements had deprived the Party of effective cross-examination.

The Court of Appeals, independently reviewing the record, affirmed the Board's refusal to strike, finding that the discrepancies among the various versions of the Starobin-letter and Childs-Weiner-conversation incidents "are not such as to indicate perjury, much less the habit of perjury essential to be shown to taint all the witness's testimony." 277 F. 2d, at 82.

The considerations relevant to the Party's contention that all of Budenz's testimony must be expunged are, first, the extent to which his prior statements to the F. B. I., compared with his testimony in the present proceedings discredit him as a witness and impugn his testimony in its entirety, and, second, the extent to which, on the whole record, it appears that the inability to cross-examine Budenz in light of those prior statements had prejudiced the Party. These are questions which can best be answered by those entrusted with ascertaining the fact; that is, the tribunal that conducts the hearing and passes judgment on the reliability of the witness in light of his total testimony and its relation to the more than 14,000 pages, exclusive of exhibits, of the administrative transcript. Wide discretion would be left to a trial judge and not less must be left to an agency like the Board in a matter of this kind—a matter of adjusting the process of inquiry to the exigencies of a particular situation as they appear to administrators immediately acquainted with the course of proceedings. On this record we cannot say that both the hearing examiner and the Board abused that discretion, or that the Court of Appeals erred in affirming their rulings. In saying this, we do not ignore the argument of the Party that the deprivation of its opportunity to cross-examine Budenz on the basis of his prior statements is the "fault" of government counsel. Suffice that we find no basis for overruling the determinations below that the Government is not to be charged with an attempt unfairly to hamper the Party's presentation of

its case. We would not, therefore, be justified in holding that evidence should have been struck which the Board found otherwise probative, inherently believable, and not discredited despite five days of cross-examination by the Party, and which the Court of Appeals found unexceptionable.

B. *The Board's Refusal to Order Production of the Gitlow Memoranda.* In 1940 Gitlow, who had been during the years prior to 1929 a high official of the Communist Party, turned over to the F. B. I. a quantity of documents and papers pertaining to the Party. Shortly thereafter he dictated a series of memoranda explaining and interpreting them. At the original hearing in the present proceeding, Gitlow, testifying for the Attorney General, identified a number of these documents, which were then put in evidence, and described their contents and significance. The Party moved the Board for an order requiring that the Attorney General produce the explanatory memoranda. The motion was denied. In its first petition in the Court of Appeals to review the order of the Board, the Party assigned the Board's refusal to order the production of documentary evidence as error; but it did not mention the Gitlow memoranda in the argument portion of its brief, nor, apparently, in oral argument. The point was not among the questions presented in the petition for certiorari in this Court in 1955 and was not relied on in the briefs here. After our remand, the Party again moved the Board to order production of the memoranda. The Board again refused. The Court of Appeals, in its second opinion reviewing the Board proceedings, held that the ruling by the Board declining to order production could not be corrected on petition to review the Board's order. Relying on *Consolidated Edison Co.* v. *Labor Board*, 305 U. S. 197, the court said that the Party's exclusive remedy was to move the Court of Appeals, under § 14 (a) of the

Act, for leave to adduce additional evidence, and that failure to make such a motion at the time when the Board refused to order the documents produced barred the Party from later challenging the action of the Board. After the second remand, the Party did make a motion pursuant to § 14 (a) seeking the Gitlow memoranda. This the court refused, holding that the Party's procedural error could not be cured *nunc pro tunc*.

We may assume *arguendo*, without deciding the point, that the Board erred in refusing to order the Gitlow memoranda produced at the original hearing. But we do not reach the question of the applicability of the *Consolidated Edison* case to this situation. It is too late now for the Party to raise this error of the Board. That error could have been raised here five years ago. Had it been raised then, we could have ordered it cured at the time of the first remand to the Board. The demands not only of orderly procedure but of due procedure as the means of achieving justice according to law require that when a case is brought here for review of administrative action, all the rulings of the agency upon which the party seeks reversal, and which are then available to him, be presented. Otherwise we would be promoting the "sporting theory" of justice, at the potential cost of substantial expenditures of agency time. To allow counsel to withhold in this Court and save for a later stage procedural error would tend to foist upon the Court constitutional decisions which could have been avoided had those errors been invoked earlier.[8] We hold that the Communist

[8] A totally different situation was presented in *Ballard* v. *United States*, 329 U. S. 187, in which it was held that a litigant who had been a party respondent in a case previously here on certiorari had not lost his right to complain of error in the selection of a jury by failing to argue the error as an independent ground for sustaining the

Party abandoned its claim of error in the Board's denial of its motion to require the Gitlow documents produced, by failing to raise that question in its previous petition for certiorari here. Of course, it could not resurrect that

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first decision of the Court of Appeals, holding in his favor on other grounds.

Reference is also made to cases in which this Court has exercised its power to control the course of litigation immediately before it—a power which finds an appropriate exercise in the avoidance of premature constitutional adjudication. But the rule which petitioner urges, which would permit saving for a possible later stage in the proceedings errors available but not raised in this Court on review of administrative action, far from enhancing the Court's ability to give effect to the policy of deferring unnecessary constitutional decision, would impede that policy. For it would allow the agencies and lower courts, after our remand, to consider potentially dispositive contentions which, had they been brought to our attention, might have derailed issues on which decision turned.

The reason for demanding that all available issues be raised in the orderly course of administrative review proceedings is made particularly evident by the circumstances of this case. This was a litigation already five years old when it first came here. Unusually extensive hearings and argument had been had before the Board and exhaustive briefing and argument before the Court of Appeals. The petition for certiorari, a document of ninety-three pages plus appendices, presented ten major questions and innumerable subsidiary points. Yet the matter of the Gitlow memoranda, which it is now argued looms so large in the context of this extraordinarily lengthy and complex proceeding, was not raised, and not raised by highly experienced lawyers who vigorously contended every step of the litigation. We remanded on other grounds and now—after five more years have passed, after the Board and the Court of Appeals have each twice more reconsidered this steadily growing record—we are asked to reverse on a ground which the Party had every opportunity to bring here but which it abandoned. To ignore the abandonment would be a most artificial, decision-shrinking abuse of the wise rule of putting off decisions of constitutional scope. Avoidance of such decisions, however compelling a policy within the limitations of ordered judicial regularity, ought not to be countenanced by grafting an *ad hoc* exception onto a generally applicable rule of appellate procedure and permitting particular litigants to avail themselves of otherwise uncog-

claim by repeating the same motion before the Board after our remand.

C. *Denial by the Court of Appeals of the Party's Motions for Orders Requiring Production of All Statements by the Witness Budenz, and of All Statements by All Witnesses for the Attorney General.* On February 14, 1958, after this case had been remanded to the Board for the second time, and more than five and a half years after the termination of the initial hearings, the Party moved the Court of Appeals, under § 14 (a), for an order requiring production of all recordings, notes and memoranda made by the F. B. I. of interviews with Budenz, insofar as these related to his testimony at the hearings. On April 14, 1959, after the Board had considered the record for the third time and written its third opinion, the Party filed a second motion in the Court of Appeals, seeking production of all statements by all government witnesses relating to their testimony. A motion of similar scope had been made before the Board on second remand in December 1958. The court denied these motions as untimely. We cannot say that in doing so it abused its discretion.

With reference to the Budenz records, the Party seeks to excuse its delay by pointing out that not until early in February 1958, did it discover that the F. B. I. had made mechanical transcriptions of interviews with this witness. The Party was misled, it argues, at the time of the original Board hearings, into believing that no prior statements by Budenz were in the possession of the Government. The short answer to this may be found in the transcript of Budenz's replies to questions of counsel for

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nizable points. No decision of this Court can be found which in similar circumstances authorizes disregard of all that has transpired over ten years of litigation so as to allow petitioner to make waste the half of it by resuscitating a long-stale claim.

the Party during his testimony on cross-examination. Although the Party might not have known of the disc recordings made of the Budenz interviews, it knew that notes or records had been taken of those interviews by the

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"Q: Did you give [the Starobin letter incident] to . . . the FBI.

"A: I am satisfied I gave it to the FBI. I couldn't say definitely, but the FBI question me about everything I write and say, and also about many other things. They question me, and I answer their questions.

"Q: Were your answers reduced in writing?

"A: As a matter of fact, I do know now, since you mention it, that I did give this to the FBI.

"Q: In writing?

"A: No, not in writing.

"Q: Was it taken down by a stenographer?

"A: No, not by a stenographer. They never do that, except in rare cases.

"Q: Was a report written up and then shown to you afterwards?

"A: No. That never happens.

"Q: So all you did was simply have an oral conversation about this incident?

"A: Yes, that is all.

"Q: Was it recorded?

"A: I judge so. It was taken down.

"Q: It was taken down?

"A: Yes. I mean, it wasn't by a stenographer, but by an FBI agent.

"Q: It was taken down by an agent?

"A: Right.

"Q: Was it taken down in shorthand or longhand, or what?

"A: Longhand.

"Q: When?

"A: That I don't know. The reason I recall it, counselor, if I may say so, is because in connection with my book, everything that was in my book was gone over by the FBI, either before or after its publication . . . .

"When I say 'gone over,' I mean the information was given to them."

F. B. I. Indeed the Party sought production of such reports, insofar as they related to the Starobin letter and the Childs-Weiner conversation, by motions made to the Board at the time Budenz testified. Had similar motions been made with regard to other aspects of Budenz's testimony, or with regard to other witnesses, and had the Board denied those motions, this issue could have been brought here on review five years ago.[10] If production had been ordered, presumably all statements by Budenz would have been found. Statements by others, if they existed, would have been found. We cannot say that the Court of Appeals was clearly wrong in holding that at the time these motions were made it was too late to remand to the Board and require production of documents in order to reopen cross-examination of witnesses who testified in 1951 and 1952.

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[10] The Party did move, at the original Board hearing, for the production of certain reports by particular government witnesses which, it may be, would be comprehended among those sought by its 1959 motion for "All statements . . . which were made by witnesses who testified for the Attorney General at the administrative hearing and which relate to the subject matters of their testimony." As in the case of the Gitlow memoranda, the question of the Board's denials of these motions was not raised in the petition for certiorari here in 1955, and has thus been waived. We note that one such motion was adverted to in a footnote in the Party's brief in this Court at that time, in connection with its argument that the Board erred in relying on the test mony of Scarletto; this and a similar footnote reference to denial of the Party's motion for production of statements of Budenz concerning the Starobin letter were the only mentions in the Party's 224-page brief of motions for production denied by the Board. These were plainly insufficient to raise the issue here. Supreme Court Rules 23, subd. 1 (c), 40, subd. 1 (d)(2).

Nor can we agree that the Party was excused from the necessity of making appropriate motions before the Board, respecting documents which it wanted produced, because similar motions with respect to other documents had previously been denied. Especially in administrative proceedings of this length and complexity, it is important that a party bring his particular requests explicitly to the attention of the agency and the reviewing courts.

## III.

We come to the Communist Party's contentions that the Board and the Court of Appeals erred in their construction of the Act and in their application of it, on the facts of this record, to the Party. It is argued that both elements of the statutory definition of a Communist-action organization in § 3 (3) of the Act—what have come in the course of this litigation to be known as the "control" and "objectives" components—were misinterpreted below; that the Board misconceived the nature of each of the eight evidentiary considerations directed to its attention by § 13 (e) as pertinent to its determination whether an organization is or is not a Communist-action organization; that the Board misapplied the phrase "world Communist movement" in § 2; and that the Board erred in taking account, as relevant to that determination, of conduct of the Party prior to the date of the Act. The Court of Appeals is said to have erred in failing to remand to the Board after striking one of its subsidiary findings as unsupported by the evidence. Finally, it is contended, the record as a whole does not support by the preponderance of the evidence, as required by § 14 (a), the conclusion that the Party is a Communist-action organization within the correct meaning of that phrase.

A. *The "Control Component."* Under § 3 (3) of the Act an organization cannot be found to be a Communist-action organization unless it is "substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement . . . ." The Party asserts that this requirement is not satisfied by any lesser demonstration than that the foreign government or foreign organization controlling the world Communist movement exercises over the organization an enforceable, coercive power to exact compliance with its demands. The Court of Appeals dis-

agreed, holding that in the circumstances of this record a consistent, undeviating dedication, over an extended period of time, to carrying out the programs of the foreign government or foreign organization, despite significant variations in direction of those programs, was sufficient. The Subversive Activities Control Board has not, in its reports, articulated any other understanding of the standard, and since its final factual determination was made after the Court of Appeals had put this definitive gloss on § 3 (3), we must attribute to it acceptance of the court's interpretation.

We agree that substantial direction, domination, or control of one entity by another may exist without the latter's having power, in the event of non-compliance, effectively to enforce obedience to its will. The issue which the Communist Party tenders as one of construction of statutory language is more sharply drawn in the abstract sphere of words than in the realm of fact. It is true that the Court of Appeals compendiously expressed its understanding of the Party's conduct over a course of thirty years, as revealed by this record and as found by the Board, in terms of "voluntary compliance." Opposing this phrase, the Party insists that the statute demands "enforceable control." But neither of these verbalisms was used by Congress, and neither has an invariant content. Nor has the language of the statute: "substantially directed, dominated, or controlled." Each of these notions carries meaning only as a situation in human relationships which arises and takes shape in different modes and patterns in the context of different circumstances.

The statute, as amended, uses the same phrase three times. A Communist-action organization must be one substantially directed, dominated, or controlled by a foreign government or foreign organization of a designated kind. A Communist-front organization must be one substantially directed, dominated, or controlled by a

Communist-action organization. § 3 (4). A Communist-infiltrated organization must be one substantially directed, dominated, or controlled by an individual or individuals engaged in giving aid or support to a Communist-action organization, Communist foreign government, or the world Communist movement. § 3 (4A). Variations of this language also occur. Subsection 13 (e)(1) refers to "the foreign government or foreign organization in which is vested, or under the domination or control of which is exercised, the direction and control of the world Communist movement . . . ." Subsection 2 (5) relates that the action organizations established by the Communist dictatorship in which is vested the direction and control of the world Communist movement are sections of a world-wide Communist organization and are "controlled, directed, and subject to the discipline of [that] . . . Communist dictatorship . . . ." Manifestly, the various relationships among nations, organizations, movements and individuals of which the Act speaks will take a multiplicity of forms. A foreign government "dominates" or "controls" the "direction" of the world Communist movement through very different means and in very different ways than one organization "dominates" or "controls" another, or than an individual "dominates" or "controls" an organization. These differences do not deprive the concepts "domination" and "control" of ample meaning. Throughout various manifestations these concepts denote a relationship in which one entity so much holds ascendancy over another that it is predictably certain that the latter will comply with the directions expressed by the former solely by virtue of that relationship, and without reference to the nature and content of the directions. This is the sense we find in the opinions expounding the decisions of the Court of Appeals. The reports of the Board evidence a similar understanding.

Nothing in the Committee Reports pertinent to the Internal Security Act of 1950, or in what was said by Congressmen in charge of its passage, affords a gloss on "substantially directed, dominated, or controlled," as used in § 3 (3). There is nothing to indicate that Congress meant that phrase to have any arcane, technical meaning. Its reach is suggested, however, by comparison with a cognate enactment, the so-called Voorhis Act of 1940, 54 Stat. 1201, now 18 U. S. C. § 2386, requiring the registration with the Attorney General of, *inter alia*, certain organizations "subject to foreign control." [11] Section 1 (e) of that Act, 54 Stat. 1202, provided that

> "An organization shall be deemed 'subject to foreign control' if (1) it solicits or accepts financial contributions, loans, or support of any kind, directly or indirectly, from, or is affiliated directly or indirectly with, a foreign government or a political subdivision thereof, or an agent, agency, or instrumentality of a foreign government or political subdivision thereof, or a political party in a foreign country, or an international political organization, or (2) its policies, or any of them, are determined by or at the suggestion of, or in collaboration with, a foreign government or political subdivision thereof, or an agent, agency, or instrumentality of a foreign government or a political subdivision thereof, or a political party in a foreign country, or an international political organization."

The Committee Report on the House bill from which the Subversive Activities Control Act derived indicates that the enactment was occasioned, in part, by the inadequacy of existing legislation. Although the Voorhis Act had

[11] A Committee Report pertinent to that Act, H. R. Rep. No. 2582, 76th Cong., 3d Sess. 1, described the organizations at which it was directed as those "substantially controlled or directed by a foreign power . . ."

been directed "against both Nazis and Communists," it had "proved largely ineffective against the latter, due in part to the skill and deceit which the Communists have used in concealing their foreign ties." H. R. Rep. No. 2980, 81st Cong., 2d Sess. 2; see also H. R. Rep. No. 1844, 80th Cong., 2d Sess. 5. It is reasonable to infer that Congress intended the registration provisions of the 1950 Act to be applicable, at the very least, to organizations concerning which a showing of "control" was made which would have brought the organization under the registration provisions of the Voorhis Act. And the 1940 Act, by its explicit definitions, did not require what the Party signifies by "enforceable" control.

The subjection to foreign direction, domination, or control of which § 3 (3) speaks is a disposition unerringly to follow the dictates of a designated foreign country or foreign organization, not by the exercise of independent judgment on the intrinsic appeal that those dictates carry, but for the reason that they emanate from that country or organization. No more apt term than domination or control could be used to describe such a relationship. The nature of the circumstances which bind an organization to unwavering compliance may be diverse. They may consist, of course, of the sort of enforceable power over the organization's members which an employer has over an employee—the power to compel obedience by threat of discharge. But they may also consist of other incidents which assure that the organization will unquestioningly adhere to the line of conduct appointed for it. Some of these incidents are suggested by the evidentiary considerations which Congress has enumerated in § 13 (e) of the Act—foreign financial or other aid whose menaced withdrawal may serve as as instrument of influence, § 13 (e)(3); subjection to, or recognition of, personal disciplinary power of the designated foreign organs by the leaders or a sub-

stantial number of the members of an organization, § 13 (e)(6); obligations in the nature of allegiance owed to those foreign organs by an organization's leaders or a substantial number of its members. § 13 (e)(8). Other incidents may involve other forces felt by individuals or groups to be compelling: a recognition of mastery, for example, which makes criticism itself a severe sanction. The existence of direction, domination, or control in each instance is an issue of particular fact. The question whether in the case of a given organization such a compulsion or impulsion arises from the complex of ties which link it to a foreign government or organization that it will, because of those ties alone, adhere in its conduct to decisions made for it abroad, is one which Congress has committed, in the first instance, to an expert trier of fact. Since the determination that an organization is or is not a Communist-action organization is largely a matter of the working out of legislative policy in multiform situations of potentially great variety, the "construction" of the statute which ensues from its application to particular circumstances by the administrative agency charged with its enforcement is to be given weight by a reviewing court. Cf. *Labor Board* v. *Hearst Publications, Inc.*, 322 U. S. 111. Our decision in *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, is especially apposite here. The case involved the question whether one communications corporation controlled another for purposes of § 2 (b) of the Communications Act of 1934, 48 Stat. 1065, providing that the Federal Communications Commission should not have jurisdiction over any carrier "engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by . . . such carrier." Refusing to set aside an order based on the Commission's finding that the New York Telephone Company controlled the Rochester Telephone Corporation, we said: "Invest-

ing the Commission with the duty of ascertaining 'control' of one company by another, Congress did not imply artificial tests of control. This is an issue of fact to be determined by the special circumstances of each case. So long as there is warrant in the record for the judgment of the expert body it must stand." *Id.*, at 145–146.

While under § 14 (a) of the Subversive Activities Control Act, providing that the findings of the Board as to facts shall be conclusive if supported by the preponderance of the evidence, a stricter standard of re-examination is set than that to which administrative findings are ordinarily subject, we cannot in this case say that the Board—and, in affirming its order, the Court of Appeals—have misapplied the Act. Neither its written report nor the opinion of the court below support the Party's interpretation of them. They do not hold, as the Party suggests, that conformity which stems from nothing more than ideological agreement satisfies the requirements of § 3 (3). What they do hold is that "the definition of a Communist-action organization was not intended by the Congress to be restricted to organizations which are subject to enforceable demands of the Soviet Union . . . . An organization or a person may be substantially under the direction or domination of another person or organization by voluntary compliance as well as through compulsion. This is especially true if voluntary compliance is simultaneous in time with the direction and is undeviating over a period of time and under variations of direction. If the Soviet Union directs a line of policy and an organization voluntarily follows the direction, the terms of this statutory definition would be met." 254 F. 2d 314, 319.

This must be read in the context of the facts of record in this proceeding. Since the determinative issue of the meaning of "substantially directed, dominated, or controlled," and the constitutional questions which the con-

struction of this statutory language raises, are to be determined essentially on the basis of the assignment of legal significance to the Board's findings of fact, those findings must be allowed to speak for themselves. They can neither be summarized nor fairly conveyed in bits and pieces. Their large scope and critical importance necessitates and justifies burdening this opinion with more extensive quotation than is customary in cases where summaries of the record may more meaningfully be made. The Board wrote:

> "The present world Communist movement was first manifested organizationally by the formation in March of 1919 in Moscow, Russia, of the Third Communist International. As this event is recorded in the *History of the Communist Party of the Soviet Union* . . . , it was 'on the initiative of the Bolsheviks, headed by Lenin,' that the first Congress of Communist Parties was called in Moscow, the work of which 'was guided by Lenin'; and, 'Thus was founded an international revolutionary proletarian organization of a new type—the Communist International—the Marxist-Leninist International.'
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> . . . . . .
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> "One year later, July 17–August 7, 1920, the Second Congress of the Communist International adopted and promulgated its *Theses and Statutes*, setting forth its aims and purposes as later herein detailed, and described itself as *'a single universal Communist party, of which the parties operating in every country form individual sections.'* . . .
>
> "A 'Statute' of the Comintern insured that it would serve the interests of Russia by providing:
>
> " 'The Communist International fully and unreservedly upholds the gains of the great proletarian revolution in Russia, the first victorious socialist

revolution in the world's history, and calls upon all workers to follow the same road. The Communist International makes it its duty to support with all the power at its disposal every Soviet Republic, wherever it may be formed.' . . .

"The Communist International was in fact a world Communist Party, organized and controlled as to policies and activities by the Soviet Union, consisting of the various Communist Parties of the countries throughout the world, which constituted its sections. With headquarters in Moscow, it embodied an elaborate organizational structure, related to implementing the basic strategy and tactics of Marxism-Leninism. . . . There was no North American Bureau, but the Political Bureau of respondent acted in that capacity, supervising the Communists in Canada, Cuba, Mexico, and others down to the Panama Canal.

"The Soviet Union was the leader of the Communist International, exercising control over its policies and activities. The Communist Party of the Soviet Union had five votes to one each for the other larger Parties in the Executive Committee of the Comintern (ECCI), which respondent in a 1934 resolution acknowledged to be 'the general staff of the world revolutionary movement giving unity and leadership to the Communist Parties of the world.' . . . The Government of the Soviet Union financed the Comintern. All of the heads of the Comintern who were identified in the record were leading members of the Communist Party of the Soviet Union. . . .

"Respondent joined this international Communist organization shortly after it was constituted and admittedly until 1940 participated therein . . .

[R]espondent recognized that its membership therein subordinated any national interests. . . .

"Further, that complete and total allegiance and dedication was demanded in affiliation with the Comintern, and was acknowledged and in turn stressed by respondent, is also shown by its 'Program': '. . . The Communist International is an organization for waging class warfare for the liberation of the working class; there can be no reservations in endorsement and affiliation with it. Loyalty "with reservations" is treachery. Endorsement and defense of Soviets in Russia, with failure to advocate the Soviet form of proletarian dictatorship in the United States is hypocrisy.' . . .

"Fundamental to the world Communist movement were the 21 'Conditions of Admission to the Communist International' promulgated in its *Theses and Statutes* in 1920. . . . Uncontradicted testimony and documents establish that these 'Conditions' were endorsed and accepted by respondent and were binding upon it.

". . . Condition No. 12 required the party to be formed upon the basis of democratic centralism, stressing that only when possessed of an 'iron discipline' . . . will it be able to fully and thoroughly carry out its duty as part of the world Communist movement. Condition No. 20, in order to aid control, required that two-thirds of all committee members and members of central institutions consist of comrades who have made open declarations as to their desire to join the Comintern. Condition No. 11 required an inspection of personnel and the removal

of unreliable elements from parliamentary party fractions, and Condition No. 13 required a systematic check of personnel to remove petty bourgeois elements which may have infiltrated a party. Condition No. 16 made binding upon the party all resolutions of the Comintern, and Condition No. 21 made liable to exclusion from the party anyone who rejected the theses and conditions of the Third Communist International.

"As to specific policies and programs, Condition No. 15 required the maintenance of a program in accordance with the resolutions of the Comintern." . . .

"Another aspect of the 'Conditions' was to make the allegiance of a section party and its members to the Comintern, and hence to the Soviet Union, paramount to any other. For example, Condition No. 14 obligates every member party of the Comintern 'to render every possible assistance to the Soviet Republics in their struggle against all counter-revolutionary forces.' . . . It directs the member parties to use legal and illegal means to obstruct military efforts against the Soviet Union. . . .

"These 21 'Conditions' were never changed by the Communist International and were enforced and implemented by respondent and used to educate its members. Considerable documentary material of record also established that respondent fully complied with and fulfilled the requirements of membership in the Communist International and faithfully followed and carried out its instructions and directives.

"The Communist International was formally dissolved as such in 1943, at which time the United States and the Soviet Union were military allies. One reason given for this formal dissolution by Stalin was that it would remove the foundation for 'fascist' charges that the Soviet Union was meddling in the internal affairs of other nations. . . .

"The world Communist movement, under the hegemony of the Soviet Union, continued, notwithstanding the 'dissolution' of its organizational form embodied in the Communist International. . . . [T]he world Communist movement, intact in the basic orientation, policies and programs discussed above, continued via the Cominform and by Communist Parties not formally affiliated with it, such as respondent.

"Respondent, although never formally a member of the Cominform, has . . . remained dedicated to 'proletarian internationalism,' Marxism-Leninism, and the policies and programs of the world Communist movement as continued by the Cominform.

"We have previously set forth that respondent joined the Communist International shortly after it was constituted and admittedly participated therein until 1940. Respondent offered no substantial evidence concerning this period of its activities, contending that this period is irrelevant, primarily because of an announced disaffiliation from the Communist International in 1940. The circumstances of the disaffiliation . . . show that there was no fundamental or significant change in respondent's relationship to the world Communist movement. . . .

"The oral testimony and official documents of respondent and of the Comintern show that respondent was under the complete control and direction of the Comintern. Gitlow was a top official of respondent and in the late 1920's a member of the Executive Committee of the Communist International. He stated, unequivocally, that the Comintern controlled all major policies of respondent. Kornfeder, also a functionary of respondent and who attended the Sixth Congress of the Comintern held in Moscow, corroborated this stating that he knew of no instance during his experience, which lasted until 1934, when respondent deviated from Comintern instructions. Nowell, based on personal experience as a member of respondent and personal contact with the Comintern, as well as what he was instructed while attending the Lenin School in Moscow in 1932, stated that the decisions of the Comintern were binding on respondent. Honig testified to Comintern directives which were carried out by respondent. . . .

"Among the specific instances of record, much of which is uncontroverted documentary material, showing the control exercised over respondent by the Comintern were: a Comintern decision in 1924 which resulted in the amalgamation of various Communist factions in the United States into the single Communist Party; a decision by Joseph Stalin in 1929, adopted by the Comintern, which expelled certain top officials of respondent and designated other individuals as leaders of respondent; advance approval by the Comintern for the holding of Communist Party conventions in the United States; Comintern instructions in 1927 that respondent charge the United States and Great Britain with intervention in Chinese affairs and to attack Chiang Kai-Shek; Comintern decision directing respondent to work for

the formation of a farmer-labor party in the United States and a subsequent change directing respondent to go into elections with the Communist Party ticket; and, advance approval by the Comintern of members of respondent who were sent to training schools in Moscow. . . .

"Respondent makes much of the fact that it 'disaffiliated' from the Communist International in 1940. There was no dispute that respondent in 1940 announced its disaffiliation for the stated purpose of avoiding registration as a foreign agent under the Voorhis Act of October 17, 1940. An issue is the effect of the disaffiliation.

". . . The Browder report makes clear that the disaffiliation was but an expediency to avoid registration under the Voorhis Act and contains nothing which negatives an intent to continue as before the principle of 'proletarian internationalism.' Various passages of Browder's report indicate an intent to end only the 'formal' and 'organizational' connection with the Communist International but not to alter the preexisting fundamental relationship. Illustrative of this is that the report states the disaffiliation would not even be considered if it were thought that it would cause the Party to 'waiver' or 'vacillate' in carrying out 'the internationalism founded by Marx and Engels, and brought to its great, historically decisive victories under the leadership of Lenin and Stalin,' and to which 'the life of every Communist is unconditionally consecrated.' . . . Also, the Browder report, by characterizing the Voorhis Act as 'an extreme example of the most vicious and oppressive *Exceptional Laws*' . . . indicates that the *organiza-*

*tional* disaffiliation was in accord with a Comintern 'Condition' that 'In every country where, in consequence of martial law or of other *exceptional laws*, the Communists are unable to carry on their work lawfully, a combination of lawful and unlawful work is absolutely necessary.' . . .

"The 1929 reorganization followed a solution dictated by Stalin, which was adopted by the Comintern, and accepted by respondent. Lovestone, Gitlow, and others were deposed as leaders of respondent and the leadership placed in a group which included William Z. Foster, present national chairman. The reorganization of respondent was due to a factional dispute which was a reflection of a struggle in the Communist Party of the Soviet Union and in the Communist International between forces led by Stalin and those led by Bukharin. The Foster faction in respondent, representing a minority of only about 10 per cent, supported Stalin whereas the Lovestone-Gitlow faction, representing about 90 per cent, sided with Bukharin. Notwithstanding this, respondent complied with the Stalin-dictated solution. The record contains no evidence of subsequent material organizational changes until May of 1944 when respondent's name was changed to the Communist Political Association then changed back in 1945 to the name Communist Party. The change to 'CPA' was in the year following the dissolution of the Comintern and, like the announcements on that dissolution, the change was assertedly to promote a peaceful co-existence of the United States and the Soviet Union. While operating under the name 'Communist Political Association,' there was a deemphasis on the more militant principles of Marxism-Leninism and the current publications of the Party put forward the so-called

Teheran line.' No evidence was presented by respondent to show a break with the basic principles of the international Communist movement. The leadership of respondent remained the same.

"Relevant to the reconstitution of respondent under the name Communist Party, the record shows that in April of 1945 Jacques Duclos, a spokesman for the world Communist movement, issued a statement the substance and effect of which was that it was a mistake to dissolve the Communist Party of the United States. . . .

"After preparation throughout the Party, respondent was reconstituted as the Communist Party of the United States of America. Earl Browder, for departing from the orthodoxy of Marxism-Leninism, was branded a 'revisionist' and 'deviationist' and deposed as the leader. Foster took over as national chairman. Otherwise those who had been officials and leaders of the CPA and the Party before that, with a few minor exceptions, remained the officers and leaders of the reconstituted Communist Party. Upon taking over as national chairman, Foster pointed out the necessity for reemphasizing the revolutionary line of Marxism-Leninism. In a report to the reconstitution convention, subsequently published in *Political Affairs*, Foster declared 'Our Party has suddenly reverted to its basic Communist principles' and 'As never before, we must train our Party in the fundamentals of Marxism-Leninism.' . . .

"As previously found, Foster became a leading officer in respondent in 1929 as a result of a Soviet Union directive. He has been national chairman since the 1945 reconstitution. A prior letter of his

to respondent's National Committee in which he opposed Browder's policies had been suppressed from respondent's membership but his position set forth in the letter was approved in the Duclos statement while Browder's policies were condemned. For a number of years prior to respondent's announced disaffiliation from the Communist International, Foster was an an [*sic*] official of the International. He has been to the Soviet Union on numerous occasions on Party business. . . .

"In addition to Foster, a number of respondent's other present leaders have been functionaries of respondents since the time of the Communist International, have been to the Soviet Union on Party business, and have been indoctrinated and trained in the Soviet Union on Communist strategy and policies. These leaders have taught in Party schools, written for the Party press, and spoken at Party meetings, on various phases of Marxism-Leninism, including the leading position of the Soviet Union, proletarian internationalism, and the necessity of revolutionary overthrow of imperialist nations, particularly the United States. . . .

"The continuance in office of Moscow-trained leaders of respondent who were functionaries during the period that respondent was an open member of the open, formal organization of the world Communist movement, and the absence of any substantial evidence showing a repudiation by respondent's leaders of the program and policy of the world Communist movement, as well as the fact that Marxism-Leninism continues to be basic to respondent, are all probative of the issues herein. . . .

". . . The reorganization of respondent's leadership pursuant to Stalin's solution for the 1929 factional dispute, . . . was supervised by a Soviet Union representative sent to the United States for that purpose. A number of individuals were identified as having in the past been in the United States as representatives from the Soviet Union to supervise the carrying out of various policies, programs, and activities by respondent. Respondent's acceptance of the authority of these foreign representatives was required by the rule of the Communist International that:

" 'The E. C. C. I. [executive committee] and its Presidium have the right to send their representatives to the various Sections of the Communist International. Such representatives receive their instructions from the E. C. C. I. or from its Presidium, and are responsible to them for their activities. Representatives of the E. C. C. I. have the right to participate in meetings of the central Party bodies as well as of the local organizations of the Sections to which they are sent . . . . Representatives of the E. C. C. I. are especially obliged to supervise the carrying out of the decisions of the World Congresses and of the Executive Committee of the Communist International.' . . .

"Eisler is the only foreign representative shown by the record to have been in the United States subsequent to the announced dissolution of the Communist International. Respondent ceased open affiliation with the Comintern to avoid identification as a foreign representative in the United States and the Comintern as an open organization was dissolved in 1943 for Soviet tactical reasons. The absence of further showing as to foreign representatives does not

itself, in the context of the record, indicate any change in respondent's nature or character.

"Respondent's policies, programs, and activities were originally formulated and carried out pursuant to directives of the foreign leadership of the world Communist movement. Such policies, programs, and activities of respondent have been consistently applied throughout respondent's existence in the United States without change or repudiation. Various tactical fluctuations in emphasis have followed those laid down by the world Communist movement. An examination of respondent's current activities shows respondent is still pursuing policies enunciated by the Soviet Union through the Communist International. . . .

". . . Respondent's witnesses were unable to cite a single instance throughout its history where, in taking a position on a question which found the views or policies of the Soviet Union and the United States Government in conflict, the CPUSA had agreed with the announced position of the United States; nor could they show a single instance when the CPUSA had disagreed with the Soviet Union on any policy question where both respondent and the Soviet Union have announced a position.

"The testimony of Dr. Mosely and documents submitted through him embraced a tremendous area of international questions on which respondent and the Soviet Union have taken positions. . . . The uniformity is constant and on a wide variety of questions, and is corroborated by other evidence of record.

"It is a material consideration in viewing the spread of this evidence spanning thirty-odd years that respondent, for the first twenty such years in this

area of activity, was required by the 'Conditions' for membership in the Communist International to conform to the 'programme and decisions' of the Comintern in its 'propaganda and agitation' . . . ; that during the years since 1943 respondent has without a single exception, as before, continued to adhere to the views and policies of the Soviet Union; and that its witnesses when asked to do so were unable to show conflict in any of these policies. This is strong evidence that the preexisting relationship between respondent and the Soviet Union continued as before, notwithstanding the formal dissolution of the Comintern by the Soviet Union." (Original emphasis throughout.)

It is on the basis of these detailed findings that the Board and the court below predicated their conclusion that the Communist Party was substantially directed, dominated, or controlled by the Soviet Union. We cannot hold that they erred in the construction of the statute and in finding that the facts shown bring the Party within it.

B. *The "Objectives Component."* Section 3 (3), defining a Communist-action organization, requires a finding that the organization "operates primarily to advance the objectives of [the] . . . world Communist movement as referred to in section 2 of this title." Although asserting that the reference to § 2 is unclear, the Party offered in the Court of Appeals a construction of this requirement which defines the objectives of the world Communist movement as (a) overthrow of existing government by any means necessary, including force and violence, (b) establishment of a Communist totalitarian dictatorship, (c) which will be subservient to the Soviet Union. See § 2 (1), (2), (3), (6). We need not now determine whether this interpretation, insofar as it implies that an

organization must operate to advance all of these objectives in order to come within the Act, is correct. Certainly, the elements which the Party has isolated are, singly or collectively, the major "objectives" described in § 2. The Court of Appeals accepted the Party's analysis *arguendo*, and its judgment affirming the order of the Board rests on its conclusion that the Party operates to advance all three of these objectives. This conclusion is supported by the findings of the Board. It adopts the interpretation most favorable to the Party.

Within the framework of these definitions, the Court of Appeals held sufficient to demonstrate the Communist Party's objective to overthrow existing government the finding of the Board that the Party advocates the overthrow of the Government of the United States by force and violence if necessary. The Party argues that this finding is inadequate to satisfy the conception of overthrow embodied in § 2 (1) and (6); that under the compulsion of the First Amendment the Act must be read as reaching only organizations whose purpose to overthrow existing government is expressed in illegal action or incitement to illegal action; that advocacy of the use of violence "if necessary" amounts at most to the promulgation of abstract doctrine, not incitement. Section 2 (1) recites that the purpose of the world Communist movement is "by treachery, deceit, infiltration . . . , espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization." Section 2 (6) recites that Communist-action organizations "endeavor to carry out the objective of the world Communist movement by bringing about the overthrow of existing governments by any available means, including force if necessary . . . ." We think that an organization may be found to operate to advance objectives so defined

although it does not incite the present use of force. Nor does the First Amendment compel any other construction. The Subversive Activities Control Act is a regulatory, not a prohibitory statute. It does not make unlawful pursuit of the objectives which § 2 defines. In this context, the Party misapplies *Yates* v. *United States*, 354 U. S. 298, and *Dennis* v. *United States*, 341 U. S. 494, on which it relies. See *Barenblatt* v. *United States*, 360 U. S. 109; *Uphaus* v. *Wyman*, 360 U. S. 72; *American Communications Assn.* v. *Douds*, 339 U. S. 382.

C. *The Evidentiary Considerations of Section 13 (e); the Striking by the Court of Appeals of a Subsidiary Finding Under Section 13 (e)(7).* Section 13 (e) prescribes that in determining whether any organization is a Communist-action organization, the Board shall take into consideration the extent of its conduct in eight enumerated dimensions. Accordingly, the Board made basic findings of fact in each, and on them based conclusions. The Party attacks each conclusion as based upon a misinterpretation or misapplication of the statutory considerations.

As to three of these considerations upon which the Board placed substantial reliance in its determination that the Communist Party is controlled by the Soviet Union and operates primarily to advance the objectives of the world Communist movement—the extent to which its policies are formulated and carried out and its activities performed pursuant to directives or to effectuate policies of the Soviet (§ 13 (e)(1)), the extent to which its principal leaders or a substantial number of its members are subject to or recognize the disciplinary power of the Soviet (§ 13 (e)(6)), and the extent to which its principal leaders or a substantial number of its members consider the allegiance they owe to the United States as subordinate to their obligations to the Soviet (§ 13 (e)(8))—the Party contends that the conclusions

of the Board are not supported by its findings of fact. We have considered the Board's report and find the Party's contention without merit.

As to three other considerations—the extent to which an organization receives financial or other aid from the foreign government or foreign organization controlling the world Communist movement (§ 13 (e)(3)), the extent to which it sends its members to a foreign country for instruction and training in the principles, tactics, etc., of the world Communist movement (§ 13 (e) (4)), and the extent to which it reports to the foreign government or foreign organization controlling the world Communist movement (§ 13 (e)(5))—the Board found, respectively, that the Communist Party had received financial aid from the Soviet Union and the Comintern, and had sent its members to the Soviet Union for training, prior to about 1940, but that there was no evidence that these activities continued after that time, and that the Communist Party "upon occasion" reports to the Soviet. From a reading of its Modified Report on Second Remand, it does not appear that the Board relied on these three findings to support its ultimate determination; rather it regarded them as inconclusive, except insofar as Soviet financial aid to the Party during the period before it became a going organization could be considered "a tile in the mosaic," and insofar as foreign-trained Party members themselves served as instructors in Party schools in the United States at later times when there was no evidence of continued foreign training as such. The Party argues that the Board's findings required it to conclude that evidence pertinent to the considerations of § 13 (e)(3), (4), and (5) tended to negate a finding that the Party was foreign-controlled. We cannot say that the basic findings of the Board compelled that conclusion and precluded its own. The Board, directed by Congress to consider "the extent to which" an organization engages in certain classes of

conduct, was not, of course, obligated to make findings in each dimension which would be conclusive of the ultimate issues before it. It was required only to consider each of these dimensions—this it has painstakingly done—and, on the whole record before it, to appraise the probative force of the evidence in each dimension. See *Secretary of Agriculture* v. *Central Roig Ref. Co.*, 338 U. S. 604; 96 Cong. Rec. 14530–14534; cf. *id.*, at 13764, 15634. The Board has explained in detail the factors which urged it to take the view it has taken of the evidence concerning financial aid, foreign training and reporting. We cannot say that on the basis of all its findings it accorded inadmissible weight to these considerations.

By § 13 (e)(2), the Board is directed to consider, in determining whether a given organization is a Communist-action organization, "the extent to which its views and policies do not deviate from those of [the] . . . foreign government or foreign organization" directing the world Communist movement. In connection with this consideration, Dr. Philip Mosely, Professor of International Relations at Columbia University and Director of the University's Russian Institute appeared as an expert witness for the Attorney General. He enumerated some forty-five major international issues during thirty years with respect to which, his testimony indicated, there had been no substantial difference between the announced positions of the Soviet Union and the Communist Party.[12]

[12] Among these were the League of Nations; the Russo-Finnish War, 1939; the Hitler-Stalin non-aggression pact, 1939; attitude toward World War II before and after the German attack on the Soviet Union; dissolution of the Communist International, 1943; West Germany; the Italian election of 1948; North Atlantic Pact; control of atomic energy; election of Yugoslavia to the United Nations Security Council, 1949; Cardinal Mindszenty case, 1949; United Nations action in Korea; Communist China's intervention in Korea, 1950; seating of Communist China in the United Nations; Peace Treaty with Japan, 1951; peace in Korea.

As to each issue, documents representative of the respective views of the Soviet and the Party were identified by Dr. Mosely and put into the record as exhibits. Both the Board and the Court of Appeals credited Dr. Mosely's testimony and placed significant reliance on it in concluding that the Communist Party is substantially dominated by the Soviet Union.

The Party urges two contentions relating to this aspect of the case. The first is that the Mosely evidence has no tendency to prove non-deviation, within the meaning of § 13 (e)(2), and no rational relevance to the ultimate issue of Soviet domination of the Party, because Dr. Mosely did not establish that as to each of the international issues concerning which Soviet Union and Party views coincided, the announced Soviet position antedated that of the Party,[13] nor did Dr. Mosely testify that the coincidence of views evidenced parroting of the Soviet position by the Party—indeed, he expressly declined, as a matter of expert judgment, to draw any inference from the coincidence alone with respect to the reasoning processes by which the Party arrived at its views. The Party contends that under § 13 (e)(2) the Board was not authorized to consider evidence merely of sameness of policy, but that sameness would become relevant only after the Attorney General had shown that the Party took its position subsequent to, and not independently of, the announced policy of the Soviet. Second, the Party argues

[13] The Party points out that with respect to a major portion of the paired sets of exhibits put in through Dr. Mosely, the documents demonstrating the Communist Party's position bear earlier dates than those demonstrating the Soviet Union's position. These exhibits were offered only as illustrative of the views which Dr. Mosely testified—his expert opinion being based on a far wider selection of readings—were those taken approximately contemporaneously by the Soviet and the Party in each instance. The Government expressly disclaimed any attempt to establish chronological sequence between the announced positions of the two.

that the Board erred in refusing to let it show, both by cross-examination of Dr. Mosely and by proffered original evidence, that many other, assertedly non-Communist groups and individuals also expressed, contemporaneously with the Soviet Union and the Party, views identical to those in which the two concurred—and, further, that the views were correct.

We do not agree that the Board was not entitled to consider and evaluate evidence of a consistent identity of policies of an organization and the Soviet Union until the Government had shown the temporal antecedence of the Soviet's position and negatived the possibility that independent reasoning processes brought about the identity. Here the Board found that the coincidence of policies extended over a vast area of subject matter, was absolutely invariant during more than thirty years—the entire life of the Party—and was unbroken even in the face of sharp reversals in the Soviet's views. Section 13 (e)(2), directing the Board to consider the extent of non-deviation, does not purport to establish a litmus test of domination or control, requiring some fixed minimum level of policy-parroting. This requirement is satisfied by consideration of whatever is logically relevant in this regard. Of course, the Government would have established a stronger case had it shown not only identity of views on more than forty issues, but also that the Soviet's view had always led and the Party's always followed, and that the similarity could not conceivably be the result of autonomous application of similar basic philosophical principles. But this is no reason to say that the Board could not consider, and form its judgment on, the showing that the Government did make in the present proceeding. Certainly, if the Act contained no § 13 (e), Dr. Mosely's testimony would be both relevant and significantly probative with respect to the issue of Soviet domination of the Party. To hold that § 13 (e)(2)

makes it a condition precedent to Board consideration of this long-continued, totally unwavering identity of policy lines, that the Attorney General also establish such elusive determinants as the dates of birth of the policies and the ratiocinative processes by which they came into being, we would have to find that by § 13 (e)(2) Congress meant to limit and severely limit, the evidences of Soviet domination, of which the Board could take account. The structure of § 13 (e) will not bear that construction.[14]

With respect to the rulings precluding the Party from showing certain facts which would have tended to establish that the views in which it paralleled the Soviet Union were correct views, or were reached independently, or were also held by other persons, we do not think that the Board abused its discretion. The questions which the Party sought to ask Dr. Mosely on cross-examination relating to the correctness of the Party's views were of two sorts. The first involved matters of value judgment or opinion, capable of interminable debate but incapable of proof, and

[14] The committee reports and other authoritative legislative history pertinent to § 13 (e)(2) are unilluminating in this connection. It is significant that on the occasion of a proposed House amendment which would have deleted the similar non-deviation consideration now found in § 13 (f)(4) of the Act (pertaining to Communist-front organizations), Mr. Nixon, who had been a leading proponent of the legislation in its several forms, argued that "if this particular standard is stricken out, it would be virtually impossible in many cases to get sufficient evidence before the Subversive Activities Control Board to justify a finding that an organization was a Communist front." 96 Cong. Rec. 13764. The implication is that Mr. Nixon, and presumably other proponents of the enactment, regarded the § 13 (e) and (f) evidentiary considerations as *expanding* the scope of evidentiary matters of which the Board might take account in determining whether organizations met the definitions of § 3 (3) and (4). The proposed amendment was defeated after debate in the course of which all Congressmen seemed tacitly to assume that non-deviation involved a question of identity of policies, not of causal connection between policies. *Id.*, at 13765–13768. And see *id.*, at 14531–14533, 15194.

which the Board might reasonably have found, would have added little to the record beyond the witness's personal views.[15] The second sort called for answers of a more objective kind, but related in general to the truth or falsity of particular, detailed assertions of fact selected out of the various documents which the Attorney General had put in evidence as illustrative of the Party's policies.[16] Since in testifying as to the nature of those policies Dr. Mosely had relied on a wide background of study of Party writings, of which the exhibits put into the record were only exemplary, and since even with reference to those par-

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[15] *E. g.*: "The article denounces the Japanese invasion of Manchuria as a clear and unprovoked act of aggression against China, does it not? . . . Was [that] . . . not the opinion of every right-thinking person at that time?" "Is it not the universal opinion of every informed observer that the Greek monarchy is a reactionary, fascist and corrupt regime?" "Is it not true that virtually every Commentator on an analysis of the Italian elections in 1948 has expressed the opinion that there was widespread American intervention and interference in these elections? . . . Was there not widespread interference on the part of the United States in that election?" "Was not this United States intervention in Formosa a violation of the Cairo Agreement on Formosa?" "Did not this policy [sending American troops beyond the 38th parallel in Korea] prove to be disastrous both militarily and politically? . . . And was it not paid for in thousands of United States lives?"

[16] *E. g.*, concerning Attorney General's Exhibit No. 284, a thirteen-page editorial:

"Q: Petitioner's Exhibit 284 is an article . . . entitled, 'Wall Street's War Against the Korean People,' . . . is that not correct?

"A: Yes, it is the subtitle of an editorial article.

"Q: Now, I call your attention to page 11. Does not the author there say that broad democratic reforms were introduced in North Korea including universal sufferage [*sic*], the secret ballot, and equal status for women, and that the land was distributed to the peasants and that industry was nationalized and that the 8 hour day and social insurance were introduced, and child labor abolished and a system of public education introduced? . . . Are these not correct statements of fact?"

ticular exhibits Dr. Mosely's testimony rested upon an expert analysis of each article read as a whole—its general tenor, deriving from its use of language, its selection of facts reported, its argumentative and exhortative parts, if any—litigation of the truth *vel non* of individual statements of fact might well have been regarded by the Board as promising to lead into distracting inquiries regarding marginal or remote issues—what in a court would constitute *res inter alios acta*—incommensurate with the materiality of the evidence produced. Objections to both kinds of questions were, in the Board's discretion, properly sustained. As for the question which the Party attempted to put to Dr. Mosely concerning approximately half of the international issues which he discussed, whether in each case an informed American observer, in the exercise of independent judgment and sensitive to the best interests of the United States, might not also reasonably have arrived at the view held by the Party and the Soviet,[17] the question was not improperly disallowed as beyond the permissible scope of cross-examination. Dr. Mosely did not purport on direct examination to establish the thought processes or the political processes by which the Soviet and the Party arrived at their positions, but only that the positions were identical. The Party was permitted to

[17] This question was put in a number of forms. The most typical is the following:

"In your opinion, could an informed American observer basing his views on what is the best interest of the American people reasonably and sincerely conclude, one, that Mr. Malik's proposal was a great service to the cause of peace and in the best interests of the American people as well as all of the people of the world; two, that the representatives of the American government attempted to frustrate Mr. Malik's proposal but were forced into truce negotiations by the overwhelming desire of the people; and three, that American representatives by provocative conduct and various pretexts attempted to cause the breakdown of armistice negotiations in Korea?"

show, and two of its witnesses testified, on both direct and cross-examination, that the policies of the Party were adopted in the autonomously reasoned belief, in each case, that a particular policy was sound and in the best interests of the American people. The Board, in its modified reports, took account of and evaluated this testimony. It was not prejudicial that the Party was not allowed to use the Government's expert witness to negative causal connections which his testimony for the Government did not seek to show.

The Party also argues that it should have been permitted to demonstrate, by cross-examination of Dr. Mosely and by original evidence, that many other persons than the Soviet and the Party held views similar to those on which the two agreed. We cannot hold that the Board erred in excluding these showings. They took two forms. First, with respect to some twenty-five international issues, the question was put to Dr. Mosely whether many non-Communist commentators did not also support the view expounded by the Party.[18] A similar question was asked of a witness for the Party concerning one more issue. Second, with respect to somewhat more than thirty issues, the Party offered to establish, by questioning Dr. Mosely and by documents proffered in evidence, that particular named individuals and groups had concurred in the views of the Party on each individual

[18] *E. g.*, "Professor, is it not a fact that many non-communist commentators and observers have expressed the view that the American proposals for international control of atomic energy were designed to make it impossible for the Soviet Union to accept them and that the American plan had no real chance of adoption?" "Would it not be accurate to state, Professor, that there was a very large and broad measure of agreement among the people and many of the leaders of both the Soviet Union and the United States on the need for the prompt establishment of a second front in Europe?"

issue.[19] The most that the Party could have proved, had it been allowed to make the offered showings, was that on the subject of each specific, isolated one among the forty-five international issues enumerated, a considerable number of persons not Soviet-dominated, took positions parallel to those of the Soviet and the Party. This is only to be expected in the case of issues of this character. The Party never offered to show, despite wide latitude allowed by the hearing panel in making proffers after similar proffers had been previously disallowed, that a continuing, substantial body of independent groups and persons concurred with the Party on a significant aggregate number of policies among the forty-five. Of the particular sources mentioned in the Party's separate questions and offers of proof, the greatest number of issues with reference to which a single source recurs—the New York Times, or individuals writing in the Times—is ten or less, and in most cases the agreement shown is with only a portion of the Party's position. No other source occurs more than roughly half a dozen times; most, two or three times.[20] On the basis of these proffers, the Board's rulings did not amount to an abuse of the discretion which it must be allowed in the conduct of its hearings to avoid opening the sluices to litigation of the views of a multitude of third parties.

Section 13 (e)(7) requires the Board to consider the extent to which "for the purpose of concealing foreign

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[19] *E. g.*, "Is it not a fact, Professor, that the Federation of American Atomic Scientists urged that the United States abandon its proposal for the international ownership of atomic raw materials in the bulletin published by that organization in March 1950?"

[20] One name appears in connection with six issues, writers in the New York Herald Tribune in connection with seven, President Franklin Roosevelt and George Bernard Shaw three each, etc. Instances in which the New York Times and the New York Herald Tribune are referred to merely as sources for the printed texts of speeches or statements by statesmen, officials, etc. are not included in this count.

direction, domination, or control, or of expediting or promoting its objectives," an organization engages in specified secret practices or otherwise operates on a secret basis. In its original report the Board concluded that the Communist Party engages in secret practices for both these purposes. The Court of Appeals, in its first opinion, held that the finding of secret practices was warranted, but that the Government had not established by the preponderance of the evidence the purpose of the practices. Although no new evidence on the point was taken on remand, the Board again found in its two modified reports that the purpose of the practices was to promote the objectives of the Communist Party.[21] In its third opinion the Court of Appeals again held the finding as to purpose unsupported by the preponderance of the evidence. Nevertheless, holding that the whole record supported the Board's conclusion that the Communist Party was substantially directed, dominated, or controlled by the Soviet Union, it rejected the Party's contention that the striking of this one subsidiary finding as to purpose of secret practices required remand of the proceeding to the Board.

We think that the Circuit Court did not err in refusing to remand the case on that ground. Cf. *Labor Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241. In the summaries of its modified reports, the Board did not rely on, or even refer to, the finding of secret practices. Thus this case is unlike *Securities & Exchange Comm'n* v. *Chenery Corp.*, 318 U. S. 80, and *Labor Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, in which proceedings were remanded to administrative agencies when this Court found unsupportable the grounds upon which the agencies had expressly rested the orders reviewed. Where a Court of Appeals strikes as not sustained by the evidence a subsidiary administrative finding upon which the agency itself does not purport to rely, it

[21] It expressly declined to find a purpose to conceal foreign control.

would be an unwarranted exercise of reviewing power to remand for further proceedings. *Labor Board* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131 (C. A. 1st Cir.). Remand would be called for only if there were a solid reason to believe that without that subsidiary finding the agency would not have arrived at the conclusion at which it did arrive. Reading the modified reports of the Board in the present case—reports written after the Court of Appeals had once held the finding as to the purpose of the Party's secret practices unsupported—this Court cannot conclude that the Court of Appeals was wrong in regarding the finding stricken as one to which the Board did not attach weight and which did not influence its determination.

D. *The Board Findings as to the World Communist Movement; Evidence of Past Practices; the Preponderance of the Evidence.* Under the Act an organization may be found to be a Communist-action organization only if the relations specified in the "control" and "objectives" components of § 3 (3) exist between it and the "world Communist movement referred to in section 2 . . . ." In the present proceeding, the Board, after recognizing that "in section 2 of the Act Congress has found the existence of a world Communist movement and has described its characteristics," set forth its own description, based on the evidence presented in this record, of contemporary Communist institutions in their international aspect, and particularly of the role of the Soviet Union in those institutions. The Party argues that because this description does not duplicate in all details that of § 2 of the Act, the world Communist movement to which the Board found that the Communist Party bore the required statutory relationship is not the world Communist movement referred to in § 2.

But the attributes of the world Communist movement which are detailed in the legislative findings are not in the nature of a requisite category of characteristics comprising

a definition of an entity whose existence *vel non* must be established, by proving those characteristics, in each administrative proceeding under the Act. Congress has itself found that that movement exists. The legislative description of its nature is not made a subject of litigation for the purpose of ascertaining the status of a particular organization under the Act. The Attorney General need not prove, in the case of each organization against whom a petition for a registration order is filed, that the international institutions to which the organization can be shown to be related fit the picture in every precise detail set forth in § 2. The only question, once an organization is found to have certain international relations, is one of statutory interpretation—of identifying the statutory referent. Are the institutions involved in those relations the "world Communist movement" to which Congress referred? We are satisfied from the Board's report that the "world Communist movement" to which its findings related the Communist Party was the same "world Communist movement" meant by Congress.

The Party contends that the Board and the court below erred in relying on evidence of conduct in which it engaged prior to the enactment of the Act to support their conclusion that it is presently a Communist-action organization. This must be rejected. Where the current character of an organization and the nature of its connections with others is at issue, of course past conduct is pertinent. Institutions, like other organisms, are predominantly what their past has made them. History provides the illuminating context within which the implications of present conduct may be known.

Finally, the Party asks that we re-examine the evidence adduced before the Board and review the Board's findings of fact. The Court of Appeals, made thoroughly familiar with this record by three such re-examinations, has held that the Board's conclusions, as expressed in its Modified

Report on Second Remand, are supported by a preponderance of the evidence. We see no reason why still another court should independently reappraise the record. We have declined to do this in the case of other agencies as to whom reviewing power on the facts has been vested in the Courts of Appeals, and we find no purpose to be served in departing now from this settled policy of appellate review. *Labor Board* v. *Pittsburgh Steamship Co.*, 340 U. S. 498; *Labor Board* v. *American National Ins. Co.*, 343 U. S. 395; *Federal Trade Comm'n* v. *Standard Oil Co.*, 355 U. S. 396.

IV.

The Party's constitutional attack on the Subversive Activities Control Act of 1950 assails virtually every provision of this extended and intricate regulatory statute. The registration requirement of § 7, by demanding self-subjection to what may be deemed a defamatory characterization and, in addition, disclosure of the identity of all rank-and-file members, is said to abridge the First Amendment rights of free expression and association of the Communist Party and its adherents. See *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449; *Bates* v. *Little Rock*, 361 U. S. 516; cf. *Thomas* v. *Collins*, 323 U. S. 516; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123. The Party's officers, it is asserted, who by filing a registration statement in its behalf evidence their status as active members of the Party, are required to incriminate themselves in violation of the Fifth Amendment, as are the individual members who must register themselves under § 8 if the Party fails to register or fails to list them. Cf. *Blau* v. *United States*, 340 U. S. 159; *Quinn* v. *United States*, 349 U. S. 155. The provision that Communist organizations label their publications is attacked as a prior restraint on, and such sanctions as denial of tax exemption are attacked as a penalty on the exercise of, the Party's

constitutionally protected freedom of speech. Cf. *Talley* v. *California*, 362 U. S. 60; *Speiser* v. *Randall*, 357 U. S. 513. The various consequences of the Party's registration for its individual members—prohibition of application for and use of passports, disqualification from government or defense-facility employment, disqualification from naturalization, subjection to denaturalization, proscription of officership or employment in labor organizations—are said to deny those members due process of law by, in effect, attainting them by association, cf. *De Jonge* v. *Oregon*, 299 U. S. 353; *Wieman* v. *Updegraff*, 344 U. S. 183, and by subjecting them to potential criminal proceedings in which the nature of the organization, membership in which is an element of various offenses, may not be judicially tried. Many of the statute's provisions are challenged as unconstitutionally vague, and it is said that the establishment of an agency, the Subversive Activities Control Board, whose continued existence depends upon its finding the Communist Party a Communist action organization within the meaning of the Act, necessarily biases the agency and deprives the Party of a fair hearing. In fact, the Party asserts, the statute as written so particularly designates the Communist Party as the organization at which it is aimed, that it constitutes an abolition of the Party by legislative fiat, in the nature of a bill of attainder. The provisions must be read as a whole, it is said; and when so read, they are seen to envisage not the registration and regulation of the Party, but the imposition of impossible requirements whose only purpose is to lay a foundation for criminal prosecution of the Party and its officers and members, in effect "outlawing" the Party.

Many of these questions are prematurely raised in this litigation. Merely potential impairment of constitutional rights under a statute does not of itself create a justiciable controversy in which the nature and extent of those rights may be litigated. *United Public Workers* v. *Mitchell*,

330 U. S. 75; *International Longshoremen's Union* v. *Boyd*, 347 U. S. 222. Even where some of the provisions of a comprehensive legislative enactment are ripe for adjudication, portions of the enactment not immediately involved are not thereby thrown open for a judicial determination of constitutionality. "Passing upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions is analogous to rendering an advisory opinion upon a statute or a declaratory judgment upon a hypothetical case." *Watson* v. *Buck*, 313 U. S. 387, 402. No rule of practice of this Court is better settled than "never to anticipate a question of constitutional law in advance of the necessity of deciding it." *Liverpool, New York & Philadelphia S. S. Co.* v. *Commissioners*, 113 U. S. 33, 39; *Arizona* v. *California*, 283 U. S. 423; Mr. Justice Brandeis, concurring, in *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 341. In part, this principle is based upon the realization that, by the very nature of the judicial process, courts can most wisely determine issues precisely defined by the confining circumstances of particular situations. See *Parker* v. *County of Los Angeles*, 338 U. S. 327; *Rescue Army* v. *Municipal Court*, 331 U. S. 549. In part it represents a conception of the role of the judiciary in a government premised upon a separation of powers, a role which precludes interference by courts with legislative and executive functions which have not yet proceeded so far as to affect individual interests adversely. See the Note to *Hayburn's Case*, 2 Dall. 409; *Massachusetts* v. *Mellon*, 262 U. S. 447. These considerations, crucial as they are to this Court's power and obligation in constitutional cases, require that we delimit at the outset the issues which are properly before us in the present litigation.

This proceeding was brought by the Attorney General under § 13 (a) of the Subversive Activities Control Act,

seeking an order of the Board that the Communist Party register as a Communist-action organization pursuant to § 7. The Board has issued such an order, in accordance with § 13 (g)(1), which is here reviewed, under § 14 (a). The effect of that order is to require the Party to register and to file a registration statement within thirty days after the order becomes final, § 7 (c)(3), upon pain of fine up to $10,000 for each day of failure to register. When the order becomes final, other consequences also ensue, for the Party, for its members and for other persons. Certain acts of the Party—distributing its publications through the mails or through the instrumentalities of interstate or foreign commerce, or causing matter to be broadcast by radio or television, without the required identification—are prohibited, § 10, and tax exemption is denied it, § 11. Specified acts of its members—*e. g.*, applying for or using a United States passport, holding government or defense-facility employment, holding labor union office or employment—are forbidden, §§ 5, 6, and those members are definitively subject to certain disqualifications—if aliens, they may not enter the United States, may be deported, may not be naturalized, may in some circumstances be denaturalized, with qualifications. 8 U. S. C. §§ 1182, 1251, 1424, 1451. Employment by the Party is not "employment" for purposes of the Social Security Act, as amended, 42 U. S. C. § 410; contributions to the Party are not tax deductible, Subversive Activities Control Act of 1950, § 11. Acts by third parties with regard to the Party or its members—the contributing of funds or services to the Party by government or defense-facility personnel, issuance of passports to Party members—are, under specified circumstances, prohibited, §§ 5, 6. All of these consequences depend upon action taken subsequent to the time when the registration order becomes final. Some depend upon action which is, at

best, highly contingent.[22] The question is which, if any, of these consequences are now before us for constitutional adjudication, as necessarily involved in the determination of the constitutionality of the Board's registration order.

A closely similar issue was presented to this Court in *Electric Bond & Share Co.* v. *Securities & Exchange Comm'n*, 303 U. S. 419. That was a statutory suit brought by the Securities and Exchange Commission to enforce against certain utility holding companies the provisions of §§ 4 (a) and 5 of the Public Utility Holding Company Act of 1935, 49 Stat. 803. The Act, like the Subversive Activities Control Act, was a statute of many intricate and interlocking sections, with a severability clause. Its fifth section provided that holding companies, as defined, might register with the Commission and file a registration statement containing specified information: unless such a company registered within the time fixed, § 4 (a) subjected it to what the Court referred to as the "penalty for failure to register": criminal liability for engaging in business in interstate commerce; or for selling, transporting, owning or operating utility assets for the transportation of gas or electricity in interstate commerce; or for using the mails or instrumentalities of interstate commerce to distribute or acquire utility securities, or to negotiate, make, or take any step in performing, service, sales or construction contracts for public utility or holding companies; or for owning, controlling or holding voting stock in any subsidiary engaging in any of these activities.[23] Once a

[22] For example, before an individual may be subjected to the penalties of §§ 8 and 15 (a) (2), the Party must have failed to register, or failed to list him as a member, and he must subsequently have failed, within the allotted time, to register himself.

[23] It was evident that the prohibitions of § 4 (a) were so comprehensive that, as pointed out in the brief for the holding companies, "it [was] . . . quite impossible for holding companies to con-

holding company registered, prescribed consequences ensued, some automatic,[24] some requiring the initiation of further proceedings by the Commission. It was unlawful for any registered holding company or any subsidiary company of a registered holding company to sell or offer for sale any security of the holding company from house to house, or to cause any officer or employee of a subsidiary company to sell such a security; it was unlawful for any registered holding company to borrow or to receive any extension of credit from any public utility company in the same holding-company system; it was unlawful for any registered holding company or any subsidiary of such a holding company to make any contribution in connection with the candidacy, nomination, election or appointment of any person for or to any office or position in federal, state or municipal government or to make any contribution to any political party; all contracts made in violation of any provision of the Act were void. Other trans-

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tinue in business, unregistered, in the face of these prohibitions." Nor could the companies cease to be holding companies, since § 4 (a) made unlawful, under penalty up to $200,000, the distribution or public offering of utility securities by unregistered holding companies through the mails or instrumentalities of interstate commerce, or the sale of securities by such companies with reason to believe that those securities would be distributed or made the subject of public offering through the mails or instrumentalities of interstate commerce. No doubt for this reason the Court regarded § 4 (a) as a "penalty" for failure to register, rather than as an independent regulatory scheme for unregistered holding companies. See 303 U. S., at 439, 442, 443. A decree requiring the holding companies to comply with §§ 4 (a) and 5 was, in effect, a decree compelling it to register.

[24] Section 3 of the Act authorized the Commission to exempt from any provision or provisions of the Act certain described classes of holding companies. It was evident from the nature of Electric Bond and Share, as developed in that litigation, that it did not come within any of these categories, and the Court did not mention § 3 in its opinion.

actions of registered companies were prohibited unless approved by the Commission, and under the "simplification" provisions of § 11, the Commission was required to take steps to break up the holding-company systems of registered holding companies.

The Commission sued for and the District Court granted, an injunction restraining companies of the Electric Bond and Share system from operating in violation of § 4 (a) until they had either registered under § 5 or ceased to be holding companies.[25] A cross bill by the companies seeking a declaratory judgment that the Act was unconstitutional in its entirety was dismissed. When the case came here, the companies argued that the scheme of the Act was a single, integrated whole; that the registration sections, which were the mechanism by which holding companies were subjected to the statute's various regulatory provisions, could not be separately considered; and that the unconstitutionality of the regulatory provisions invalidated the registration requirement. The Court affirmed the decree, but on the basis of a deliberate abstention from consideration of any but the registration section, § 5, as enforced by the sanctions of § 4 (a). Noting that if the statute's severability clause were given effect, the registration obligation could be validly enforced even though any or all of the "control" provisions applicable to registered companies were unconstitutional, and finding in the legislative history nothing to indicate that

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[25] The decree was without prejudice to any rights which the companies might have at law or in equity after registration, and left the companies free to challenge the validity of any provisions of the Act other than §§ 4 (a) and 5. In the present proceeding, of course, the Board's order does not operate to foreclose the Communist Party, or any other person adversely affected by provisions of the Subversive Activities Control Act, from subsequently challenging in appropriate proceedings other of the Act's provisions than those requiring the registration of Communist-action organizations.

the various regulatory sections "were intended to constitute a unitary system, no part of which can fail without destroying the rest," 303 U. S., at 438–439, the Court declined to decide the broad constitutional questions pressed upon it. Likewise, the District Court's dismissal of the cross bill was sustained:

> ". . . By the cross bill, defendants seek a judgment that each and every povision of the Act is unconstitutional. It presents a variety of hypothetical controversies which may never become real. We are invited to enter into a speculative inquiry for the purpose of condemning statutory provisions the effect of which in concrete situations, not yet developed, cannot now be definitely perceived. We must decline that invitation." *Id.*, at 443.

Not until eight years later were some of these other related, important questions, at last properly presented, decided.[26]

The decision in *Electric Bond & Share* controls the present case. This Act, like the one involved there, has a section directing that if any of its provisions, or any of its applications, is held invalid, the remaining provisions and other possible applications shall not be affected. The authoritative legislative history clearly demonstrates that a major purpose of the enactment was to regulate Communist-action organizations by means of the public disclosure effected by registration, apart from the other regulatory provisions of the Act.[27] Such is, of course, the very purpose of the severability clause. This being so, our consideration of any other provisions than those of

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[26] See *North American Co.* v. *Securities & Exchange Comm'n*, 327 U. S. 686.

[27] See S. Rep. No. 2369, 81st Cong., 2d Sess. 4; H. R. Rep. No. 2980, 81st Cong., 2d Sess. 3; H. R. Rep. No. 1844, 80th Cong., 2d Sess. 2, 5; see also 96 Cong. Rec. 14174, 14237, 14256–14257, 14297, 14598.

§ 7, requiring Communist-action organizations to register and file a registration statement, could in no way affect our decision in the present case. Were every portion of the Act purporting to regulate or prohibit the conduct of registered organizations (or organizations ordered to register) and of their members, as such, unconstitutional, we would still have to affirm the judgment below. Expatiation on the validity of those portions would remain mere pronouncements, addressed to future and hypothetical controversies. This is true with regard to those sections of the Act which prescribe consequences legally enforceable against the Communist Party once a final registration order is in effect against it—the "labeling" and tax-exemption denial provisions of §§ 10 and 11. These are analogous to the proscription of specified credit transactions, or specified security sales, or specified political contributions, by the Public Utility Holding Company Act considered in *Electric Bond & Share*. Although they become operative as soon as a registration order is made final, their application remains in a very real sense problematical. We cannot now foresee what effect, if any, upon the Party the denial of tax exemption will have. We do not know whether the Party now has, or whether it will have at any time after a Board order goes into effect, any taxable income, or, indeed, any income whatever. We do not know that, after such an order is in effect, the Party will wish to utilize the mails or any instrumentality of interstate commerce for the circulation of its publications. We cannot guess the nature of whatever publications it may wish to circulate, or their relation to the purposes and functions of the Party. These circumstances may be critical for constitutional determination. It will not do to discount their significance by saying, now, that no difference in circumstances will effect a different constitutional result—that the principles relevant to a determination of the validity of these statutory provisions do not depend

upon the variations in circumstances in which they are potentially applicable. For this analysis presupposes that we now understand what are the relevant constitutional principles, whereas the reason of postponing decision until a constitutional issue is more clearly focused by, and receives the impact from, occurrence in particular circumstances is precisely that those circumstances may reveal relevancies that abstract, prospective supposition may not see or adequately assess.

These considerations are equally appropriate in the case of those sections of the Act which proscribe specified conduct by members of an organization concerning which a final registration order is in effect, or which impose obligations upon them, or which subject them to described disabilities under certain circumstances. It is wholly speculative now to foreshadow whether, or under what conditions, a member of the Party may in the future apply for a passport, or seek government or defense-facility or labor-union employment, or, being an alien, become a party to a naturalization or a denaturalization proceeding. None of these things may happen. If they do, appropriate administrative and judicial procedures will be available to test the constitutionality of applications of particular sections of the Act to particular persons in particular situations. Nothing justifies previsioning those issues now.

But the Party argues that the threat, however indefinite, of future application of these provisions to penalize individuals who are or become its members, affiliates or contributors, will effectively deter persons from associating with it or from aiding and supporting it. Thus, the provisions exercise a present effect upon the Party sufficiently prejudicial to justify its challenging them in this proceeding. In support of this contention, the Party cites cases in which we have held that litigants had "standing" to attack a statute or regulation which oper-

ated to coerce other persons to withdraw from profitable relations or associations with the litigants. See, e. g., *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123; *Pierce* v. *Society of Sisters*, 268 U. S. 510; *Buchanan* v. *Warley*, 245 U. S. 60; *Truax* v. *Raich*, 239 U. S. 33; cf. *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449; *Bates* v. *Little Rock*, 361 U. S. 516. But these cases purported only to discuss what issues a litigant might raise, not when he might raise them. That a proper party is before the court is no answer to the objection that he is there prematurely. In none of the cases cited was the constitutional issue decided on a record which showed only potential deterrence of association with the litigant on the part of an unnamed and uncounted number of persons. In the *Refugee Committee* case, three organizations sued for injunctive or declaratory relief, challenging their inclusion on the Attorney General's list as Communist organizations. Each alleged that it had already suffered injury as a result of the listing: that contributors had withdrawn support, that persons had refused to take part in fund-raising activities, that members had resigned. The case came here on the pleadings, and we held such allegations sufficient as against a motion to dismiss. In *Pierce* v. *Society of Sisters*, *supra*, private schools were permitted to attack a state compulsory public-education statute: their complaints had alleged that because of the law, students who otherwise would have continued in attendance at the schools had withdrawn.[28] In *Buchanan* v. *Warley*, *supra*, a contract had been made, performance refused, and the state courts had denied enforcement on the ground of the challenged ordinance; and in *Truax* v. *Raich*, *supra*, in which an alien employee sued to enjoin enforcement of a statute requiring certain classes of em-

[28] See also *Columbia Broadcasting System, Inc.*, v. *United States*, 316 U. S. 407; *Truax* v. *Corrigan*, 257 U. S. 312.

ployers to retain not less than eighty per cent native-born citizens or qualified electors. Raich's employer had been arrested for violation of the statute and Raich had been threatened with immediate discharge. In *Terrace* v. *Thompson*, 263 U. S. 197, both landowners and a prospective tenant brought suit to enjoin enforcement of a state statute forbidding aliens to hold land and providing that land transferred to aliens should be forfeit to the State. The complainants alleged that they were prepared to enter into a lease and would have done so but for the statute.

The present proceeding differs from all of these. The record here does not show that any present members, affiliates, or contributors of the Party have withdrawn because of the threatened consequences to them of its registration under the Subversive Activities Control Act, or that any prospective members, affiliates, or contributors have been deterred from joining the Party or giving it their support. We cannot know how many, if any, members or prospective members of the Party are also employees or prospective employees of the Government or of defense facilities or labor unions, or how many, if any, contributors to the Party hold government or defense-facility employment. It is thus impossible to say now what effect the provisions of the Act affecting members of a registered organization will have on the Party. Cf. *New Jersey* v. *Sargent*, 269 U. S. 328. To pass upon the validity of those provisions would be to make abstract assertions of possible future injury, indefinite in nature and degree, the occasion for constitutional decision. If we did so, we would be straying beyond our judicial bounds. Of course, the Party may now assert those rights of its members, such as that of anonymity, which are allegedly infringed by the very act of its filing a registration statement, and which could not be otherwise asserted than by raising them here. *N. A. A. C. P.* v. *Alabama*, *supra*; *Bates* v. *Little Rock*, *supra*. But the

rights of its members, as potentially affected by the Act, to receive and use passports, seek and hold certain employment, be naturalized and preserve their citizenship once naturalized, are not of this category. We limit our consideration to the constitutionality of § 7 as applied in this proceeding.

V.

The constitutional contentions raised by the Party with respect to the registration requirement of § 7 are (A) that that requirement, in the context of the Act, in effect "outlaws" the Party and is in the nature of a bill of attainder; (B) that compelling organizations to register and to list their members on a showing merely that they are foreign-dominated and operate primarily to advance the objectives of the world Communist movement constitutes a restraint on freedom of expression and association in violation of the First Amendment; (C) that requiring Party officers to file registration statements for the Party subjects them to self-incrimination forbidden by the Fifth Amendment; (D) that the Act violates due process by legislative predetermination of facts essential to bring the Communist Party within the definition of a Communist-action organization, and that the evidentiary elements prescribed for consideration by the Board bear no rational relation to that definition; (E) that in several aspects the Act is unconstitutionally vague; and (F) that the Subversive Activities Control Board is so necessarily biased against the Communist Party as to deprive it of a fair hearing.

A. *"Outlawry" and Attainder.* Our determination that in the present proceeding all questions are premature which regard only the constitutionality of the various particular consequences of a registration order to a registered organization and its members, does not foreclose the Party from arguing—and it does argue—that in light of the cumulative effect of those consequences the reg-

istration provisions of § 7 are not what they seem, but represent a legislative attempt, by devious means, to "outlaw" the Party. The registration requirement, the Party contends, was designed not with the purpose of having Communist-action organizations register, but with a purpose to make it impossible to register, because of the onerous consequences of registration, and thus to establish a pretext for criminal prosecution of the organization and its members. The Act is said to be aimed particularly at the Communist Party as an identifiable entity, intending to punish it, and in this aspect to constitute a bill of attainder prohibited by Art. I, § 9, cl. 3 of the Constitution.

Of course, "only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground." *Flemming* v. *Nestor*, 363 U. S. 603, 617. No such proof is offered here. The Act on its face gives no indication that the registration provisions were not intended to be complied with. None of the consequences which attach to registration, whatever may be their validity when weighed separately in the constitutional balance, is so devoid of rational relation to the purposes of the Act as expressed in its second section that it appears a mere pressuring device meant to catch an organization between two fires. Section 2 recites that the world Communist movement, whose purpose is to employ deceit, secrecy, infiltration, and sabotage as means to establish a Communist totalitarian dictatorship, establishes and utilizes action organizations. The Act requires such organizations to register and to label their communications, and prohibits their members from government, defense-facility and certain labor-organization employment. Section 2 sets forth that Communist-action organizations are sections of a world-wide Communist movement and that international travel of its members and agents facilitates the purposes of the movement. The Act restricts the in-

gress and access to United States citizenship of alien members of Communist-action organizations and deprives all members of the use of United States passports. Section 2 finds that Communist-action organizations purpose to overthrow the Government of the United States by any available, necessary means. The Act forbids government and defense-facility employees to support such organizations, and withdraws from the organizations and their contributors certain tax exemptions. None of this is so lacking in consonance as to suggest a clandestine purpose behind the registration provisions. Nor does the legislative history contain any such suggestion. Rather, the Committee reports on the bills from which the Act derived express an object "to require the Communist movement in the United States to operate in the open rather than underground," and "to expose the Communist movement and protect the public against innocent and unwitting collaboration with it." [29]

It is true, as the Party asserts, that bills had been introduced in Congress that would have applied to the Communist Party by name,[30] and it is no doubt also true that the form which the Subversive Activities Control Act finally took was dictated in part by constitutional scruples against outlawing of the Party by "legislative fiat." [31] It

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[29] S. Rep. No. 2369, 81st Cong., 2d Sess. 4. See note 27, *supra*.

[30] See H. R. 1884, 80th Cong., 1st Sess. (prohibiting Party members from filing as candidates for elective office); H. R. 2122, 80th Cong., 1st Sess. (making Party membership unlawful); H. R. 4422, 80th Cong., 1st Sess. (requiring registration of Party members as agents of a foreign principal); H. R. 4482, 80th Cong., 1st Sess. (disqualifying political parties affiliated with the Communist Party from the ballot); H. R. 5852, 80th Cong., 2d Sess. (requiring the registration of "Communist-front" organizations; defining "Communist front" as including the Communist Party).

[31] H. R. Rep. No. 2980, 81st Cong., 2d Sess. 5; H. R. Rep. No. 1844, 80th Cong., 2d Sess. 6; S. Rep. No. 1358, 81st Cong., 2d Sess. 9.

is probable, too, that the legislators who voted for the Act in its final form expected that the Communist Party, if it continued to engage in the activities which had been reported to Congress as characterizing its past conduct, would be required to register under § 7.[32] From this the Party would have us conclude that the Act is only an instrument serving to abolish the Communist Party by indirection. But such an analysis ignores our duty of respect for the exercise of the legislative power of Congress, and, more specifically, ignores the crucial constitutional significance of what Congress did when it rejected the approach of outlawing the Party by name and accepted instead a statutory program regulating not enumerated organizations but designated activities. We would be indulging in a revisory power over enactments as they come from Congress—a power which the Framers of the Constitution withheld from this Court—if we so interpreted what Congress refused to do and what in fact Congress did; that is, if we treated this Act as merely a ruse by Congress to evade constitutional safeguards. Congress deemed it an attempt to achieve its legislative purpose consistently with constitutional safeguards.[33]

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[32] See H. R. Rep. No. 2980, 81st Cong., 2d Sess. 1-2; S. Rep. No. 1358, 81st Cong., 2d Sess. 5; cf. H. R. Rep. No. 1844, 80th Cong., 2d Sess. 1; 96 Cong. Rec. 13765, 14233, 14585.

[33] See, *e. g.*, S. Rep. No. 1358, 81st Cong., 2d Sess. 9:

"The committee gave serious consideration to the many well-intentioned proposals which were before it which attempted to meet the problems by outlawing the Communist Party. Proponents of this approach differed as to what they desired. Some wanted to bar the Communist Party from the ballot in the elections. Others would have made membership in the Communist Party illegal per se.

"The committee believes that there are several compelling arguments against the outlawing approach. There are grave constitutional questions involved in attempting to interfere with the rights of the States to declare what parties and individuals may qualify for

Whether it has done so—the issue which is now before us—is to be determined by the manner in which the enactment works in its practical application. "So long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power." *Barenblatt* v. *United States*, 360 U. S. 109, 132. *Oklahoma ex rel. Phillips* v. *Atkinson Co.*, 313 U. S. 508; *Sonzinsky* v. *United States*, 300 U. S. 506; *McCray* v. *United States*, 195 U. S. 27. The true and sole question before

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appearance on the ballot. To make membership in a specifically designated existing organization illegal per se would run the risk of being held unconstitutional on the grounds that such an action was legislative fiat.

"Among other policy considerations which militate against this type of approach are the following:

"(1) Illegalization of the party might drive the Communist movement further underground, whereas exposure of its activities is the primary need.

"(2) Illegalization has not proved effective in Canada and other countries which have tried it.

"(3) If the present Communist Party severs the puppet strings by which it is manipulated from abroad, if it gives up its undercover methods, there is no reason for denying it the privilege of openly advocating its beliefs in the way in which true political parties advocate theirs. In politics as well as sports there are certain rules of the game which must be obeyed. Daggers are out of order on the American playing field. Undercover methods and foreign direction cannot be tolerated on the political field.

"This legislation does not constitute, therefore, a fiat. The Communist Party of the United States is not made guilty of any offense by reason of the enactment of the provisions of this act. If, however, the Communist Party of the United States or any other party now in existence or to be formed operates in such a way that it comes within the definitions and performs activities which are proscribed under the act, then the legislation will apply to it. . . . If such a party changes its characteristics, then the objectives sought by the committee will have been accomplished."

us is whether the effects of the statute as it was passed and as it operates are constitutionally permissible.

The Act is not a bill of attainder. It attaches not to specified organizations but to described activities in which an organization may or may not engage. The singling out of an individual for legislatively prescribed punishment constitutes an attainder whether the individual is called by name or described in terms of conduct which, because it is past conduct, operates only as a designation of particular persons. See *Cummings* v. *Missouri*, 4 Wall. 277; *Ex parte Garland*, 4 Wall. 333. The Subversive Activities Control Act is not of that kind. It requires the registration only of organizations which, after the date of the Act, are found to be under the direction, domination, or control of certain foreign powers and to operate primarily to advance certain objectives. This finding must be made after full administrative hearing, subject to judicial review which opens the record for the reviewing court's determination whether the administrative findings as to fact are supported by the preponderance of the evidence. Present activity constitutes an operative element to which the statute attaches legal consequences, not merely a point of reference for the ascertainment of particular persons ineluctably designated by the legislature.

The fact that activity engaged in prior to the enactment of the legislation may be regarded administratively and judicially as relevant to a determination that an organization is presently foreign-controlled and presently works to advance the objectives of the world Communist movement, does not alter the operative structure of the Act. The incidents which it reaches are nonetheless present incidents. The past is pertinent only as probative of these. In this proceeding the Board has found, and the Court of Appeals has sustained its conclusion, that the Communist Party, by virtue of the activities in which it

now engages, comes within the terms of the Act. If the Party should at any time choose to abandon these activities, after it is once registered pursuant to § 7, the Act provides adequate means of relief. As often as once a year it may apply to the Attorney General for cancellation of registration, and in the event of his refusal to remove it from the register and to relieve it from the duty of filing annual statements, it may petition the Board for a redetermination of its amenability to the registration requirements of the Act, pursuant to a hearing which, again, is subject to judicial review. §§ 13 (b), (i), (j), 14 (a). Far from attaching to the past and ineradicable actions of an organization, the application of the registration section is made to turn upon continuingly contemporaneous fact; its obligations arise only because, and endure only so long as, an organization presently conducts operations of a described character.

Nor is the statute made an act of "outlawry" or of attainder by the fact that the conduct which it regulates is described with such particularity that, in probability, few organizations will come within the statutory terms. Legislatures may act to curb behavior which they regard as harmful to the public welfare, whether that conduct is found to be engaged in by many persons or by one. So long as the incidence of legislation is such that the persons who engage in the regulated conduct, be they many or few, can escape regulation merely by altering the course of their own present activities, there can be no complaint of an attainder. It would be ingenuous to refuse to recognize that the Subversive Activities Control Act of 1950 was designed to reach the Communist Party's operations as then reported to Congress—operations in which, the Board has found, the Party persists. But to base a determination of constitutionality on this design would be to confuse the occasion of legislation with its operative effect

and consequently to mistake decisive constitutional determinants. No doubt, the activity whose regulation the Act seeks to achieve is activity historically associated with the Communist Party. From its legislative study of the Communist Party, Congress concluded that that kind of activity was potentially dangerous to the national interest and that it must be subjected to control. But whatever the source from which the legislative experience and instruction derived, the Act applies to a class of activity only, not to the Communist Party as such. Nothing in this offends the constitutional prohibition of attainder.

B. *The Freedoms of Expression and Association Protected by the First Amendment.* The Communist Party would have us hold that the First Amendment prohibits Congress from requiring the registration and filing of information, including membership lists, by organizations substantially dominated or controlled by the foreign powers controlling the world Communist movement and which operate primarily to advance the objectives of that movement: the overthrow of existing government by any means necessary and the establishment in its place of a Communist totalitarian dictatorship (§§ 3 (3), 2 (1)(6)). We cannot find such a prohibition in the First Amendment. So to find would make a travesty of that Amendment and the great ends for the well-being of our democracy that it serves.

No doubt, a governmental regulation which requires registration as a condition upon the exercise of speech may in some circumstances affront the constitutional guarantee of free expression.[34] *Thomas* v. *Collins*, 323 U. S.

[34] We need not consider now the decisions in which this Court has struck down regulations requiring not merely registration but the securing of a license, issued either at the arbitrary discretion of licensing officials or by the application of licensing standards so broad or uncertain as to permit arbitrary action by officials, as pre-

516. In that case, the Court held that a State could not constitutionally punish for contempt a public speaker who had addressed a labor-organization meeting in violation of a restraining order prohibiting him from soliciting memberships in a labor union without having first registered as a paid labor organizer and secured an organizer's card. The decision was a narrow one, striking down the registration requirement only as applied to the particular circumstances of the case, *id.*, at 541–542—that is, to an individual who, as the Court several times insisted, had come into the State "for one purpose and one only—to make the speech in question." *Id.*, at 533; see also *id.*, at 521, 526.[35] Since this speech was the sole incident of Thomas' conduct upon which the State relied in asserting that he was an "organizer" and thus required to register as such, the Court regarded the statute, in this application, as basing the obligation to register upon speech activity alone.[36] "So long as no more is involved

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requisite to the right to speak. *E. g., Staub* v. *Baxley*, 355 U. S. 313; *Superior Films, Inc.*, v. *Department of Education*, 346 U. S. 587; *Gelling* v. *Texas*, 343 U. S. 960; *Joseph Burstyn, Inc.*, v. *Wilson*, 343 U. S. 495; *Niemotko* v. *Maryland*, 340 U. S. 268; *Kunz* v. *New York*, 340 U. S. 290; *Largent* v. *Texas*, 318 U. S. 418; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Schneider* v. *State*, 308 U. S. 147; *Hague* v. *C. I. O.*, 307 U. S. 496; *Lovell* v. *Griffin*, 303 U. S. 444. The present statute has no such licensing provision.

[35] After the speech, Thomas had also solicited one individual, by name, to join the union. The Court declined to decide whether such a solicitation, apart from the speech, might constitutionally have been made the basis of punishment for contempt. 323 U. S., at 541. The state court's order adjudging Thomas in contempt imposed a single sentence for both "solicitations," and the Court therefore regarded the statute, in this application, as restraining and punishing Thomas "for uttering, in the course of his address, the general as well as the specific invitation." *Id.*, at 529.

[36] This is clear from the Court's reliance on *De Jonge* v. *Oregon*, 299 U. S. 353.

than exercise of the rights of free speech and free assembly," the Court said, "it is immune to such a restriction." *Id.*, at 540. The present statute does not, of course, attach the registration requirement to the incident of speech, but to the incidents of foreign domination and of operation to advance the objectives of the world Communist movement—operation which, the Board has found here, includes extensive, long-continuing organizational, as well as "speech" activity. Thus the *Thomas* case is applicable here only insofar as it establishes that subjection to registration requirements may be a sufficient restraint upon the exercise of liberties protected by the First Amendment to merit that it be weighed in the constitutional balance.

Similarly, we agree that compulsory disclosure of the names of an organization's members may in certain instances infringe constitutionally protected rights of association. *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449; *Bates* v. *Little Rock*, 361 U. S. 516; *Shelton* v. *Tucker*, 364 U. S. 479. But to say this much is only to recognize one of the points of reference from which analysis must begin. To state that individual liberties may be affected is to establish the condition for, not to arrive at the conclusion of, constitutional decision. Against the impediments which particular governmental regulation causes to entire freedom of individual action, there must be weighed the value to the public of the ends which the regulation may achieve. *Schenck* v. *United States*, 249 U. S. 47; *Dennis* v. *United States*, 341 U. S. 494; *American Communications Assn.* v. *Douds*, 339 U. S. 382.

In the *N. A. A. C. P.* and *Bates* cases, this Court examined the circumstances under which disclosure was demanded, and concluded that "whatever interest the State may have in obtaining names of ordinary members has not been shown to be sufficient to overcome

[the] . . . constitutional objections to the production order." *N. A. A. C. P.* v. *Alabama*, 357 U. S., at 465. In the *N. A. A. C. P.* case, the Attorney General of Alabama had brought an equity suit to enjoin the Association from conducting further activities within, and to oust it from, the State on the grounds of its non-compliance with Alabama's foreign-corporation registration statute. The Attorney General sought, and the state court ordered, production of lists of the Association's rank-and-file members as pertinent to the issues whether the N. A. A. C. P. was conducting intrastate business in violation of the statute, and whether the extent of that business justified its permanent ouster from the State. Noting that the Association had admitted its presence and conduct of activities in Alabama during almost forty years and that it had offered to comply in all respects with the qualification statute, we said that "we are unable to perceive that the disclosure of the names of [N. A. A. C. P.'s] . . . rank-and-file members has a substantial bearing" upon any issue presented to the Alabama courts. *Id.*, at 464. *Bates* v. *Little Rock*, *supra*, involved the conviction of custodians of records of branches of the N. A. A. C. P. for failure to comply with provisions of local regulations which required organizations operating within the municipality to file with a municipal official, *inter alia*, financial statements showing the names of all contributors to the organizations. These regulations were amendments to ordinances levying license taxes on persons engaging in businesses, occupations or professions within municipal limits. Finding that the occupation taxes were based on the nature of the activity or enterprise conducted, not upon earnings or income, and, moreover, that there had been no showing that the N. A. A. C. P. branches were engaged in activity taxable under the ordinances, or had ever been regarded by tax authorities as subject to taxa-

tion under the ordinances, the Court concluded that: "In this record we can find no relevant correlation between the power of the municipalities to impose occupational license taxes and the compulsory disclosure and publication of the membership lists of the local branches of the National Association for the Advancement of Colored People." 361 U. S., at 525. Thus, these cases hold that where the required making public of an organization's membership lists bears no rational relation to the interest which is asserted by the State to justify disclosure, and where because of community temper publication might prejudice members whose names were revealed, disclosure cannot constitutionally be compelled.

*Shelton v. Tucker, supra,* did not involve legislation which, as a means of regulating an appropriately defined class of organizations whose activities menaced the public welfare, required those organizations to reveal their members. It involved an Arkansas statute which, conversely, as an incident of the State's attempt to control the activities of a class of individuals—the teachers in its public schools and publicly supported institutions of higher learning—required the individuals to disclose the associations to which they belonged. The statute's purported justification lay in its furtherance of the State's effective selection of teaching personnel; to subserve this end, it attempted to "ask every one of its teachers to disclose every single organization with which he has been associated over a five-year period." 364 U. S., at 487–488. The Court, finding that "Many such relationships could have no possible bearing upon the teacher's occupational competence or fitness," *id.*, at 488, and hence that "The statute's comprehensive interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers," *id.*, at 490, struck the

legislation down. Again, the *ratio decidendi* of the decision was the absence of substantial connection between the breadth of disclosure demanded and the purpose which disclosure was asserted to serve.

The present case differs from *Thomas* v. *Collins* and *from N. A. A. C. P., Bates, and Shelton in the magnitude* of the public interests which the registration and disclosure provisions are designed to protect and in the pertinence which registration and disclosure bear to the protection of those interests. Congress itself has expressed in § 2 of the Act both what those interests are and what, in its view, threatens them. On the basis of its detailed investigations Congress has found that there exists a world Communist movement, foreign-controlled whose purpose it is by whatever means necessary to establish Communist totalitarian dictatorship in the countries throughout the world, and which has already succeeded in supplanting governments in other countries. Congress has found that in furthering these purposes, the foreign government controlling the world Communist movement establishes in various countries action organizations which, dominated from abroad, endeavor to bring about the overthrow of existing governments, by force if need be, and to establish totalitarian dictatorships subservient to that foreign government. And Congress has found that these action organizations employ methods of infiltration and secretive and coercive tactics; that by operating in concealment and through Communist-front organizations they are able to obtain the support of persons who would not extend such support knowing of their true nature; that a Communist network exists in the United States; and that the agents of communism have devised methods of sabotage and espionage carried out in successful evasion of existing law. The purpose of the Subversive Activities Control

Act is said to be to prevent the world-wide Communist conspiracy from accomplishing its purpose in this country. It is not for the courts to re-examine the validity of these legislative findings and reject them. *See Harisiades v. Shaughnessy*, 342 U. S. 580, 590. They are the product of extensive investigation by Committees of Congress over more than a decade and a half.[37] Cf. *Nebbia v. New York*, 291 U. S. 502, 516, 530. We certainly cannot dis-

[37] Among the Committee reports, see the following: Investigation of Communist Propaganda, H. R. Rep. No. 2290, 71st Cong., 3d Sess.; Investigation of Nazi and Other Propaganda, H. R. Rep. No. 153, 74th Cong., 1st Sess.; Investigation of Un-American Activities and Propaganda, H. R. Rep. No. 2, 76th Cong., 1st Sess.; Investigation of Un-American Propaganda Activities in the United States, H. R. Rep. No. 1476, 76th Cong., 3d Sess.; Investigation of Un-American Propaganda Activities in the United States, H. R. Rep. No. 1, 77th Cong., 1st Sess.; Special Report on Subversive Activities Aimed at Destroying Our Representative Form of Government, H. R. Rep. No. 2748, 77th Cong., 2d Sess.; Sources of Financial Aid for Subversive and Un-American Propaganda, H. R. Rep. No. 1996, 79th Cong., 2d Sess.; Investigation of Un-American Activities and Propaganda, H. R. Rep. No. 2233, 79th Cong., 2d Sess.; Investigation of Un-American Activities and Propaganda, H. R. Rep. No. 2742, 79th Cong., 2d Sess.; The Communist Party of the United States as an Agent of a Foreign Power, H. R. Rep. No. 209, 80th Cong., 1st Sess.; Report on the Communist Party of the United States as an Advocate of Overthrow of Government by Force and Violence, H. R. Comm. Print, 80th Cong., 2d Sess.; Report of the Committee on Un-American Activities to the United States House of Representatives, Eightieth Congress, H. R. Comm. Print, 80th Cong., 2d Sess.; Soviet Espionage Within the United States Government (second report), H. R. Comm. Print, 80th Cong., 2d Sess.; The Strategy and Tactics of World Communism, H. R. Doc. No. 619, 80th Cong., 2d Sess., and (Country Studies), H. R. Doc. No. 154, 81st Cong., 1st Sess.; Annual Report of the Committee on Un-American Activities For the Year 1949, H. R. Rep. No. 1950, 81st Cong., 2d Sess.; Report on Atomic Espionage, H. R. Rep. No. 1952, 81st Cong., 2d Sess. For a bibliography of published committee hearings during this period, see Internal Security Manual, S. Doc. No. 47, 83d Cong., 1st Sess. 216–223.

miss them as unfounded or irrational imaginings. See *Galvan* v. *Press*, 347 U. S. 522, 529; *American Communications Assn.* v. *Douds*, 339 U. S. 382, 388–389. And if we accept them, as we must, as a not unentertainable appraisal by Congress of the threat which Communist organizations pose not only to existing government in the United States, but to the United States as a sovereign, independent nation—if we accept as not wholly unsupportable the conclusion that those organizations "are not free and independent organizations, but are sections of a world-wide Communist organization and are controlled, directed, and subject to the discipline of the Communist dictatorship of [a] . . . foreign country," § 2 (5)—we must recognize that the power of Congress to regulate Communist organizations of this nature is extensive. "Security against foreign danger is one of the primitive objects of civil society," James Madison wrote in The Federalist (No. 41). "It is an avowed and essential object of the American Union. The powers requisite for attaining it must be effectually confided to the federal councils." The Federalist (Wright ed. 1961) 295. See also The Federalist (Nos. 2–5), *id.*, at 93 *et seq.* Means for effective resistance against foreign incursion—whether in the form of organizations which function, in some technical sense, as "agents" of a foreign power,[38] or in the form of organizations which, by complete dedication and obedience to foreign directives, make themselves the instruments of a foreign power—may not be denied to the national legislature. "To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment

[38] See the Foreign Agents Registration Act, 52 Stat. 631, as amended, 22 U. S. C. §§ 611–621.

come. . . ." *The Chinese Exclusion Case*, 130 U. S. 581, 606. See also *Perez* v. *Brownell*, 356 U. S. 44; *Ex parte Quirin*, 317 U. S. 1; *Hines* v. *Davidowitz*, 312 U. S. 52; *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 315–322; *Mackenzie* v. *Hare*, 239 U. S. 299, 311; *Fong Yue Ting* v. *United States*, 149 U. S. 698; Mr. Justice Bradley, concurring in the *Legal Tender Cases*, 12 Wall. 457, 554, 556.

Of course, congressional power in this sphere, as in all spheres, is limited by the First Amendment. Individual liberties fundamental to American institutions are not to be destroyed under pretext of preserving those institutions, even from the gravest external dangers. But where the problems of accommodating the exigencies of self-preservation and the values of liberty are as complex and intricate as they are in the situation described in the findings of § 2 of the Subversive Activities Control Act—when existing government is menaced by a world-wide integrated movement which employs every combination of possible means, peaceful and violent, domestic and foreign, overt and clandestine, to destroy the government itself—the legislative judgment as to how that threat may best be met consistently with the safeguarding of personal freedom is not to be set aside merely because the judgment of judges would, in the first instance, have chosen other methods. Especially where Congress, in seeking to reconcile competing and urgently demanding values within our social institutions, legislates not to prohibit individuals from organizing for the effectuation of ends found to be menacing to the very existence of those institutions, but only to prescribe the conditions under which such organization is permitted, the legislative determination must be respected. *United Public Workers* v. *Mitchell*, 330 U. S. 75; *American Communications Assn.* v. *Douds*, *supra*.

In a number of situations in which secrecy or the concealment of associations has been regarded as a threat to public safety and to the effective, free functioning of our national institutions Congress has met the threat by requiring registration or disclosure.[39] The Federal Corrupt Practices Act, enacted in 1925, 43 Stat. 1070, 2 U. S. C. §§ 241–245, requires all political committees (organizations accepting contributions or making expenditures to influence the election of candidates for designated national offices in two or more States, or branches of national committees) to have a chairman and a treasurer, and makes it the duty of the treasurer to keep detailed financial accounts and to file with the Clerk of the House of Representatives periodic statements containing, *inter alia*, the names and addresses of all persons contributing more than $100 to the committee during any year. *Burroughs* v. *United States*, 290 U. S. 534, sustained that statute against the claim that Congress lacked constitu-

[39] Compare 18 U. S. C. § 612 (prohibiting the publication or distribution of written statements concerning candidates for designated national elective offices unless such statements contain the names of the persons or associations responsible for the publication or distribution and, in the case of associations, the names of their officers); 37 Stat. 553, as amended, 39 U. S. C. §§ 233–234 (prescribing the withdrawal of second-class mailing privileges from publications which do not file with the Postmaster General, and publish in the second issue of the publication printed after filing, a statement setting forth the names of the publication's editors, publishers, managers and owners, and, if the owners are corporations, the names of stockholders and other security holders; and prohibiting the printing, by publications enjoying second-class privileges, of paid advertisements not marked as such), sustained against First Amendment challenge in *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288; Communications Act of 1934, § 317, 48 Stat. 1089, 47 U. S. C. § 317 (requiring, in the case of all matter broadcast by radio for which a valuable consideration is paid by any person, an announcement that the matter has been paid for by such person).

tional power to regulate such political organizations; the Court found ample authority in congressional power "to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption." *Id.*, at 545. The Federal Regulation of Lobbying Act, 60 Stat. 839, 2 U. S. C. §§ 261–270, applies to any person who solicits or receives money or anything of value to be used principally, or if the person's principal purpose is, to influence the passage or defeat of legislation by Congress. It requires any person receiving any contributions or expending any money for the purposes of influencing the passage or defeat of legislation to file with the Clerk of the House quarterly statements which set out the names and addresses of each person who has made a contribution of $500 or more not mentioned in the preceding report. It also requires that any person who engages himself for pay for the purpose of attempting to influence the passage or defeat of legislation, before doing anything in furtherance of that objective, register with the Clerk of the House and the Secretary of the Senate, and state in writing, *inter alia*, his name and address and the name and address of the person by whom he is employed, and in whose interest he works. These paid lobbyists must file quarterly reports of all money received and expended in carrying on their work, to whom paid, for what purposes, the names of publications in which they have caused any articles to be published, and the proposed legislation they are employed to support or oppose; this information is to be printed in the Congressional Record. In *United States* v. *Harriss*, 347 U. S. 612, we held that the First Amendment did not prohibit the prosecution of criminal informations charging violation of the registration and reporting provisions of the Act. We said:

> "Present-day legislative complexities are such that individual members of Congress cannot be expected

to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal. This was the evil which the Lobbying Act was designed to help prevent.

"Toward that end, Congress has not sought to prohibit these pressures. It has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose. It wants only to know who is being hired, who is putting up the money, and how much. . . ." *Id.*, at 625.

The Foreign Agents Registration Act, first enacted in 1938, 52 Stat. 631, and since several times amended, provides, as now set forth in 22 U. S. C. §§ 611–621, that agents of foreign principals must register with the Attorney General and file periodic registration statements (which are to be held by the Attorney General open to public inspection) containing, among other information, the registrant's name, a comprehensive statement of the nature of the registrant's business, a complete list of the registrant's employees and a statement of the nature of the work of each (unless this requirement is waived by the Attorney General), the name and address of the registrant's foreign principals, with further information as to the principals' character, ownership and control, the names and addresses of all persons other than a registrant's foreign principal who contribute to the registrant in connection with specified activities of the registrant, and detailed financial accounts. Such agents must also

file with the Attorney General and the Librarian of Congress, and must label as emanating from a registered agent of a foreign principal, and mark with the name of the agent and the principal, any political propaganda transmitted in the United States mails or through any instrumentality of interstate or foreign commerce. In addition, Title 18 U. S. C. § 2386, derived from the so-called Voorhis Act of 1940, 54 Stat. 1201, requires the registration with the Attorney General of organizations subject to foreign control which engage in political or civilian military activity (as those terms are defined in the section), organizations which engage in both political and civilian military activity (as defined), and organizations whose purpose is the overthrow of government by the use or threat of force or violence or military measures. Organizations required to register must report, *inter alia*, the names and addresses of their officers, branch officers and contributors, a detailed description of their activities, and a detailed statement of assets, and must file copies of publications which they issue or distribute; registration statements must be kept up to date and are to be open for public examination. Committee reports pertinent to the Subversive Activities Control Act of 1950 state that the necessity for the legislation derived in part from the difficulty of enforcing the Foreign Agents Registration and Voorhis Acts against Communist organizations "due in part to the skill and deceit which the Communists have used in concealing their foreign ties." [40]

Certainly, as the *Burroughs* and *Harriss* cases abundantly recognize, secrecy of associations and organizations, even among groups concerned exclusively with political processes, may under some circumstances constitute a danger which legislatures do not lack constitutional power

[40] H. R. Rep. No. 2980, 81st Cong., 2d Sess. 2; H. R. Rep. No. 1844, 80th Cong., 2d Sess. 5.

to curb. In *New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, this Court held that the Due Process Clause of the Fourteenth Amendment was not offended by a state statute requiring filing with the Secretary of State of the constitution and by-laws, rules and regulations, membership oath, roster of members and list of officers of every association of twenty or more members having as a condition of membership an oath. The statute made it unlawful to become or remain a member of such an association with knowledge that it had failed to comply with the filing requirement. Exceptions for labor unions and benevolent orders indicated that the measure was directed primarily at the Ku Klux Klan. Compelling disclosure of membership lists and other information by organizations of the character of the Klan, the Court found, was reasonable both as a means for providing the government of the State with knowledge of the activities of those organizations within its borders, and because "requiring this information to be supplied for the public files will operate as an effective or substantial deterrent from the violations of public and private right to which the association might be tempted if such a disclosure were not required." *Id.*, at 72. It was the nature of the organization regulated, and hence the danger involved in its covert operation, which justified the statute and caused us to distinguish the *Bryant* case in *N. A. A. C. P.* v. *Alabama*, *supra*, 357 U. S., at 465.[41] In *N. A. A. C. P.* and *Bates* v. *Little Rock*, *supra*, as we have said, there was no showing of any danger inherent in concealment, no showing that the State, in seeking disclosure, was attempting to cope with any perceived danger. Nor was this kind of

[41] One aspect of the constitutional attack on the New York statute in the *Bryant* case was that the "liberty" protected by the Due Process Clause comprehended freedom to form harmless associations and engage in non-violent associational activity.

danger—arising when secrecy itself is made an active instrument of public harm—put forth to justify the statute which was held invalid in *Shelton* v. *Tucker*, *supra*.

Congress, when it enacted the Subversive Activities Control Act, did attempt to cope with precisely such a danger. In light of its legislative findings, based on voluminous evidence collected during years of investigation, we cannot say that that danger is chimerical, or that the registration requirement of § 7 is an ill-adjusted means of dealing with it. In saying this, we are not insensitive to the fact that the public opprobrium and obloquy which may attach to an individual listed with the Attorney General as a member of a Communist-action organization is no less considerable than that with which members of the National Association for the Advancement of Colored People were threatened in *N. A. A. C. P.* and *Bates*. But while an angry public opinion, and the evils which it may spawn, are relevant considerations in adjudging, in light of the totality of relevant considerations, the validity of legislation that, in effecting disclosure, may thereby entail some restraints on speech and association, the existence of an ugly public temper does not, as such and without more, incapacitate government to require publicity demanded by rational interests high in the scale of national concern. Where the mask of anonymity which an organization's members wear serves the double purpose of protecting them from popular prejudice and of enabling them to cover over a foreign-directed conspiracy, infiltrate into other groups, and enlist the support of persons who would not, if the truth were revealed, lend their support, see § 2 (1), (6), (7), it would be a distortion of the First Amendment to hold that it prohibits Congress in removing the mask.

These considerations lead us to sustain the registration provisions of § 7, as not repugnant to the First Amend-

ment, insofar as they require Communist-action organizations to file a registration statement containing the names and addresses of its present officers and members. The requirement that persons who were officers or members at any time during the year preceding registration must be listed, see § 7 (d)(2), (4), is a reasonable means of assuring that the obligation to list present members and officers will not be evaded. For reasons which do not require elaboration, the requirement that a registering organization list the aliases of officers and members, see § 7 (d)(5), must also be sustained. Nor do we find that § 7 (d)(3), requiring a financial accounting, or § 7 (d)(6),[42] requiring a listing of all printing presses in the possession or control of the organization or its members violate First Amendment rights. Disclosure both of the financial transactions of a Communist-action organization and of the identity of the organs of publication which it controls might not unreasonably have been regarded by Congress as necessary to the objective which the Act seeks to achieve: to bring foreign-dominated organizations out into the open where the public can evaluate their activities informedly against the revealed background of their character, nature, and connections. Of course, printing presses may not be regulated like guns. That generalization gets us nowhere. On the concrete, specific issue before us, we hold that the obligation to give information identifying presses, without more and as applied to foreign-dominated organizations, does not fetter constitutionally protected free expression. No other kind of regulation is involved here. As to the penalties for failure to register, see § 15 (a), which the Party attacks as exorbitant and oppressive, these are not now before us. They have not yet been imposed on the Party and may never be. *United States* v. *Harriss*, 347 U. S. 612; *United States* v. *Wurzbach*, 280 U. S. 396.

[42] Added by an Act of July 29, 1954, 68 Stat. 586.

It is argued that if Congress may constitutionally enact legislation requiring the Communist Party to register, to list its members, to file financial statements, and to identify its printing presses, Congress may impose similar requirements upon any group which pursues unpopular political objectives or which expresses an unpopular political ideology. Nothing which we decide here remotely carries such an implication. The Subversive Activities Control Act applies only to *foreign-dominated* organizations which work primarily to advance the objectives of a world movement controlled by the government of a *foreign* country. See §§ 3 (3), 2 (4). It applies only to organizations directed, dominated, or controlled by a *particular* foreign country, the leader of a movement which, Congress has found, is "in its origins, its development, and its present practice, . . . a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups . . . , espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization." § 2 (1). This is the full purported reach of the statute,[43] and its fullest effect. There is no attempt here to impose stifling obligations upon the proponents of a particular political creed as such, or even to check the importation of particular political ideas from abroad for propagation here. The Act compels the registration of organized groups which have been made the instruments of a long-continued, systematic, disciplined activity directed by a foreign power and purposing to overthrow existing government in this country. Organi-

[43] See S. Rep. No. 2369, 81st Cong., 2d Sess. 4; H. R. Rep. No. 2980, 81st Cong., 2d Sess. 3; S. Rep. No. 1358, 81st Cong., 2d Sess. 3, 5, 8; H. R. Rep. No. 1844, 80th Cong., 2d Sess. 2; 96 Cong. Rec. 13731, 14171–14173.

zations are subject to it only when shown, after administrative hearing subject to judicial review, to be dominated by the foreign power or its organs and to operate primarily to advance its purposes. That a portion of the evidence upon which such a showing is made may consist in the expression of political views by the organization does not alter the character of the Act or of the incidents to which it attaches. Such expressions are relevant only as probative of foreign control and of the purposes to which the organization's actions are directed. The Board, in the present proceeding, so understood the Act. The registration requirement of § 7, on its face and as here applied, does not violate the First Amendment.

C. *Self-Incrimination of the Party's Officers.* Section 7 (a) and (c) requires that organizations determined to be Communist-action organizations by the Subversive Activities Control Board register within thirty days after the Board's registration order becomes final. Registration is to be accompanied by a registration statement, prepared in such manner and form as the Attorney General, by regulations, prescribes. § 7 (d). The form which, pursuant to this authority, the Attorney General has prescribed requires that registration statements "shall be signed by the partners, officers, and directors, including the members of the governing body of the organization." 28 CFR § 11.200; Dept. Justice Form ISA–1. If the organization fails to register or to file a registration statement, it is the duty of the executive officer, the secretary, the president or chairman, the vice-president or vice-chairman, the treasurer, and the members of the governing board, council, or body, to register the organization by filing a registration statement for it within ten days after the expiration of the thirty-day registration period allowed the organization. See 28 CFR § 11.205, issued pursuant to § 7 (h) of the Act. The Party contends that these

requirements cannot be imposed and exacted consistently with the Self-Incrimination Clause of the Fifth Amendment. Officers of the Party, it is argued, are compelled, in the very act of filing a signed registration statement, to admit that they *are* Party officers—an admission which we have held incriminating. *Blau* v. *United States*, 340 U. S. 159; cf. *Quinn* v. *United States*, 349 U. S. 155. What is required is said to be not merely the production of documents kept in an official capacity for the Party, see *McPhaul* v. *United States*, 364 U. S. 372; *United States* v. *White*, 322 U. S. 694; *Wilson* v. *United States*, 221 U. S. 361, but individual action by the officers which, by establishing a connection between the officers and the documents, in effect convicts the officers out of their own mouths. Cf. *Curcio* v. *United States*, 354 U. S. 118.

Manifestly, insofar as this contention is directed against the provisions of § 7 (h) and 28 CFR § 11.205, requiring that designated officers file registration statements in default of registration by an organization, it is prematurely raised in the present proceeding. The duties imposed by those provisions will not arise until and unless the Party fails to register. At this time their application is wholly contingent and conjectural. Cf. *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450.[23]

We find that the self-incrimination challenge to § 7 (a) and (d), as implemented by the Attorney General's regulations and forms, is also premature at this time. The privilege against self-incrimination is one which normally must be claimed by the individual who seeks to avail himself of its protection. *Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103; *United States* v. *Murdock*, 284 U. S. 141; *Rogers* v. *United States*, 340 U. S. 367; see also *Smith* v. *United States*, 337 U. S. 137, 147–148;

[23] *A fortiori* we do not reach at this time the question of the validity of § 8 of the Act. See note 22 *supra*.

*United States* v. *Monia*, 317 U. S. 424, 427. We cannot know now that the Party's officers will ever claim the privilege. There is no indication that in the past its high-ranking officials have sought to conceal their identity, and no reason to believe that in the future they will decline to file a registration statement whose whole effect, in this regard, is further to evidence a fact which, traditionally, has been one of public notice. Within thirty days after the Board's registration order becomes final, the Party's officers may file signed registration statements in the form required by Form ISA–1. Or they may file statements claiming the privilege in lieu of furnishing the required information. If a claim of privilege is made, it may or may not be honored by the Attorney General. We cannot, on the basis of supposition that privilege will be claimed and not honored, proceed now to adjudicate the constitutionality under the Fifth Amendment of the registration provisions. Whatever proceeding may be taken after and if the privilege is claimed will provide an adequate forum for litigation of that issue.

The Party contends, however, that under the Subversive Activities Control Act there will be no opportunity for its officers to claim the Fifth Amendment privilege without, at the same time, giving up all the protection which the Fifth Amendment secures them. Persons who come forward to make the claim, it is said, will as much reveal themselves to the Attorney General as officers of the Party as if they had in fact filed a registration statement. But it is always true that one who is required to assert the privilege against self-incrimination may thereby arouse the suspicions of prosecuting authorities. Nevertheless, it is not and has never been the law that the privilege disallows the asking of potentially incriminatory questions or authorizes the person of whom they are asked to evade them without expressly asserting that his answers may tend to incriminate him. *State* v. *Kemp*, 126 Conn.

60, 9 A. 2d 63; *O'Connell* v. *United States*, 40 F. 2d 201 (C. A. 2d Cir.); *In re Knickerbocker Steamboat Co.*, 139 F. 713 (D. C. S. D. N. Y.); *In re Groban*, 99 Ohio App. 512, 135 N. E. 2d 477, aff'd, 164 Ohio St. 26, 128 N. E. 2d 106, aff'd, 352 U. S. 330; *Allhusen* v. *Labouchere*, L. R. 3 Q. B. D. 654; *Fisher* v. *Owen*, L. R. 8 Ch. D. 645. And see *United States* v. *Hiss*, 185 F. 2d 822 (C. A. 2d Cir.); *Commonwealth* v. *Granito*, 326 Mass. 494, 95 N. E. 2d 539. In *United States* v. *Sullivan*, 274 U. S. 259, this Court sustained a conviction for failure to file an income tax return, despite the defendant's objection that answers called for on the return would have incriminated him. Mr. Justice Holmes, for a unanimous Court, wrote that "If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all . . . . [I]f the defendant desired to test that or any other point he should have tested it in the return so that it could be passed upon. He could not draw a conjurer's circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law." *Id.*, at 263–264. This would, of course, be the normal rule. Perhaps *Sullivan* is distinguishable, however, from the situation of registration under the Subversive Activities Control Act. Tax returns must be filed generally, and answers to tax return questions may involve any of a wide variety of activities, whereas the obligation to file a registration statement compels a few particular individuals to come forward, to identify themselves, and to suggest, at least, their connection with a relatively limited potential sphere of criminal conduct. Then, too, in *Sullivan*, Mr. Justice Holmes assumed that some, at least, of the answers to the questions on the tax return would not have been incriminating, whereas in the case of the registration statement,

any claim of the privilege would involve the withholding of all information; thus, there is, presumably, a greater governmental interest in having the privilege claimed specifically on the form in the tax-return circumstances. To suggest these possible distinctions is to recognize that the applicability of the *Sullivan* principle here may raise novel and difficult questions as to the reach of the Fifth Amendment—questions which should not be discussed in advance of the necessity of deciding them. See *Peters* v. *Hobby*, 349 U. S. 331, 338. The stage at which that decision will become necessary, if at all, is the stage at which *Sullivan* itself was decided: when enforcement proceedings for failure to register are instituted against the Party or against its officers. See *People* v. *McCormick*, 102 Cal. App. 2d Supp. 954, 228 P. 2d 349.

In arguing that the issue is not now premature, the Party cites *Boyd* v. *United States*, 116 U. S. 616, for the proposition that, where a statute compelling the production of potentially incriminating information allows the exercise of the Fifth Amendment privilege only under circumstances which effectively nullify the Amendment's protection, the statute may be held "unconstitutional and void," not merely unenforceable in cases in which a proper claim of privilege is made. Assuming *arguendo* that this proposition is correct, the most that can be drawn from it of pertinence to the present case is that, in a prosecution of the Party for failure to register, or in a prosecution of its officers for failure to register the Party, the Court would have to determine whether the Subversive Activities Control Act is a statute which, like the statute in *Boyd*, unconstitutionally circumscribes the effectual exercise of the privilege. Obviously, such a determination would never have to be made if an enforcement proceeding were never brought—either because Party officials registered pursuant to § 7 (a) and (d) without complaint, or because they did choose to assert the privilege in some form in which it

could be recognized. The *Boyd* case involved a statute providing that in proceedings other than criminal arising under the revenue laws, the Government could secure an order of the court requiring the production by an opposing claimant or defendant of any documents under his control which, the Government asserted, might tend to prove any of the Government's allegations. If production were not made, the allegations were to be taken as confessed. On the Government's motion, the District Court had entered such an order, requiring the claimants in a forfeiture proceeding to produce a specified invoice. Although the claimants objected that the order was improper and the statute unconstitutional in coercing self-incriminatory disclosures and permitting unreasonable searches and seizures, they did, under protest, produce the invoice, which was, again over their constitutional objection, admitted into evidence. This Court held that on such a record a judgment for the United States could not stand, and that the statute was invalid as repugnant to the Fourth and Fifth Amendments. In *Boyd*, production had been ordered, objected to, and, the Court held, unconstitutionally compelled. There is nothing in the case which justifies advisory adjudication of self-incrimination questions prior to the time when a demand for information has been, at the least, made and resisted.

D. *Legislative Predetermination of Adjudicative Fact.* It is next asserted that the Act offends the Due Process Clause of the Fifth Amendment by predetermining legislatively facts upon which the application of the registration provisions to the Communist Party depends. Two arguments are made in this regard. The first is that although § 3 (3), defining a "Communist-action organization," purports to require findings that an organization is controlled by "the foreign government or foreign organization controlling the world Communist movement referred to in section 2 . . ." and operates primarily to advance

the objectives "of such world Communist movement as referred to in section 2 . . . ," the existence of a world Communist movement, its direction by the government of a foreign country, and the nature of its objectives are "found" by Congress in § 2, and may not be litigated in proceedings before the Board. Thus, an organization is precluded from showing operative facts which would take it out of § 3 (3): *viz.*, that there is no world Communist movement, or that, if there is, it is not controlled by a foreign government, or that it does not have the objectives attributed to it by § 2. The second argument is that the Board was in effect foreclosed from finding that the Party was not a Communist-action organization by the declarations in § 2 (9), (12), and (15), that there are in the United States individuals who knowingly and willfully participate in the world Communist movement, that there is a Communist network in the United States, and that the "Communist movement in the United States is an organization: . . ." Given these "facts," it is asserted, nothing is left to the Board but to supply the name of the organization—a name which, the Party contends, is obvious. Further, it is pointed out, Congress in 1954, prior to the Board's final determination in this proceeding, enacted the Communist Control Act, 68 Stat. 775, 50 U. S. C. § 841 *et seq.*, which declares in its second section:

> "The Congress hereby finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States . . . . [T]he policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement . . . . [I]ts role as the agency of a hostile foreign power renders its existence a clear present and continuing danger to the security of the United States. . . ."

The Board could not, therefore, the Party argues, find that the Communist Party was not a Communist-action organization without contradicting Congress.

*First:* We have held, *supra*, that the congressional findings that there exists a world Communist movement, that it is directed by the Communist dictatorship of a foreign country, and that it has certain designated objectives, *inter alia*, the establishment of a Communist totalitarian dictatorship throughout the world through the medium of a world-wide Communist organization, § 2 (1), (4), are not open to re-examination by the Board. We find that nothing in this violates due process. Under § 3 (3) of the Act, an organization may not be found to be a Communist-action organization unless it is shown to be, first, "substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 . . . ." The only operative function of § 2 in this respect is to designate what Congress meant by "world Communist movement," "the foreign government," etc. The characteristics of the movement and the source of its control are not to be established by the Attorney General in proceedings before the Board, nor may they be disproved. But this is because they are merely defining terms whose truth, as such, is irrelevant to the issues in such proceedings. They are referrents which identify "*the* foreign government" to which § 3 (3) adverts. The Board, construing the statute, concluded that that foreign government was the Soviet Union. We affirm that construction. The statute, then, defines a Communist-action organization in terms of substantial direction, domination, or control by the Soviet Union. The Government offered evidence to show that the Soviet Union substantially directed, dominated, or controlled the Communist Party. The Party had an opportunity to rebut this showing, and it attempted to do so. The Board found that the Gov-

ernment's showing was persuasive; it issued a 240-page report so concluding; and the Court of Appeals affirmed. None of the operative facts were "predetermined," except in the sense in which any statute, as construed, designates the nature of the facts pertinent to issues which may be litigated under it. If, in future years, in a future world situation, the Soviet Union is no longer the foreign country to which § 2 (1) and (4), fairly read in their context, refer—so that substantial domination by the Soviet Union would not bring an organization within the terms of § 3 (3)—that, too, will be a matter of statutory construction which no "findings" in the statute foreclose. The Board or a reviewing court will be able to say that the "world Communist movement," as Congress meant the term in 1950 (and whether or not there really existed, in 1950, a movement having all the characteristics described in § 2), no longer exists, or that Country *X* or *Y*, not the Soviet Union, now directs it. A similar process of adjudication is required under § 3 (3)(a)(ii), the "objectives" component of the definition of a Communist-action organization. It provides that, in order to be found a Communist-action organization, an organization must be shown to operate "primarily to advance the objectives of such world Communist movement as referred to in section 2 . . . ." What those objectives are is made clear by the terms of § 2 itself. They are there described in detail. Whether they are in fact the objectives of some "world Communist movement" which in fact exists may not be litigated, because the question is irrelevant. Whether the particular organization against whom the Attorney General files a petition for a registration order operates primarily to advance those objectives is the pertinent issue under the statute, and this issue may be litigated. That is all that due process requires.

The decisions cited by the Party, *Tot* v. *United States*, 319 U. S. 463; *McFarland* v. *American Sugar Ref. Co.*,

241 U. S. 79; *Manley* v. *Georgia*, 279 U. S. 1; *Western & Atlantic R. Co.* v. *Henderson*, 279 U. S. 639; and see *Bailey* v. *Alabama*, 219 U. S. 219, have no application here. These cases involved statutes which, purporting to attach legal consequences to one set of facts, created a rebuttable presumption of the existence of that set of facts which arose upon proof of other facts having, this Court found, no rational relation to the facts upon which the statutory consequences turned. The Subversive Activities Control Act, however, does not define a Communist-action organization as one which operates primarily to advance whatever objectives are actually held by the world Communist movement, leaving these objectives as facts to be proved. It finds that the particular objectives set out in § 2 *are* those of the world Communist movement and requires the registration of certain foreign-dominated organizations which operate primarily to advance those objectives. One, and only one, set of facts is in issue under § 3 (3) (a) (ii): whether a particular organization does or does not operate primarily to advance those objectives; and, as to this, the legislation "predetermines" nothing.

*Second:* We do not find that the congressional assertions in § 2 (9), (12) and (15), that there exist in the United States individuals dedicated to communism, a "Communist network," a "Communist movement," and a Communist "organization," deprive the Party of the fair hearing which due process of law requires. Fairly read, these findings neither compel nor suggest the outcome in any particular litigation before the Board. They do not create the impression that there is a single Communist-action organization in the United States, still less that the Communist Party is "it." Nor can we hold that the findings of § 2 of the Communist Control Act of 1954 unconstitutionally prejudice the Party. It is not suggested that these were enacted with a purpose to influ-

ence the then-pending proceedings in the present case. Rather, they are a portion of legislation deemed necessary by Congress pursuant to its continuing duty to protect the national welfare. Nowhere in the extensive modified reports of the Board nor in the opinions of the Court of Appeals are the 1954 legislative findings considered. While we must, of course, assume that the Board was aware of them, we cannot say that their very annunciation by Congress—in the absence of any showing that the Board took them into account—foreclosed or impaired a fair administrative determination.

The other constitutional questions raised by the Party have been carefully considered, but do not call for detailed discussion. And we must decline, of course, to enter into discussion of the wisdom of this legislation. The Constitution does not prohibit the requirement that the Communist Party register with the Attorney General as a Communist-action organization pursuant to § 7.

The judgment of the Court of Appeals is

*Affirmed.*

# SUPREME COURT OF THE UNITED STATES

No. 12.—October Term, 1960.

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| Communist Party of the United States of America, Petitioner, v. Subversive Activities Control Board. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit. |

[June 5, 1961.]

Mr. Chief Justice Warren, dissenting.

When this case was here in 1956, the Court refused to pass upon the constitutional issues raised by the parties, and instead remanded to the Board because of the possibility that the record was tainted by perjured testimony. At that time the Court said: "This non-constitutional issue must be met at the outset, because the case must be decided on a non-constitutional issue, if the record calls for it, without reaching constitutional problems." *Communist Party of the United States* v. *Subversive Activities Control Board*, 351 U. S. 115, 122. The Court also noted that a remand was required because the "fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted." *Id.*, at 124. These statements, applicable in 1956, are even more applicable today, for in my opinion, the record in this case presents four serious errors of a non-constitutional nature, the proper resolution of which would not only avoid unnecessary constitutional adjudications, but would also be consistent with the requirements of a fair administration of justice.[1] To be

[1] On remand from this Court, the Board expunged the entire testimony of the alleged perjurers Crouch, Matusow, and Johnson. Although the Board concluded, and the Court of Appeals agreed, that

sure, I, like most of my Brethren, have views on the constitutional questions which are raised by this case. I also recognize that a decision as to these constitutional questions would probably put an end to this already protracted litigation. However, I do not believe that strongly felt convictions on constitutional questions or a desire to shorten the course of this litigation justifies the Court in resolving any of the constitutional questions presented so long as the record makes manifest, as I think it does, the existence of non-constitutional questions upon which this phase of the proceedings can and should be adjudicated. After persuasively expounding the reasons which underlie this Court's steadfast reluctance to decide constitutional questions prematurely, *ante*, p. —, the Court concludes that the resolution of some of the constitutional issues raised by the parties should be left for another day. However, in a surprising turnabout, the Court then proceeds to decide other constitutional questions, and it reaches these questions only by first brushing aside, on the basis of a procedural technicality or a strained analysis, many important non-constitutional issues. I do not think that the Court's action can be justified.

I.

One of the Government's leading witnesses at the initial hearing before the Board was Benjamin Gitlow. Prior to his expulsion from the Communist Party in 1929, Gitlow had been a high official in the Party. His testimony before the Board covered over 1,400 pages in the record, and the Board relied heavily upon his testimony

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the remaining evidence was sufficient to support an order compelling the petitioner to register, there can be no doubt that the Government's case was weakened by the deletion of the testimony of three important witnesses, and it is therefore on the basis of this already abbreviated record that the non-constitutional errors alleged by the petitioner must be considered.

in finding that the Communist International controlled petitioner, subsidized it, and supervised it through foreign representatives in this country. In addition, the Board relied upon Gitlow's testimony to corroborate the testimony of government witness Joseph Kornfeder, whose demeanor led the Board "to examine his testimony with . . . caution." In 1940, Gitlow turned over to the FBI a large quantity of official documents relating to the Party and its past history. He also prepared and gave to the FBI memoranda which explained and interpreted the documents. During his direct examination at the original hearing before the Board, Gitlow identified many of the original documents and explained their contents and significance. On cross-examination, the petitioner, obviously hoping to impeach Gitlow's damaging testimony, moved for the production of the explanatory memoranda which Gitlow had prepared in 1940. The petitioner's motion was denied by the Board. Although in its first petition in the Court of Appeals to review the order of the Board, the petitioner assigned the Board's denial of the motion for production as error, the court failed to decide the question, presumably because the petitioner had not pressed the point either in its brief or during oral argument. *Communist Party of the United States* v. *Subversive Activities Control Board*, 254 F. 2d 344, 322. Nor was the issue raised in the petition for certiorari filed in this Court in 1955. However, after this Court remanded the case in 1956, the petitioner again moved the Board to order production of the memoranda. The Board denied the motion, and on review, the Court of Appeals held that the Board's ruling could not be corrected by a petition to review the Board's order. Relying on *Consolidated Edison Co.* v. *Labor Board*, 305 U. S. 197, the court said that the petitioner's failure to make a motion in the Court of Appeals for leave to adduce addi-

tional evidence under § 14 (a) of the Act at the time the Board initially refused to order production of the memoranda constituted a waiver of the objection. After a second remand to the Board by the Court of Appeals, the Party did seek to have the memoranda produced pursuant to § 14 (a) of the Act. However, the Court of Appeals denied the motion, later explaining that the petitioner's procedural misstep could not be rectified *nunc pro tunc*. *Communist Party of the United States* v. *Subversive Activities Control Board*, 277 F. 2d 78, 81.[2]

Today, the Court refuses to reach this important evidentiary question, and it does so by adopting an argument that was unanimously rejected by the Court of Appeals. 254 F. 2d, at 321–322. The Court holds that petitioner may not now challenge the Board's refusal to order the production of the Gitlow memoranda because it failed to raise the question in its 1955 petition for certiorari. With due respect, I must dissent from this holding, which, to the extent that it transforms Rule 23 (c) of our Rules of Procedure[3] into an immutable rule of abandon-

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[2] The relevant portion of § 14 (a) reads as follows:

"If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material, the court may order such additional evidence to be taken before the Board and to be adduced upon the proceeding in such manner and upon such terms and conditions as to the court may seem proper. The Board may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by the preponderance of the evidence shall be conclusive, and its recommendations, if any, with respect to action in the matter under consideration." 64 Stat. 1001–1002.

[3] Rule 23 (c) provides:

"The petition for writ of certiorari shall contain . . .

"(c) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every sub-

ment, is both unorthodox and unwise. The Court's position will not bear analysis.

It is undoubtedly true that piecemeal appeals should be avoided and that claims not preserved throughout a litigation will not generally be entertained at some subsubsequent, and perhaps terminal, stage of the proceedings. However, this general rule is not an absolute dogma, and has on numerous occasions yielded to subordinating policy considerations. In fact, the United States Reports are replete with instances wherein the Court decided issues which were never even mentioned in the petition for certiorari. See, *e. g.*, *Boynton* v. *Virginia*, 364 U. S. 454; *Mackey* v. *Mendoza-Martinez*, 362 U. S. 384; *Neese* v. *Southern R. Co.*, 350 U. S. 77; *Alma Motor Co.* v. *Timken-Detroit Axle Co.*, 329 U. S. 129; *Marshall* v. *Pletz*, 317 U. S. 383; *Erie R. Co.* v. *Tompkins*, 304 U. S. 64. One of the policy considerations which has always led the Court to forsake the general rules of waiver is the admonition that "we ought not to pass on questions of constitutionality . ... unless such adjudication is unavoidable." *Spector Motor Service, Inc.*, v. *McLaughlin*, 323 U. S. 101, 105. Thus, in *Neese* v. *Southern R. Co.*, *supra*, the Court refused to pass upon the constitutional question which had been tendered by the petition for certiorari, and instead rested its decision upon the adjudication of an evidentiary question which had not been raised in the petition for certiorari. In so doing, the Court said: "We need not consider respondent's contention that only the jurisdictional question was presented by the petition for certiorari, for in reversing on the above ground we follow the traditional practice of the Court of refusing to decide constitutional questions when the record discloses other grounds of decision, *whether or not they*

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sidiary question fairly comprised therein. *Only the questions set forth in the petition or fairly comprised therein will be considered by the court.*" (Emphasis added.)

*have been properly raised before us by the parties.*" *Id.*, at 78. (Emphasis added.) And in *Alma Motor Co.* v. *Timken-Detroit Axle Co.*, *supra*, the Court avoided a difficult constitutional adjudication by resting its decision on a non-constitutional ground which, as the Court noted, "was neither considered nor decided by the court below, nor argued here." *Id.*, at 132. Only last Term in *Mackey* v., *Mendoza-Martinez*, *supra*, the Court, in an effort to avoid an unnecessary constitutional decision, remanded the case to the District Court for consideration by that court of a non-constitutional issue which had not been raised by either party in any court, but which this Court, *sua sponte*, had discovered lurking in the record. This action was taken even though the case had had a lengthy history and had been before this Court on a previous occasion. See also *Boynton* v. *Virginia*, *supra*. Thus, if the Court, in order to avoid the adjudication of constitutional questions, has in the past rested its decisions on issues not raised by a petition for certiorari, there certainly should be no objection to avoiding a difficult constitutional decision in this case by resolving a non-constitutional issue which was decided by the Court of Appeals, explicitly raised in the instant petition for certiorari, and thoroughly briefed by counsel for both sides.[4]

[4] In view of the Court's justified concern over the lengthy history of this litigation, it is noteworthy, I think, that many of the cases to which I have referred also involved protracted litigations, which were lengthened even further by the Court's refusal to adjudicate the constitutional issues argued by the parties. However, what was said in the *Alma Motor* case is equally applicable here: "We agree that much time has been wasted by the earlier failure of the parties to indicate, or the Circuit Court of Appeals or this Court to see, the course which should have been followed. This, however, is no reason to continue now on the wrong course. The principle of avoiding constitutional questions is one which was conceived out of considerations of sound judicial administration. It is a traditional policy of our courts." 329 U. S., at 142.

Since the petitioner should not be deemed to have waived the Gitlow question if a resolution of that question will make it unnecessary for the Court to reach the constitutional issues presented by this case, the next question which must be considered is whether a determination of the Gitlow question, on the merits, would require a reversal of the judgment below. I think it would. As indicated, the Court of Appeals, relying on the *Consolidated Edison* case, based its decision on the ground that the petitioner waived its objection by not having made a timely motion for leave to adduce additional evidence pursuant to § 14 (a) of the Act. However, the lower court's reliance upon *Consolidated Edison* is misplaced. In that case, an examiner for the Labor Board refused to permit one of the parties to a proceeding to offer the testimony of two witnesses who had not been scheduled to appear. Instead of invoking § 10 (e) (f) of the National Labor Relations Act (which is very similar to § 14 (a) of the Subversive Activities Control Act) and seeking leave of the Court of Appeals to adduce the testimony of the two witnesses, the offering party objected to the examiner's action in a petition to have the Board's final order set aside. The Court of Appeals rejected the claim. This Court recognized that the examiner's action was arbitrary, but, nevertheless, it held that the party's sole remedy in such a situation was to make a motion for leave to adduce the additional testimony of the proffered witnesses, and that by having failed to pursue that remedy, the party waived its objection.

The wisdom of the Court's holding in *Consolidated Edison*, insofar as the waiver question is concerned, is certainly subject to criticism. Not only did the decision permit a clearly arbitrary ruling of an examiner to stand uncorrected, but it also established a cumbersome procedure whereby resort to the Court of Appeals was required every time the Board excluded evidence which the offering party

thought should have been admitted. It is not surprising, therefore, that the Courts of Appeals have consistently sought ways to avoid the impact of this Court's decision in *Consolidated Edison*. Thus, one Court of Appeals adopted the fiction of treating the petition for review as including, *sub silentio*, an application by the party for leave to adduce additional evidence. *Mississippi Valley Structural Steel Co.* v. *Labor Board*, 145 F. 2d 664, 667. On another occasion, the same court limited the *Consolidated Edison* holding "to evidence going to the merits of the charge and not to the question of the regularity or fairness of the hearing as conducted by the Board." *Cupples Company Manufacturers* v. *Labor Board*, 103 F. 2d 953, 956. In fact, even the Court of Appeals whose judgment we are now reviewing applied the *Consolidated Edison* rule with great reluctance.[5] However, it is not necessary to re-evaluate the holding of *Consolidated Edison*, for, in my opinion, that holding is not applicable to the type of situation presented by this case. The statute construed in *Consolidated Edison*, like § 14 (a) of this Act, deals only with a situation wherein a party to a proceeding wishes to introduce additional evidence which he has acquired independently and which will bolster his own case. The statute, by its terms, clearly does not apply to a situation in which a party requests the production of documents for the sole purpose of impeaching his opponent's witnesses. The party making such a request is not attempting "to adduce additional evidence"; he is merely seeking to use documents in the possession of his adversary to impeach testimony which has already been adduced by his adversary. It is thus interesting to

[5] After discussing the different ways in which other courts have attempted to avoid applying the *Consolidated Edison* rule, the Court of Appeals said: "There is much force to these various suggestions, and perhaps we misconstrue the opinion of the Supreme Court. But we are bound by the opinion as we read it." 254 F. 2d, at 323.

note that of all the cases which I have found involving an application of the *Consolidated Edison* principle, not one has dealt with the production of documents for purposes of impeachment.[6] In fact, the most recent decision which involved such a situation properly ignored *Consolidated Edison* and held, on a petition to enforce the Labor Board's order, that the Board's failure to require the production of a possibly impeaching document required a remand to the Board. This action was taken even though the complaining party had not made a motion in the Court of Appeals for leave to adduce additional evidence. *Labor Board* v. *Adhesive Products Corp.*, 258 F. 2d 403.[7]

Since the Court of Appeals erred in resting its decision on *Consolidated Edison*, it next becomes necessary to consider the Government's contention that, even if the Board should have ordered the production of the memoranda, its failure to do so was merely harmless error. In

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[6] See *Labor Board* v. *Crompton-Highland Mills, Inc.*, 337 U. S. 217, 221; *Pittsburgh Plate Glass Co.* v. *Labor Board*, 313 U. S. 146, 155; *Coca-Cola Bottling Co. of St. Louis* v. *Labor Board*, 195 F. 2d 955, 956; *Labor Board* v. *Fairchild Engine & Airplane Corp.*, 145 F. 2d 214, 215; *Labor Board* v. *National Laundry Co.*, 138 F. 2d 589, 591; *California Lumbermen's Council* v. *Federal Trade Comm'n*, 115 F. 2d 178, 183; *Swift & Co.* v. *Labor Board*, 106 F. 2d 87, 91; *Wilson & Co., Inc.*, v. *Labor Board*, 103 F. 2d 243, 245.

[7] Even the Court below has not followed its conception of the *Consolidated Edison* rule consistently. Thus, on April 11, 1958, after the case had been remanded to the Board, the court ordered the Government to produce prior statements made by witness Budenz, even though the petitioner had not made a motion pursuant to § 14 (a) for leave to adduce additional evidence when the Board initially denied a motion for production of the Budenz statements. It is difficult to understand why the court did not follow the same procedure with regard to the Gitlow memoranda, especially in view of the fact that petitioner did make a motion for production, pursuant to § 14 (a), the second time that the case was remanded to the Board. Since the case was being remanded in any event, the court's refusal to grant the § 14 (a) motion seems unreasonable.

my judgment, the error committed by the Board was anything but harmless. There can be little doubt that the Board should have ordered the production of the Gitlow memoranda. *Jencks* v. *United States*, 353 U. S. 657, 18 U. S. C. § 3500. It is certainly possible that the petitioner, armed with these memoranda, may have been able to impeach significantly the testimony of Gitlow, who, as has already been indicated, was a key witness for the Government, and whose expulsion from the Party in 1929 undoubtedly made him hostile toward the petitioner. It would be contrary to our traditional scrupulous protection of the right to have potentially impeaching documents produced for the Court to say that the Board's failure to order the production of this important witness' prior memoranda was merely harmless error. See *Jencks* v. *United States, supra; Campbell* v. *United States*, 365 U. S. 85. Accordingly, since the Court of Appeals committed reversible error in refusing to remand the case for the production of the Gitlow memoranda, I think the Court should abandon its reliance upon an unorthodox procedural technicality, remand the case to the Board for the production of the memoranda and the further cross-examination of Gitlow, and thereby, consistent with its own admonition, avoid the premature adjudication of complex and difficult constitutional issues.

II.

Another of the Government's major witnesses at the hearing before the Board was Louis Budenz. As the Court's opinion indicates, Budenz' testimony filled some 700 pages in the record and was used by the Board to support many of its findings, including the crucial finding that petitioner received financial aid from the Soviet Union after petitioner's disaffiliation from the Communist International. During his direct examination, Budenz

made repeated references to the so-called Starobin letter and to the Childs-Weiner conversation. Budenz admitted that he had given reports to the FBI concerning these matters, but, on the Government's objection, the Board erroneously denied the petitioner's motion for the production of all such prior statements.[*] After this Court remanded the case in 1956, the petitioner renewed its motion. On the Government's objection, the motion was again denied by the Board. The Court of Appeals affirmed the Board's action on the ground that the FBI seemingly did not have in its possession any statements made by Budenz concerning the Starobin and Weiner matters. However, in response to a petition for rehear-

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[*] The court's conclusion resulted from the Government's representation that Budenz had made no statements to the FBI concerning the Starobin and Weiner matters. However, in view of the following extract from the record, it would seem that the court should have pressed the inquiry further:

"Q. Prior to your appearance before the Un-American Activities Committee, did you tell the FBI about the Starobin letter?

"A. That, I wouldn't recall.

"Q. You don't recall that. You spent 100 hours with the FBI, or more, you said, before you went there?

"A. Yes, but the FBI asked me a very great number of questions, and I answered their questions.

"Q. But the Manuilsky business and the Starobin letter—

"A. I may have told them, counselor. I say I do not recall. The thing is that—

"Q. May I complete my question, please?

"A. Yes.

"Q. The Starobin letter and the Manuilsky incident were supposed to be quite important in this setup that you got up against the Communist Party, was it not? You now say you don't recall whether you gave it to the FBI?

"A. I don't recall the time. The FBI asked me a great number of questions. *Undoubtedly if it were in my book; I must have given it to the FBI.* The point of the matter is that the FBI particularly at that period, and as a matter of fact this has been the general prac-

ing filed by the petitioner in the Court of Appeals, the Government disclosed for the first time that the FBI did have in its possession disc recordings of a five-day interview with Budenz in 1945, and that these discs contained statements pertinent to the Starobin letter and the Childs-Weiner conversation. Accordingly, the Court of Appeals ordered the Government to produce all statements made by Budenz relating to the matters in question. During the Board proceedings that followed, statements made by Budenz relating to the Starobin letter and the Weiner conversation were excerpted from the recorded interview and the FBI memoranda of later interviews, and these extracts were furnished to the petitioner. Based on the apparent inconsistency between the statements produced and the testimony given by Budenz before the Board, the petitioner moved that Budenz be recalled for cross-examination in the light of the produced documents. As it turned out, however, Budenz was severely ill, and, as stipulated by both parties, was unavailable for further examination. The petitioner then moved to have all of Budenz' testimony stricken on the basis of the inconsistencies referred to, and on the further ground that Budenz' unavailability for cross-examination made it impossible for the petitioner to demonstrate exactly how unreliable all of Budenz' testimony had been. The Board agreed to strike Budenz' testimony on the Starobin and Weiner matters, but it refused to strike any other portion of his testimony. On appeal, the Court of Appeals affirmed the Board's rulings.

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tice, asked me questions. I do not rush out and volunteer a lot of information, as a rule.

"Q. But didn't you regard it as an important incident?

"A. Oh, sure it was important.

"Q. *As a matter of fact, you described it in your book, 'This is My Story,' as—and I quote your language—'the most sensational by-product of the San Francisco conference.' Did you not so describe it?*

"A. *That? I think, was correct.*". (Emphasis added.)

This Court now affirms the lower court's holding, saying that great weight must be given to those whose primary responsibility it is to consider the credibility of witnesses. However, the problem is not as simple as the Court would have us believe. A distinction must be drawn between those situations in which the unavailability of a witness is due to the fault of neither party, and those situations in which the witness' unavailability is directly attributable to the conduct of one of the parties. The rule to be applied in each of these cases has been succinctly stated by Professor Wigmore:

> "Where the witness' *death* or *lasting illness* would not have intervened to prevent cross-examination but for the *voluntary act* of the witness himself or the party offering him—as, by a postponement or other interruption brought about immediately after the direct examination, it seems clear that the direct testimony must be struck out. Upon the same principle, the same result should follow where the illness is but temporary and the offering party might have recalled the witness for cross-examination before the end of the trial.
>
> "But, where the death or illness prevents cross-examination under such circumstances that *no responsibility* of any sort can be attributed to either the witness or his party, it seems harsh measure to strike out all that has been obtained on the direct examination. Principle requires in strictness nothing less. But the true solution would be to avoid any inflexible rule, and to leave it to the trial judge to admit the direct examination so far as the loss of cross-examination can be shown to him to be not in that instance a material loss." Wigmore, Evidence (3d ed.), § 1390.

Thus, as Professor Wigmore indicates, if neither the petitioner nor the respondent had been responsible for

Budenz' unavailability, then the Court would be correct in saying that the Board must be given wide latitude in deciding whether to strike Budenz' testimony, and that the Board will be reversed only if it has abused its discretion. However, if Budenz' unavailability was caused by the Government's conduct, then, as Professor Wigmore states, "it seems clear that the direct testimony must be struck out."

The record of this case convincingly demonstrates that the Government was directly responsible for creating the situation in which the petitioner found itself in 1958, when it finally obtained Budenz' prior statements but could make no use of them. Not only did the Government, by its objections to the petitioner's original motions for production, prompt the Board to refuse production, but it also prevented the Court of Appeals from rectifying the Board's error by representing to the Court that Budenz had made no statements to the FBI concerning the Starobin and Weiner matters. Then, not until it was too late for Budenz to be called for further cross-examination, was the Court of Appeals apprised of the existence of Budenz' prior statements. I do not mean to imply that the Government deliberately withheld this vital information beyond the time that it could have aided the petitioner. But there can be no doubt that the Government's delay in disclosing the existence of Budenz' prior statements made it impossible for the petitioner to make effective use of those statements. Since the Government's voluntary acts caused the curtailment of Budenz' cross-examination, I think the Court of Appeals should have granted the relief which is normal in this type of situation by ordering the Board to strike all of Budenz' testimony.

Nor can the lower court's error be dismissed as harmless. Reference has already been made to the importance of Budenz' testimony to the Government's case. More-

over, as the Court's opinion demonstrates, and as the Court of Appeals admitted, there were marked discrepancies between Budenz' prior statements and his testimony before the Board. Had the petitioner been given Budenz' prior statements, it might have pursued a course of cross-examination which would have thoroughly discredited Budenz and destroyed the Board's apparent faith in his reliability.[9] However, the petitioner was never able to conduct such an examination, and the record is therefore clouded by the not unlikely possibility that much of Budenz' testimony was unreliable. This being the case, regard for the elemental rules of fair procedure requires that Budenz' testimony be stricken from the record. Cf. *Communist Party of the United States* v. *Subversive Activities Control Board*, 351 U. S. 115; *Mesarosh* v. *United States*, 352 U. S. 1.

III.

I think the Court of Appeals also erred in its interpretation and application of § 3 (3), one of the most crucial provisions of the Act. That section defines a "Communist-action organization," as one (1) which is directed or dominated "by the foreign government or foreign organization controlling the world Communist movement," and (2) which "operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title." 64 Stat. 989. Unfortunately, the statute does not, in terms, define the objectives of the world Communist movement which the alleged Communist-action organization must be found to ad-

[9] In this connection, it should be noted that in three additional places in its Report the Board found it necessary to explain seeming inconsistencies in Budenz' testimony. If the petitioner could have discredited Budenz' testimony on the basis of his prior statements, it is possible that the Board would have resolved these other discrepancies against Budenz and the Government.

vance. However, to set the framework for its argument, the petitioner suggested that the objectives of the world Communist movement, as contemplated by the Act, should be defined as: (1) the overthrow of all existing capitalist governments by any means necessary, including force and violence, and (2) the establishment of a Communist totalitarian dictatorship, which (3) will be subservient to the Soviet Union. The Court of Appeals tentatively accepted the petitioner's definition of the objectives, and concluded that the Board's findings demonstrate that the Party operates to advance all of the suggested objectives. With regard to the first of the three objectives, the court relied upon the Board's finding that the Party "advocates the overthrow of the Government of the United States by force and violence *if necessary*." (Emphasis added.)

The petitioner contends that, in the light of our decisions in *Dennis* v. *United States*, 341 U. S. 494; and *Yates* v. *United States*, 354 U. S. 298, the objectives component of § 3 (3) should be construed in such a way that an organization could not be deemed to be advancing the first of the three cited objectives unless it engages in advocacy directed at prompting forceful overthrow of the Government, as distinguished from advocacy as an abstract doctrine; that the Board did not find that the Party engaged in illegal advocacy, but instead found that the petitioner merely engaged in the advocacy of force "if necessary," which is tantamount to the advocacy of forceful overthrow as an abstract doctrine; and that the absence of a finding of unlawful advocacy on the part of the petitioner renders the Board's order unsupportable.

In my judgment, the petitioner's argument is eminently correct. In *Yates* v. *United States*, *supra*, the Court made it clear that a distinction had to be drawn "between advocacy of abstract doctrine and advocacy directed at

prompting unlawful action." *Id.*, at 318. It then went on to hold that, while the latter type of advocacy could be prohibited consistently with the dictates of the First Amendment, an attempt to prohibit the former type of advocacy would raise grave constitutional problems. The Court therefore concluded that Congress, well aware of this distinction and of the constitutional problems involved, intended the Smith Act to apply only to advocacy which was aimed at inciting to action. See also *Dennis* v. *United States*, *supra*. There is no reason to assume that when Congress adopted the Subversive Activities Control Act it was any less aware of the constitutional pitfalls involved in attempting to proscribe advocacy as an abstract doctrine than it was when it passed the Smith Act, for as the Court said in *Yates*, in construing a congressional enactment, "we should not assume that Congress chose to disregard a constitutional danger zone so clearly marked." *Id.*, at 319. Therefore, since the construction urged by the petitioner will make the statute more compatible with this Court's prior decisions defining the area of prohibition permissible under the First Amendment, it should be adopted, and the Court should hold that the Board cannot require a group to register as a Communist-action organization unless it first finds that the organization is engaged in advocacy aimed at inciting action.[10] Clearly, the Board made no such finding in this case. The Board merely found that the petitioner has engaged in advocating the use of force "if necessary." However, this is not the sort of advocacy which incites to

[10] The expansive lengths to which the Court has on occasion gone in construing a statute in a manner designed to avoid constitutional challenges is demonstrated by the decision in *Scales* v. *United States*, decided this day, *ante*, p. ——. Certainly, the interpretation of this Act suggested by the petitioner would require far less legislative redrafting than the Court undertook to accomplish in *Scales*.

action.' At most, it is no more than the formulation of an abstract doctrine, which, as the Court indicated in *Yates*, "is too remote from concrete action to be regarded as the kind of indoctrination preparatory to action which was condemned in *Dennis*." *Id.*, at 321–322.

The Court brushes aside the petitioner's argument by saying that, because this statute is "regulatory" and not "prohibitory," the *Yates* and *Dennis* cases are inapplicable. However, it blinks reality to say that this statute is not prohibitory. There can be little doubt that the registration provisions of the statute and the harsh sanctions which are automatically imposed after an order to register has been issued make this Act as prohibitory as any criminal statute. Therefore, for the reasons which I have stated, I think the Board's order ought to be vacated and the case remanded so that the Board can determine whether the evidence supports a finding that the petitioner is engaging in advocacy aimed at inciting the forceful overthrow of the Government.

IV.

Finally, I think the Court of Appeals erred in sustaining an order of the Board which was based, in part, on a finding which the court admitted lacked evidentiary support. Section 13 (e) of the Act lists eight criteria which the Board should consider in determining whether a group is a Communist-action organization. The seventh of these criteria is the extent to which "for the purpose of concealing foreign direction, domination, or control, or of expediting or promoting its objectives," 64 Stat. 999, an organization engages in certain secret practices or otherwise operates on a secret basis. In its original Report, the Board concluded that the Party engaged in secret practices in order to achieve both of the purposes recited in the Act. The Court of Appeals, in its first opinion, held that

the finding of secret practices was proper, but that the Government's evidence failed to demonstrate the purposes for which these practices were pursued. While recognizing this deficiency in the Government's evidence, the Court nevertheless affirmed the Board's order. The two Modified Reports, issued by the Board after the first and second remands, eliminated the original finding that one of the purposes of the secret practices was the concealment of foreign control. However, though no additional evidence was taken regarding secret practices, and even though the Court of Appeals had already expressed its view that the Board's purpose findings were unsupported by the evidence, the two Modified Reports reiterated the finding that the secret practices were engaged in to promote the objectives of the Communist Party. In its third opinion, the Court of Appeals adhered to its ruling that the Board's finding was unsupported by the evidence, but it nevertheless affirmed the order, holding that the finding was merely a subsidiary one and that the whole record supported the Board's conclusion that the petitioner met the definition of a Communist-action organization contained in § 3 (3).

The Court now adopts the lower court's reasoning; and holds that since the unsupported finding was merely "subsidiary," it is not necessary to remand the case to ascertain whether the Board would reach the same ultimate conclusion in the absence of the unsupported finding. I submit that the Court's action does not square either with the facts, as they appear in the record, or with the prior decisions of this Court. It is unrealistic to characterize the Board's secrecy finding as insignificant and subsidiary. It directly relates to one of the eight enumerated criteria listed in § 13 (e). The Board devoted 19 pages to it in the Modified Report. It is also the only one of the § 13 (e) standards concerning which there was

any substantial amount of evidence of post-Act conduct on the part of the Party.[11] In view of these circumstances, and in view of the fact that the Board found it necessary to reassert the finding, even though it knew that the Court of Appeals considered the finding unsupported by the evidence, how can it be said that the finding is unimportant? Surely, if the finding is as unimportant to the Board's conclusion as the Court of Appeals and this Court seem to think it is, the Board would have abandoned the finding altogether rather than retain it and risk another remand either by the Court of Appeals or by this Court. These factors would not seem to indicate that the finding was trivial, but, on the contrary, that it was crucial to the Board's ultimate conclusion. This being the case, it will not do for the Court of Appeals or for this Court to conclude that the Board would have reached the same conclusion without relying upon the unsupported finding. Congress has placed the responsibility for making that determination in the Board and not in the courts. As this Court said in *Securities & Exchange Comm'n* v. *Chenery Corp.*, 318 U. S. 80, 88, "If

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[11] At this point, it should be observed that the vast bulk of the evidence introduced by the Government at the hearing before the Board related to the Party's activities prior to its disaffiliation from the Communist International in 1940. In order to link this stale evidence to the Party's current activities, with which the Act is concerned, the Board indulged in a presumption of continuity, whereby it reasoned that since the Party was under Soviet control prior to 1940, and since the Party still adheres to the principles of Soviet Communism, it must be presumed that the Party is still controlled by the Soviet Union. The validity of such a presumption is certainly dubious. However, if the Board is to be permitted to rely upon this presumption, the least to which the Party is entitled is that the record be free from serious procedural errors and that the findings upon which the Board rests its order be supported by some evidence.

an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment." An agency's "action must be measured by what . . . . [it] did, not by what it might have done.", *Id.*, at 93–94. See also *Labor Board* v. *Virginia Elec. & Power Co.*, 314 U. S. 469. Therefore, because the Board's order is clouded by the fact that it rests upon a finding which is admittedly unsupported by the evidence, I think the Court should strike the secrecy finding and remand the case to the Board for reconsideration.

V.

In my view, the Court today strays from the well-trod path of our prior decisions by reaching out to decide constitutional issues prematurely. If the Court would remand on any one of the four errors which I have discussed, and I think each warrants a remand, the resolution of the difficult constitutional issues presented by by this case would certainly be postponed, and perhaps made totally unnecessary. For, if further cross-examination of Gitlow based on the memoranda discredited his testimony, or if all of Budenz' testimony were stricken, or if the Board were required to find that the petitioner actually engaged in advocacy aimed at inciting action, or if the secrecy finding were stricken, the Government's case might be so weakened that it would be impossible for the Board to conclude, on the basis of the present record, that the petitioner is a Communist-action organization, as that term is used in the statute. Moreover, a remand on the basis of these non-constitutional errors is the only disposition that would be consistent with the "fastidious regard for the honor of the administration of justice"

which the Court found so compelling in 1956.[12] 351 U. S., at 124.

I think it is unwise for the Court to brush aside the non-constitutional errors disclosed by this record. However, since the Court insists upon doing so, I feel constrained to express my views on a dispositive constitutional issue which now confronts us by virtue of the Court's holding on the non-constitutional questions. I agree with MR. JUSTICE BRENNAN that, once having entered the area of constitutional adjudication, the Court must decide now whether the Act violates the Fifth Amendment privilege against self-incrimination by requiring the petitioner's officers to submit a registration statement on behalf of the petitioner. For the reasons set forth in his opinion, which I join, I believe that the Act does constitute a violation of the Fifth Amendment.

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[12] I cannot agree with the theory of MR. JUSTICE DOUGLAS that the non-constitutional errors herein discussed are less important than the mere possibility of perjury which clouded the record in 1956 and which prompted the Court to remand the case to the Board at that time. For all we know, a cross-examination of Gitlow based on his prior memoranda, or a full cross-examination of Budenz based on his prior statements to the FBI and his testimony inconsistent therewith might have disclosed further possibilities of perjury. Nor can I agree with the suggestion that since Congress, in the Communist Control Act of 1954, branded the Communist Party as "an instrumentality of a conspiracy to overthrow the government of the United States," 68 Stat. 775, the Board's hearings and findings are merely superfluous, and the non-constitutional errors committed by the Board and the Court of Appeals are therefore unimportant. In the first place, this theory did not dissuade the Court from remanding to the Board in 1956 because of defects in the record. Moreover, there is nothing in the language or legislative history of the Communist Control Act of 1954 to indicate that Congress intended to repeal those provisions of the Subversive Activities Control Act which carefully delineate the Board's functions and describe the procedural mechanism by which the Board is to apply the Act.

# SUPREME COURT OF THE UNITED STATES

No. 12.—October Term, 1960.

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| Communist Party of the United States of America, Petitioner, *v.* Subversive Activities Control Board. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit. |

[June 5, 1961.]

Mr. Justice Black, dissenting.

I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish. The first banning of an association because it advocates hated ideas—whether that association be called a political party or not—marks a fateful moment in the history of a free country. That moment seems to have arrived for this country.

The Subversive Activities Control Act of 1950[1] here involved defines "Communist action" organizations and requires them to register with the Attorney General giving much information of every kind with regard to their property, income, activities and members. The Communist Party has been ordered to register under that Act by the Subversive Activities Control Board and has challenged the validity of that order on the ground, among others, that the Act is unconstitutional in that it amounts to a complete outlawry of the Communist Party. The contention is that this Act, considered as a whole and in its relation to existing laws which affect members of the Party, imposes such overhanging threats of disgrace,

[1] 64 Stat. 987, as amended, 50 U. S. C. §§ 781-798.

humiliation, fines, forfeitures and lengthy imprisonments upon registered organizations and their members, most of which burdens become effective automatically upon registration, that it will be impossible for the Party to continue to function if the registration order is upheld.

The Court's opinion is devoted chiefly to the task of explaining why it will not decide any of the substantial issues raised by this attack upon the constitutionality of the Act as it is actually written and will actually operate and why it must decide the case just as though none of these other burdens existed and we were dealing with an Act that required nothing more than the registration of an organization. I cannot agree to decide the case on any such hypothetical basis. If registration were the only issue in the case, I would agree at once that Congress has power to require every "person" acting as an agent of a foreign principal to file registration statements comprehensively showing his agency activities as is required, for example, by the Foreign Agents Registration Act.[2] That Act requires the registration of any "person"—including an individual, partnership, association, corporation, organization, or other combination of individuals—"who acts or agrees to act, within the United States, as . . . a public-relations counsel, publicity agent, information-service employee, servant, agent, representative, or attorney for a foreign principal . . . ."[3] Referring to that Act, I said in *Viereck* v. *United States:*

> "Resting on the fundamental constitutional principle that our people, adequately informed, may be trusted to distinguish between the true and the false, the bill is intended to label information of foreign origin so that hearers and readers may not be deceived by the belief that the information comes

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[2] 52 Stat. 631, as amended, 22 U. S. C. §§ 611–621.

[3] 22 U. S. C. § 611.

from a disinterested source. Such legislation implements rather than detracts from the prized freedoms guaranteed by the First Amendment."[4]

The Act before us now, however, unlike the Foreign Agents Registration Act involved in the *Viereck* case, is not based on the principle that "our people, adequately informed, may be trusted to distinguish between the true and the false." Instead, the present Act, like many other pieces of current legislation, is based on the precisely contrary principle that "our people [even when] adequately informed may [not] be trusted to distinguish between the true and the false." In this regard, the principle upon which Congress acted in passing the Subversive Activities Control Act is identical to that upon which it acted in making membership in the Communist Party a crime in the Smith Act,[5] a provision under which the Court has today sustained the conviction and imprisonment for six years of a person for being a mere member of the Communist Party with knowledge of its purposes.[6] Statutes based upon such a principle, which really amounts to nothing more than the idea that the Government must act as a paternal guardian to protect American voters from hearing public policies discussed, do not implement "the prized freedoms guaranteed by the First Amendment"—they are designed to and do directly detract from those freedoms.

The difference between the Subversive Activities Control Act and the Foreign Agents Registration Act is strikingly illustrated by the reasons Congress has itself given for the enactment of the statute now before us. When Viereck registered under the earlier and genuine registration statute, he was not thereby branded as being engaged

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[4] 318 U. S. 236, 251 (dissenting opinion).

[5] 18 U. S. C. § 2385.

[6] *Scales* v. *United States*, *post*, p. —.

in an evil, despicable undertaking bent on destroying this Nation. But that is precisely the effect of the present Act. Registration as a "Communist action organization" under the Subversive Activities Control Act means, according to the express provisions of the Act, that the Party and its members who register are under the control of a foreign dictatorship,[7] that they have devised "clever and ruthless espionage and sabotage tactics,"[8] and that they are a part of a "world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration . . . terrorism and any other means deemed necessary to establish a Communist totalitarian dictatorship in the countries throughout the world."[9] A registrant organization is declared, by a finding of Congress, to be "an organization numbering thousands of adherents, rigidly and ruthlessly disciplined," merely awaiting a chance to overthrow this Government by force.[10] And the members of such an

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[7] 50 U. S. C. § 781 (4). "The direction and control of the world Communist movement is vested in and exercised by the Communist dictatorship of a foreign country."

[8] 50 U. S. C. § 781 (11). "The agents of communism have devised clever and ruthless espionage and sabotage tactics which are carried out in many instances in form or manner successfully evasive of existing law."

[9] 50 U. S. C. § 781 (1). "There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization."

[10] 50 U. S. C. § 781 (15). "The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United

organization are declared by the Act to have "repudiate[d] their allegiance to the United States, and in effect transfer[red] their allegiance to the foreign country in which is vested the direction and control of the world Communist movement." [11]

This difference standing alone would be sufficient to establish the essential dissimilarity of the Subversive Activities Control Act from genuine registration statutes such as the Foreign Agents Registration Act. For the need of Government to provide means by which the people can obtain useful information—the basis of every genuine registration statute—can certainly be accomplished without resort to official legislative pronouncements as to the treasonable nature of those compelled to register. But this difference does not stand alone in the case of the Subversive Activities Control Act—indeed, there are so many other differences of so much greater magnitude that the recitals of the Act branding those who register under it pale almost into insignificance.

The plan of the Act is to make it impossible for an organization to continue to function once a registration order is issued against it. To this end, the Act first provides crushing penalties to insure complete compliance with the disclosure requirements of registration. Thus, if the Party or its members fail to register within the time required by the Act, or if they fail to make annual reports as required, or to keep records as required, each individual guilty of such failure can be punished

States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. . . ."

[11] 50 U. S. C. § 781 (9). "In the United States those individuals who knowingly and willfully participate in the World Communist movement, when they so participate, in effect repudiate their allegiance to the United States, and in effect transfer their allegiance to the foreign country in which is vested the direction and control of the world Communist movement."

by a fine of $10,000, by imprisonment for five years, or both, for each offense [12]—and each offense means "each day of failure to register" [13] or "each listing of the name or address of any one individual" [14] either by the organization or by an individual. Thus, for a delay of thirty days in filing required reports, a fine of $300,000 and imprisonment for 150 years could be imposed by a trial judge.

Having thus made it mandatory that Communist organizations and individual Communists make a full disclosure of their identities and activities, the Act then proceeds to heap burden after burden upon those so exposed. Certain tax deductions allowed to others are denied to a registered organization.[15] Mail matter must be stamped before the organization sends it out to show that it was disseminated by a "Communist action" organization,[16] with all the treasonable connotations given that term by the recitals of "fact" in the Act. Members of a registered organization cannot hold certain jobs with the Government, or any jobs with private businesses engaged in doing certain work for the Government.[17] Members cannot use or attempt to use a passport and cannot even make application for a passport without being subject to a penalty of five years in the penitentiary.[18] The Act thus makes it extremely difficult for a member of the Communist Party to live in this country and, at the same time, makes it a crime for him to try to get a passport to get out.

In addition to these burdens imposed directly by the Act itself, the registration requirement must also be considered in the context of the other laws now existing

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[12] 50 U. S. C. § 794 (a) (2).
[13] *Ibid.*
[14] 50 U. S. C. § 794 (b) (2).
[15] 50 U. S. C. § 790.
[16] 50 U. S. C. § 789 (1).
[17] 50 U. S. C. § 784.
[18] 50 U. S. C. § 785.

which affect the Communist Party. The Act requires that the information obtained upon registration be given wide publicity [19] thus insuring that those identified as members of the Party will be subjected to all the civil disabilities,[20] criminal prosecutions [21] and public harassments [22] that have become common in recent years. I agree with MR. JUSTICE DOUGLAS that this aspect of the Act is alone sufficient to establish its invalidity under the self-incrimination provision of the Fifth Amendment. But I think the interrelationship between the present Act and these other laws goes deeper than that, for I think that interrelationship establishes all but conclusively that the present Act cannot be upheld as a mere registration statute. The information elicited by the Act must be considered, not, as in the *Viereck* case, an aid to the exercise of individual judgment by the people, but rather a part of a pattern of suppression by the Government, for that is certainly the inevitable effect of any system that requires registration on the one hand and imposes pains and penalties upon those registering on the other.

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[19] 50 U. S. C. § 788.

[20] There seems to be little doubt that a registered member of the Communist Party would find it almost impossible to get or retain employment in this country. See, *e. g.*, *American Communications Assn.* v. *Douds*, 339 U. S. 382; *Barsky* v. *Board of Regents*, 347 U. S. 442; *Lerner* v. *Casey*, 357 U. S. 468; *Beilan* v. *Board of Education*, 357 U. S. 399; *Nelson* v. *County of Los Angeles*, 362 U. S. 1; *Konigsberg* v. *State Bar of California*, — U. S. —; *In re Anastaplo*, — U. S. —. Cf. *Shelton* v. *Tucker*, 364 U. S. 479.

[21] See, *e. g.*, *Dennis* v. *United States*, 341 U. S. 494; *Yates* v. *United States*, 354 U. S. 298; *Scales* v. *United States*, *post*, p. —; *Noto* v. *United States*, *post*, p. —.

[22] See, *e. g.*, *Watkins* v. *United States*, 354 U. S. 178; *Sweezy* v. *New Hampshire*, 354 U. S. 234; *Barenblatt* v. *United States*, 360 U. S. 109; *Uphaus* v. *Wyman*, 360 U. S. 72; *Uphaus* v. *Wyman*, 364 U. S. 388; *Wilkinson* v. *United States*, 365 U. S. 399; *Braden* v. *United States*, 365 U. S. 431.

All of these enormous burdens, which are necessarily imposed upon the Party and its members by the act of registration, are dismissed by the Court on the basis of an alleged conflict with the Court-created rule that constitutional questions should be avoided whenever possible. Thus, the Court engages in extended discussions as to whether the people involved will ever want to do the things the Act says they cannot do and whether they will ever object to doing the things the Act says they must do, suggesting, among other things, that the members of the Communist Party may never object to providing the evidence needed to send them to prison for violating the Smith Act; that they may never protest because they are forced to give up the tax deductions that other people receive; that they may be willing to stamp all the Party's mail as coming from an evil organization; that they may never want to hold the jobs from which the Act disqualifies them; and that they may never want to get a passport to get out of the country. On the basis of all these "uncertainties" the Court seems to consider its hands tied because, it says, these are as yet only potential impairments of constitutional rights. In its view, there is no "justiciable" issue at all between the United States and the Communist Party except the bare requirement of registration.

In the context of this case, I can find no justification for the Court's refusal to pass upon the serious constitutional questions raised. The Court of Appeals met its responsibility by deciding the questions. The Government has not asked that the Court refrain from giving a full decision on these important matters. Assuming that the Act is wholly valid aside from registration and that Congress does have power to outlaw groups advocating dangerous ideas, it seems to me unfair to Congress for this Court to refuse to decide whether its Act can be fully enforced. And assuming that the Act is not wholly valid

because of some limitation upon that power, it seems to me that we should say so now. By refusing to do so, the Court in effect allows this serious question to be decided by default. For the Party can no more continue to function with all of these tremendous burdens of undetermined constitutional validity overhanging it and its members than it could if the burdens were considered and upheld. The only sense in which the Court has avoided a constitutional issue is by permitting the destruction of a group seeking to raise the issue of the constitutionality of its destruction.[23]

This whole Act, with its pains and penalties, embarks this country, for the first time, on the dangerous adventure of outlawing groups that preach doctrines nearly all Americans detest. When the practice of outlawing parties and various public groups begins, no one can say where it will end. In most countries such a practice once begun ends with a one-party government. There is something of tragic irony in the fact that this Act, expressly designed to protect this Nation from becoming a "totalitarian dictatorship" with "a single political party," has adopted to achieve its laudable purpose the policy of outlawing a party—a policy indispensable to totalitarian dictatorships. I think we should meet and decide this whole question now in the administration of a sound judicial policy that carries out our responsibilities both to Congress and to the American people.

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[23] In this regard, I think the present case is identical to *Ex parte Young*, 209 U. S. 123. There the Court reached and decided the constitutional question tendered, saying: "It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights." *Id.*, at 147.

In my judgment, the Act here under consideration is unconstitutional on at least three grounds in addition to its direct conflict with the self-incrimination provisions of the Fifth Amendment. It is, in the first instance, a classical bill of attainder which our Constitution in two places prohibits, for it is a legislative act that inflicts pains, penalties and punishments in a number of ways without a judicial trial.[24] The legislative fact-findings as to Communist activities, which the Court—despite the constitutional command for trial of such facts by a court and jury—accepts as facts, supply practically all of the proof needed to bring the Communist Party within the proscriptions of the Act. The Act points unerringly to the members of that Party as guilty people who must be penalized as the Act provides. At the same time, these legislative fact-findings fall little short of being adequate in themselves to justify a finding of guilt against any person who can be identified, however faintly, by any informer, as ever having been a member of the Communist Party. Most of whatever is lacking in the legislative fact-findings is later supplied by administrative fact-findings of an agency which is not a court, which is not manned by independent judges, and which does not have to observe the constitutional right to trial by jury and other trial safeguards unequivocally commanded by the Bill of Rights. Yet, after this agency has made its findings and its conclusions, neither its findings of fact nor the findings of fact of the legislative body can subsequently be challenged in court by any individual who may later be brought up on a charge that he failed to register as required by the Act and the Board. The Act thus not only is a legislative bill of attainder but also violates due process by short-cutting practically all of the Bill of Rights, leaving no

[24] *Cummings* v. *Missouri*, 4 Wall. 277, 323. And see *United States* v. *Lovett*, 328 U. S. 303.

hope for anyone entangled in this legislative-administrative web except what has proved in this case to be one of the most truncated judicial reviews that the history of this Court can afford.[25]

I think also that this outlawry of the Communist Party and imprisonment of its members violates the First Amendment. The question under that Amendment is whether Congress has power to outlaw an association, group or party either on the ground that it advocates a policy of violent overthrow of the existing government at some time in the distant future or on the ground that it is ideologically subservient to some foreign country. In my judgment, neither of these factors justifies an invasion of rights protected by the First Amendment. Talk about the desirability of revolution has a long and honorable history, not only in other parts of the world, but in our own country. This kind of talk, like any other, can be used at the wrong time and for the wrong purpose. But, under our system of Government, the remedy for this danger must be the same remedy that is applied to the danger that comes from any other erroneous talk—education and contrary argument.[26] If that remedy is not sufficient, the only meaning of free speech

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[25] This provides yet another difference between the Act under consideration here and the Act under which the prosecution involved in the *Viereck* case was brought. Before Viereck could be convicted for having failed to register or report as a foreign agent, he was entitled to have all the facts upon which his guilt depended determined by a jury under an indictment returned by a grand jury and during the course of a judicial proceeding in which he was accorded the protection of all the forms and procedures designed through the years to protect defendants charged with the commission of a criminal offense.

[26] Cf. *Whitney* v. *California*, 274 U. S. 357, 378: "Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly." (Brandeis, J., concurring.)

must be that the revolutionary ideas will be allowed to prevail.[27]

This conclusion is not affected by the fact that those advocating a policy of revolution are in sympathy with a foreign government. If there is one thing certain about the First Amendment it is that this Amendment was designed to guarantee the freest interchange of ideas about all public matters and that, of course, means the interchange of *all* ideas, however such ideas may be viewed in other countries and whatever change in the existing structure of government it may be hoped that these ideas will bring about. Now, when this country is trying to spread the high ideals of democracy all over the world—ideals that are revolutionary in many countries—seems to be a particularly inappropriate time to stifle First Amendment freedoms in this country. The same arguments that are used to justify the outlawry of Communist ideas here could be used to justify an outlawry of the ideas of democracy in other countries.

The freedom to advocate ideas about public matters through associations of the nature of political parties and societies was contemplated and protected by the First Amendment. The existence of such groups is now, and for centuries has been, a necessary part of any effective promulgation of beliefs about governmental policies. And the destruction of such groups is now and always has been one of the first steps totalitarian governments take. Within recent months we have learned of such practices in other countries. Only a few weeks ago an executive edict outlawing all parties, groups and associations all the way down through Rotary Clubs was issued in a country where

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[27] Cf. *Gitlow* v. *New York*, 268 U. S. 652, 673: "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way." (Holmes, J., dissenting.)

the government is largely in the hands of a single man. Indeed, our own ancestors were not unfamiliar with this practice. Men and women belonging to dissenting religious, political or social groups in England before the colonization of this country were sometimes imprisoned, mutilated, degraded by humiliating pillories, exiled and even killed for their views.

A typical example of the type of legislation under which this sort of persecution was carried on is provided by a statute enacted in 1593 to destroy dissenting religious sects and force all the people of England to become regular attendants at the established church.[28] The basic premise upon which its commands rested was not at all unlike that upon which the Act here proceeds:

> "For the better discovering and avoiding of such traiterous and most dangerous Conspiracies and Attempts, as are daily devised and practised against our most gracious Sovereign Lady the Queen's Majesty and the happy Estate of this common Weal, by sundry wicked and seditious Persons, who terming themselves Catholicks, and being indeed Spies and Intelligencers, not only for her Majesty's foreign Enemies, but also for rebellious and traiterous Subjects born within her Highness Realms and Dominions, and hiding their most detestable and devilish Purposes under a false Pretext of Religion and Conscience, do secretly wander and shift from Place to Place within this Realm, to corrupt and seduce her Majesty's Subjects, and to stir them to Sedition and Rebellion . . . ."

These attainted Catholics were not permitted to go "above five Miles" from their homes. For violation of this command they could be sentenced to prison and have

[28] 35 Elizabeth, cc. I and II, entitled "An Act to retain the Queen's Majesty's Subjects in their due Obedience" and "An Act for Restraining Popish Recusants to some certain Places of Abode."

all their goods, lands and other possessions forfeited "to the Queen's Majesty." One has only to read this statute to see how thorough-going government can be in making life miserable for groups whose beliefs have fallen into disfavor.

That statute also has peculiar relevance to the consideration of the Subversive Activities Control Act because it too used disclosure as a lever to secure effective enforcement of its provisions. Thus, one section of the statute provided:

> "And be it further enacted and ordained by the Authority aforesaid, That if any Person which shall be *suspected* to be a Jesuit, Seminary or Massing Priest, being examined by any Person having lawful Authority in that Behalf to examine such Person which shall be *so suspected*, shall refuse to answer directly and truly whether he be a Jesuit, or a Seminary or Massing Priest, as is aforesaid, every such Person so refusing to answer shall, for his Disobedience and Contempt in that Behalf, be committed to Prison by such as shall examine him as is aforesaid, and thereupon shall remain and continue in Prison without Bail or Mainprise, until he shall make direct and true Answer to the said Questions whereupon he shall be so examined." (Emphasis supplied.)

One cannot help but wonder whether this Court, were it called upon to consider the constitutionality of a provision of that kind in this country, would pass it off as involving nothing more than potential impairments of religious freedoms and a right to travel which the attainted persons might never want to exercise.

There were many other statutes of this kind passed in England before our Revolutionary War.[29] By no means

[29] A brief history of some of these statutes is set out in my dissenting opinion in *American Communications Assn.* v. *Douds*, 339 U. S. 382, 447–448, notes 3 and 4.

all of them were aimed at the Catholics. Indeed, during the times when the Catholics were themselves in power, almost identical repressive measures were adopted in an attempt to curb the rise of Protestantism.[30] And the persecution of Puritans in England, dramatized by some of the most famous writers of the time, is a story that is, I hope, familiar to most Americans.[31] It is a matter of history that not one of these laws achieved its purpose. Many men died, suffered and were driven from their country. And, in a sense, it might be said that our own country profited from these laws because it was largely founded by refugees from English oppression. But England itself gained little if any profit from its policies of repression. The outlawed groups were not destroyed. Many people have thought that these repressive measures were more effective to bring about revolutions than to stop them. Be that as it may, it cannot be denied that the most tranquil period of English history, from an internal standpoint, has been the period since England abandoned these practices of trying to inculcate belief by oaths and force.

Even after the American Revolution, England continued to pass statutes outlawing groups and punishing their members. One that is of particular interest here because of the many similarities between it and the Act involved in this case was passed in 1799 under the title "An Act for the more effectual Suppression of Societies established for Seditious and Treasonable Purposes; and for better preventing Treasonable and Seditious practices."[32] The premise upon which this Act was passed

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[30] Several examples of the persecution inflicted upon Protestants by Catholics were set out in the Appendix to my concurring opinion in *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 146-149.

[31] See, *e. g.*, Bunyan, The Pilgrims Progress; Milton, Areopagitica.

[32] 39 George III, c. 79.

was also similar to that used here—"a traitorous Conspiracy has long been carried on, in conjunction with the Persons from Time to Time exercising the Powers of Government in *France*, to overturn the Laws, Constitution, and Government, and every existing Establishment, Civil and Ecclesiastical, both in *Great Britain* and *Ireland* . . . ." The Act broadly provided for the suppression and prohibition "as unlawful Combinations and Confederacies," of all such societies "particularly . . . *Societies of United Englishmen, United Scotsmen, United Britons, United Irishmen*, and *The London Corresponding Society* . . . ." This 1799 English Act, like the Subversive Activities Control Act here, comprehensively provided for fines, forfeitures, penalties and imprisonments. It went on to outlaw places where debates could take place or lectures be given or books be gathered and read unless, under very restrictive standards, licenses had been granted by Justices of the Peace. Great emphasis was laid upon the fact that unlicensed gatherings should be treated as nuisances and disorderly houses. Following the course that such repressive measures always must, and indeed precisely the course that is here being followed by our own Government with respect to the Communist Party,[33] the English Act placed print-

[33] Section 7 (d) (6) of the Act, 50 U. S. C. § 786 (d) (6) requires the "listing, in such form and detail as the Attorney General shall by regulation prescribe, of all printing presses and machines including but not limited to rotary presses, flatbed cylinder presses, platen presses, lithographs, offsets, photo-offsets, mimeograph machines, multigraph machines, multilith machines, duplicating machines, ditto machines, linotype machines, intertype machines, monotype machines, and all other type of printing presses, typesetting machines or any mechanical devices used or intended to be used, or capable of being used to produce or publish printed matter or material, which are in the possession, custody, ownership, or control of the Communist-action or Communist-front organization or its officers, members, affiliates, associates, group, or groups in which the Communist-action or Communist-front organization, its officers or members have an interest."

ing presses, type and everything else useful for publishing discussion of public matters under strict regulations.

The parliamentary debates underlying the enactment of this 1799 English statute indicate plainly the close parallel between it and the Act here under consideration. The chief fear of the English rulers that brought on the 1799 Act was that the people of England would be seduced away from their loyalty to their government if societies were left free to discuss public matters and if the common people were left free to read and hear arguments. William Pitt, the Younger, in offering the bill which provided the basis for the Act, expressed his fear that debating societies and other such manifestations of liberty of press and speech might call "the attention of the lower orders of the people to objects of discussion of the most mischievous tendency, objects which are not calculated for their understandings, and which are of all others the most liable to be attended with dreadful effects." [34] He thought these "dreadful effects" could be averted, in large part, by making individual authors sign everything they wrote. But he then went on to urge that "in order to make the measure effectual, and prevent the press from becoming an engine of corruption and innovation in the hands of factions who are ready to circulate cheap publications, adapted to inflame and pervert the public mind, it will be necessary to keep a general register, not only of the presses used by printers, but of those in the possession of private persons." [35] All of this, Mr. Pitt explained, was necessary in order to render "more effectual" an Act passed at the previous session of Parliament entitled "An Act to empower his majesty to secure and detain such persons as his majesty shall suspect are conspiring against his person and government." [36]

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[34] Parliamentary Debates, Hansard, 1st Series, 34, at 987.
[35] *Id.*, at 988.
[36] *Ibid.*

The debates on the English statute also show the true nature of the "revolutionary" principles advocated by the various societies named which were being used to justify their outlawry. These principles were chiefly parliamentary reform providing for annual sessions of Parliament, universal suffrage and fair parliamentary representation, and repeal of the right of the King to veto measures passed by Parliament.[37] It is, of course, true that Congress has no power to outlaw political parties advocating such measures in this country. But I wonder how this Court could ever reach the question in view of its holding today. And if the Court is, as it holds, truly bound by legislative findings as to the nature of political parties and their involvement with foreign powers, how could it strike down the very statute I have just described? For that statute purported to establish, as a matter of fact, that the named societies were a part of a "traitorous Conspiracy" acting "in conjunction with the Persons from Time to Time exercising the Powers of Government in *France*."

At the very time England was going through its era of terror about the "Jacobins," a heated political struggle involving many of the same issues was going on in this country between the two chief political parties. One of those parties, the Federalists, wanted to outlaw the party of Jefferson on the ground that they too were "Jacobins" and therefore a threat to our security. The Jeffersonians quite naturally opposed such outlawry and in fact opposed any measure which would restrict the freedoms of speech, press, petition and assembly. The difference between the two parties was expressed by Jefferson in this way: "Both of our political parties, at least the honest part of them, agree conscientiously in the same object, the public good . . . . One fears most the

[37] *Id.*, at 984–998.

ignorance of the people; the other, the selfishness of rulers independent of them. Which is right, time and experience will prove." [38] This conflict of ideals and policies was temporarily resolved in favor of the Federalists and the result was the infamous era of the Alien and Sedition Acts.[39] These laws, passed over vigorous Jeffersonian opposition, declared that it was necessary in order to protect the security of the Nation to give the President the broadest of powers over aliens and to make substantial inroads upon the freedoms of speech, press and assembly.

The enforcement of these statutes, particularly the Sedition Act, constitutes one of the greatest blots on our country's record of freedom.[40] Publishers were sent to jail for writing their own views and for publishing the views of others. The slightest criticism of government or policies of government officials was enough to cause biased federal prosecutors to put the machinery of government to work to crush and imprison the critic. Rumors which filled the air pointed the finger of suspicion at good men and bad men alike, sometimes causing the social ostracism of people who loved their free country with a deathless devotion.[41] Members of the

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[38] 4 Memoir of Jefferson 28.

[39] The so-called Alien and Sedition Acts comprised three different statutes enacted in 1798: 1 Stat. 570; 1 Stat. 577; and 1 Stat. 596.

[40] For a graphic discussion of the period of the Alien and Sedition Acts, see Bowers, Jefferson and Hamilton, 1925, c. XVI, "Hysterics," and c. XVII, "The Reign of Terror."

[41] Much of this sort of misdirected persecution was doubtless due to the attitude and public statements of the influential Federalist Secretary of State, Timothy Pickering. See Miller, Crisis in Freedom 89-90 (1951): "By Pickering and his followers, it was held that since honest men who valued the national welfare would not cavil at the Sedition Act, it could be presumed that those who criticized it were no better than Jacobin fellow-travelers. It was laid down as a sound principle that 'when a man is heard to inveigh against this law, set him

Jeffersonian Party were picked out as special targets so that they could be illustrious examples of what could happen to people who failed to sing paeons of praise for current federal officials and their policies. Matthew Lyon, a Congressman of the Jeffersonian Party, was prosecuted, convicted and forced to serve a prison sentence in a disreputable jailhouse because of criticisms he made of governmental officials and their activities. This was a particularly egregious example of the repressive nature of the Sedition Act for Lyon's conviction could not possibly have been upheld under even the most niggardly interpretation of the First Amendment.[42]

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down as a man who would submit to no restraint which is calculated for the peace of society. He deserves to be suspected.'" Thus, Jacobin sympathizers were to be known by their attitude toward the Sedition Act; a critical or skeptical frame of mind was *prima facie* evidence of guilt. The Secretary of State looked darkly upon such troublemakers: 'Those who complain of legal provisions for punishing intentional defamation and lies, as bridling the liberty of speech and of the press,' he said, 'may, with equal propriety, complain against laws made for punishing assault and murder, as restraints upon the freedom of men's actions.'" In such an atmosphere, it is small wonder, as Miller observes, that "it became impossible for the Federalists to distinguish between a genuine, freedom-loving American democrat and a French Jacobin bent upon overturning religion, morality and the State." *Id.*, at 90.

[42] The indictment against Lyon alleged two counts of libel against President Adams. The first count alleged that Lyon had made and published the following statement: "As to the Executive, when I shall see the effects of that power bent on the promotion of the comfort, the happiness, and accommodation of the people, that Executive shall have my zealous and uniform support. But whenever I shall, on the part of our Executive, see every consideration of public welfare swallowed up in a continual grasp for power, in an unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice—when I shall behold men of real merit daily turned out of office for no other cause than independency of sentiment—when I shall see men of firmness, merit, years, abilities, and experience, discarded in their applications for office, for fear they possess that independence, and men of meanness preferred for the ease with

Lyon was but one of many who had to go to jail, be fined, or otherwise be made to suffer for the expression of his public views. Carpenters, preachers, lawyers, and many others furnished grist for the prosecutor's biased political activities in the "administration of justice." Unfortunately, our federal courts did not emerge from this fever of hysteria with the kind of reputations that shed lustre on the business of judging. Although the Founders had provided for federal judges to be appointed for life, thus intending to give them the independence necessary for the higher responsibility they had, some federal judges, even including members of the highest courts, presided

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which they can take up and advocate opinions, the consequence of which they know but little of—when I shall see the sacred name of religion employed as a State engine to make mankind hate and persecute each other, I shall not be their humble advocate!" The second count of the indictment alleged that Lyon had caused the publication of the following letter from a person in France: "The misunderstanding between the two Governments has become extremely alarming: confidence is completely destroyed; mistrusts, jealousies, and a disposition to a wrong attribution of motives, are so apparent as to require the utmost caution in every word and action that are to come from your Executive—I mean if your object is to avoid hostilities. Had this truth been understood with you before the recall of Monroe—before the coming and second coming of Pinckney; had it guided the pens that wrote the bullying speech of your President, and stupid answer of your Senate, at the opening of Congress in November last, I should probably have had no occasion to address you this letter. But when we found him borrowing the language of Edmund Burke, and telling the world that, although he should succeed in treating with the French, there was no dependence to be placed in any of their engagements, that their religion and morality were at an end, and they had turned pirates and plunderers, and that it would be necessary to be perpetually armed against them, though you are at peace; we wondered that the answer of both Houses had not been an order to send him to the mad-house. Instead of this, the Senate have echoed the speech with more servility than ever George the Third experienced from either House or Parliament." 8 Cong. Globe 411.

over grand juries and trials in a way that is sad to be recalled even at this late date.[43]

All the governmental activities set out above designed to suppress the freedom of American citizens to think their own views and speak their own thoughts and read their own selections, and even more, occurred under the 1798 Sedition Act. And all these things happened despite the fact that the promoters of that legislation were unable to make it as strong as their philosophical and political brethren in England had made their Act for the complete suppression of all kinds of societies. But even this comparatively less repressive law and its enforcement was too much of an infringement upon personal liberty to stand the test of public opinion among the plain, sturdy pioneers of America. In the very next election following its enactment, Jefferson was elected President on a platform which contained, as its principal plank, a promise to abandon the Sedition Act and the policy of repression behind it.[44] Members of Congress and the Senate were elected to help him carry out his pledge. The pledge was carried out, and in order to try to make amends to those who had suffered under this obnoxious

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[43] The part played by federal judges in the creation of the atmosphere of hysteria which characterized the period is discussed in Bowers, Jefferson and Hamilton 398–402. See also Miller, Crisis in Freedom 135–142.

[44] The significance of the issue of political freedom in the election of 1800 is shown by the fact that Jefferson devoted a large part of his inauguaral address to that subject. It was at that time that he gave new emphasis to the creed of political freedom by which this country lived and prospered for so long: "If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it." The part of Jefferson's First Inaugural Address dealing with political freedom is reprinted in Jones, Primer of Intellectual Freedom, 142 (Harvard University Press, 1949).

law. Congress was busy for many years indemnifying those who had been prosecuted under its provisions and even their descendants.[15] The superior judgment of the people over that of their legislators who passed the Act in the first place was graphically illustrated when Matthew Lyon, who had been sent to jail for refusing to refrain from criticizing Federalist office holders, was triumphantly re-elected by the people of Vermont while still in jail.

I, regret, exceedingly regret, that I feel impelled to recount this history of the Federalist Sedition Act because, in all truth, it must be pointed out that this law—which has since been almost universally condemned as unconstitutional [16]—did not go as far in suppressing

[15] In 1840, for example, President Van Buren signed a bill that indemnified the descendents of Matthew Lyon for the persecution he had suffered under the Sedition Act. See 8 Cong. Globe 410–414, 478. Appropriately, this act of official denouncement of the Sedition Law was accomplished on July 4 of that year. 6 Stat. 802.

[16] Perhaps the strongest denunciation of the Sedition Act as unconstitutional has come from Congress itself. The report of the Committee of the House of Representatives which presented the bill passed in 1840 to refund the fine imposed under that Act upon Matthew Lyon stated: "The committee do not deem it necessary to discuss at length the character of that law, or to assign all the reasons, however demonstrative, that have induced the conviction of its unconstitutionality. No question connected with the liberty of the press ever excited a more universal and intense interest—ever received so acute, able, long-continued, and elaborate investigation—was ever more generally understood, or so conclusively settled by the concurring opinions of all parties, after the heated political contests of the day had passed away. All that now remains to be done by the Representatives of the people who condemned this act of their agents as unauthorized, and transcending their grant of power, to place beyond question, doubt, or cavil, that mandate of the Constitution prohibiting Congress from abridging the liberty of the press, and to discharge an honest, just, moral, and honorable obligation, is to refund from the Treasury the fine thus illegally and wrongfully obtained from one of their citizens; for which purpose the committee

the First Amendment freedoms of Americans as do the Smith Act and the Subversive Activities Control Act. All the fervor and all the eloquence and all the emotionalism and all the prejudice and all the parades of horrors about letting the people hear arguments for themselves were not sufficient in 1798 to persuade the members of Congress to pass a law which would directly and unequivocally outlaw the party of Jeffers ., at which the law was undoubtedly aimed.[47] The same arguments were made then about the "Jacobins," meaning the Jeffersonians, with regard to their alleged subservience to France, that are made today about the Communists with regard to their subservience to Russia. Even the language of the charges that were hurled was substantially the same as that used in the charges made today. The Jacobins were "trained, officered, regimented, and formed to subordination, in a manner that our militia have never yet equalled;" and "it is as certain as any

herewith report a bill.". 8 Cong. Globe 411. Cf. *Abrams* v. *United States*, 250 U. S. 616, 630: "I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed." (Holmes, J., dissenting.)

[47] The real aim of the Sedition Act emerges with indisputable clarity from the debates surrounding its enactment. Thus John Allen, one of the supporters of the Act in the House of Representatives, urged the necessity of the Act in the following terms: "I hope this bill will not be rejected. If ever there was a nation which required a law of this kind, it is this. Let gentlemen look at certain papers printed in this city and elsewhere, and ask themselves whether an unwarrantable and dangerous combination does not exist to overturn and ruin the Government by publishing the most shameless falsehoods against the Representatives of the people of all denominations, that they are hostile to free Governments and genuine liberty, and of course to the welfare of this country; that they ought, therefore, to be displaced, and that the people ought to raise an *insurrection*

future event can be, that they [the Jeffersonians] will take arms against the laws as soon as they dare . . . ." [48]

These charges expressed fears that were echoed time and time again during the congressional debate on the Alien and Sedition Acts. The very same fears are again being voiced today as a justification for curtailing the liberties of the people of America. Thus, § 2 (15) of the Subversive Activities Control Act under consideration says that "[t]he Communist movement in the United States is an organization numbering thousands of adher-

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against the Government. . . . I say, sir, this paper [the Aurora, a paper which supported the Jeffersonian party] must necessarily, in the nature of things, be supported by a powerful party: I do not say of whom that party is composed. The anonymous pieces and paragraphs it contains, evince the talents and industry employed to give it currency; and it is perfectly well understood, by all parties and persons, to contain the opinions of certain great men, and certain gentlemen in this House. This inflammatory address to the Irishmen, is, therefore, understood by them to come clothed with high authority. This is the work of a party; this paper is devoted to party; it is assiduously disseminated through the country by a party; to that party is all the credit due; to that party it owes its existence; if they loved the peace of our Zion, if they sought the repose of our country, it would cease to emit its filth; it has flourished by their smiles; it would perish at their frowns." 8 Annals of Cong. 2093–2100. It is, of course, true that some Congressmen who favored the Sedition Act did so on broader grounds. "Harrison Gray Otis would have employed the Sedition Act against all associations, including the Masons: 'The spirit of association,' he warned, 'is a dangerous thing in a free government, and ought carefully to be watched.'" Miller, Crisis in Freedom, 187.

[48] These charges were made by Fisher Ames in writings published in April 1798. See Ames, Laocoon, reprinted in Works of Fisher Ames, 109, at 115, 116. Similar sentiments were expressed by Mr. Justice Peters of this Court in a letter, dated August 24, 1798, to Secretary of State Pickering. Mr. Justice Peters apparently thought it necessary, for the good of the country, "to get rid of a Set of Villians who are ready to Strike when they think the Crisis arrives." See Miller, Crisis in Freedom, 137.

ents, rigidly and ruthlessly disciplined" only awaiting "a moment when . . . overthrow of the Government of the United States by force and violence may seem possible of achievement . . . ."

This excuse for repression is, of course, not a distinctively American creation. It is the same excuse that was used for the 1799 English Act described above. Thus, Charles Abbot, a member of Parliament, urged as one of the justifications for outlawing the societies named in that Act: "The malignancy of their character is distinguishable by the restless spirit which it infuses into the lowest orders of the people, encouraging them to take up arms, and teaching them that they have great and powerful partisans and leaders' *who are secretly prepared to seize the favorable moment* for showing themselves openly at their head, when they can hope to do so with impunity." [49]

The truth is that this statutory outlawry of the Communist Party is not at all novel when considered in the perspective of history. Quite the contrary, it represents nothing more than the adoption by this country, in part at least, of one of the two conflicting views that have emerged from a long-standing and widespread dispute among political philosophers as to what kind of Government will best serve the welfare of the people. That view is that Governments should have almost unlimited powers. The other view is that governmental power should be very strictly limited. Both the Smith Act and the Subversive Activities Control Act are based upon the view that officials of the Government should have power to suppress and crush by force critics and criticisms

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[49] Parliamentary Debates, Hansard, 1st Series, 34, at 1073. (Emphasis supplied.) Cf. *Dennis v. United States*, 341 U. S. 494, 510, in which this Court upheld convictions for advocacy of overthrow of the Government "as speedily as circumstances would permit."

of governmental officials and their policies. The contrary view, which Congress necessarily rejected in passing these laws, is that current public officials should never be granted power to use governmental force to keep people from hearing, speaking or publishing such criticisms of Government or from assembling together to petition their Government to make changes in governmental policies, however basic the majority may deem these policies to be.

It is my belief that our Constitution with its Bill of Rights was expressly intended to make our Government one of strictly limited powers. The Founders were intimately familiar with the restrictions upon liberty which inevitably flow from a Government of unlimited powers. By and large, they had found this experience a painful one. Many of them were descended from families that had left England and had come to this country in order to escape laws that could send them to jail or penalize them in various ways for criticizing laws and policies which they thought bore too heavily and unfairly upon them. Others had personally felt the brunt of such repressive measures. Only after they won the Revolutionary War did these people have an opportunity to set up a Government to their liking. To that end they finally settled upon the Constitution, which very clearly adopted the policy of limiting the powers of the Federal Government. Even then the people of this country were not completely satisfied. They demanded more precise and unequivocal limitations upon the powers of Government and obtained the Bill of Rights, the central provisions of which were the First Amendment guarantees of complete religious and political freedom.[50]

[50] *See Konigsberg* v. *State Bar of California*, — U. S. —, — (dissenting opinion); *Feldman* v. *United States*, 322 U. S. 487, 501 (dissenting opinion).

In the very face of the provisions of the First Amendment, however, the Court today upholds laws which ignore the wisdom of the Founders' decision to set up a limited Government and adopt the policy of force to crush views about public matters entertained by a small minority in this country. This, to me, marks a major break in the wall designed by the First Amendment to keep this country free by leaving the people free to talk about any kind of change in basic governmental policies they desire to talk about. I see no possible way to escape the fateful consequences of a return to the era in which all governmental critics had to face the probability of being sent to jail except for the Court to abandon what I consider to be the dangerous constitutional doctrine of "balancing" to which the Court is at present adhering. That doctrine is not a new one. In fact, history shows that it has been the excuse for practically every repressive measure that Government has ever seen fit to adopt. Mr. Pitt proved, in 1799, that he was a master of the concept and language of "balancing" in his speech urging the passage of laws to muzzle the press of England in order to prevent the dissemination of the "revolutionary" ideas that England should have parliamentary reform:

> "We cannot too highly prize that sacred liberty [of the press] when we consider that it has been instrumental in bringing our Constitution to that envied perfection which it possesses. Yet it must also be admitted that when abused, the most fatal consequences have ever resulted from it. It has been the great principle of the Constitution that the liberty of the press should flourish, but it is also clear from the nature of the principle itself, and for the security of the press, that the author or publisher of every work should be amenable to the laws of his country." [51]

[51] Parliamentary Debates, Hansard, 1st Series, 34, at 987.

And there certainly was no shortage of "balancers" in our own Congress when the Alien and Sedition and Sedition Acts of 1798 were passed.[52]

The "balancing test" of First Amendment freedoms is said to justify laws aimed at the advocacy of overthrow of the Government "as speedily as circumstances would permit." [53] Thus, the "test" being used here is identical to the arguments used to justify the Alien and Sedition Acts of 1798 in this country and the 1799 Sedition Act in England. The unprecedented incorporation into our constitutional law of this time-worn justification for tyranny has been used to break down even the minimal protections [54] of

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[52] See, *e. g.*, the argument of Representative Harper on the floor of the House in favor of the passage of the Sedition Act: "He had often heard in this place, and elsewhere, harangues on the liberty of the press, as if it were to swallow up all other liberties; as if all law and reason, and every right, human and divine, was to fall prostrate before the liberty of the Press; whereas, the true meaning of it is no more than that a man shall be at liberty to print what he pleases, provided he does not offend against the laws, and not that no law shall be passed to regulate this liberty of the press. He admitted that a law which should say a man shall not slander his neighbor would be unnecessary: but it is perfectly within the Constitution to say, that a man shall not do this, or the other, which shall be injurious to the well being of society; in the same way that Congress had a right to make laws to restrain the personal liberty of man, when that liberty is abused by acts of violence on his neighbor." 8 Annals of Cong. 2102.

[53] *Dennis* v. *United States*, 341 U. S. 494. See also *Yates* v. *United States*, 354 U. S. 298; *Scales* v. *United States*, *ante*, p. —; *Noto* v. *United States*, *ante*, p. —.

[54] As the Court said, in *Bridges* v. *California*, 314 U. S. 252, 263: "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the

the First Amendment forged by Mr. Justice Holmes and Mr. Justice Brandeis which would bar prosecution for speech or writings in all cases except those in which the words used "so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country." [55]

I realize that these laws are aimed only at the Communist Party. No one need console himself, however, that the policy of using governmental force to crush dissident groups upon which they are based can or will be stopped at that point. The weakening of constitutional safeguards in order to suppress one obnoxious group is a technique too easily available for the suppression of other obnoxious groups to expect its abandonment when the next generally hated group appears. Only eleven years ago, this Court upheld a governmental penalty directed at Communists on the ground that "only a relative handful" would be affected by the penalty involved in that case.[56] Today, it upholds statutes which I think totally outlaw that Party, claiming nonetheless that "[n]othing which we decide here remotely carries . . . [the] implication . . . [that] Congress may impose similar requirements upon any group which pursues unpopular political objectives or which expresses an unpopular political ideology." I am very much afraid that we will see the day when the very implication which the Court now denies is found.

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press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."

[55] *Abrams* v. *United States*, 250 U. S. 616, 630 (Holmes, J., dissenting). I have recently expressed my belief that the "balancing test" can derive no support whatever from the "clear and present danger" test used by Mr. Justice Holmes and Mr. Justice Brandeis. See *Konigsberg* v. *State Bar of California*, — U. S. —, — (dissenting opinion).

[56] *American Communications Assn.* v. *Douds*, 339 U. S. 382, 404.

I am ready to admit that strong arguments can be made for saying that Governments in general should have power to suppress speech and press. These arguments are particularly strong in countries where the existing Government does not represent the will of the people because history shows that people have a way of not being willing to bear oppressive grievances without protest. Such protests, when bottomed upon facts, lead almost inevitably to an irresistable popular demand for either a redress of those grievances or a change in the Government. It is plain that there are Governments in the world today that desperately need to suppress such protests for they probably could not survive a week or even a day if they were deprived of the power to use their informers to intimidate, their jails to imprison and their firing squads to shoot their critics. In countries of that kind, repressive measures like the Smith Act and the Subversive Activities Control Act are absolutely necessary to protect the ruling tyrants from the spread of information about their misdeeds. But in a democracy like ours, such laws are not only unnecessary but also constitute a baseless insult to the patriotism of our people.

I believe with the Framers of the First Amendment that the internal security of a nation like ours does not and cannot be made to depend upon the use of force by Government to make all the beliefs and opinions of the people fit into a common mold on any single subject. Such enforced conformity of thought would tend only to deprive our people of the bold spirit of adventure and progress which has brought this Nation to its present greatness. The creation of public opinion by groups, organizations, societies, clubs, and parties, has been and is a necessary part of our democratic society. Such groups, like the Sons of Liberty and the American Corresponding Societies, played a large part in creating sentiment in this country that led the people of the Colonies to want a nation of

their own. The Father of the Constitution—James Madison—said, in speaking of the Sedition Act aimed at crushing the Jeffersonian Party, that had that law been in effect during the period before the Revolution, the United States might well have continued to be "miserable colonies, groaning under a foreign yoke." [37]

In my judgment, this country's internal security can better be served by depending upon the affection of the people than by attempting to instill them with fear and dread of the power of Government. The Communist Party has never been more than a small group in this country. And its numbers had been dwindling even before the Government began its campaign to destroy the Party by force of law. This was because a vast majority of the American people were against the Party's policies and overwhelmingly rejected its candidates year after year. That is the true American way of securing this Nation against dangerous ideas. Of course that is not the way to protect the Nation against *actions* of violence and treason. The Founders drew a distinction in our Constitution which we would be wise to follow. They gave the Government the fullest power to prosecute overt actions in violation of valid laws but withheld any power to punish people for nothing more than advocacy of their views.

I am compelled to say in closing that I fear that all the arguments and urgings the Communists and their sympathizers can use in trying to convert Americans to an ideology wholly foreign to our habits and our instincts are far less dangerous to the security of this Nation than laws which embark us upon a policy of repression by the outlawry of minority parties because they advocate radical changes in the structure of Government. This widespread program for punishing ideas on the ground that

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[37] Miller, Crisis in Freedom, 84.

they might impair the internal security of the Nation not only sadly fails to protect that security but also diverts our energies and thoughts from the many far more important problems that face us as a Nation in this troubled world.

I would reverse this case and leave the Communists free to advocate their beliefs in proletarian dictatorship publicly and openly among the people of this country with full confidence that the people will remain loyal to any democratic Government truly dedicated to freedom and justice—the kind of Government which some of us still think of as being "the last best hope of earth."

# SUPREME COURT OF THE UNITED STATES

No. 12.—October Term, 1960.

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| Communist Party of the United States of America, Petitioner, *v.* Subversive Activities Control Board. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit. |

[June 5, 1961.]

Mr. Justice Douglas, dissenting.

I.

The Subversive Activities Control Board found, and the Court of Appeals sustained the finding, that petitioner, the Communist Party of the United States, is "a disciplined organization" operating in this nation "under Soviet Union control" to install "a Soviet style dictatorship in the United States." Those findings are based, I think, on facts; and I would not disturb them.

The other objections made are not of the character of those which led us to reverse and remand for additional hearings five years ago. There we had a record tainted by perjury. *Communist Party* v. *Control Board*, 351 U. S. 115, 124–125. No one—no matter how venal—could suffer penalties under our regime of law where perjury tainted the record. The present errors that are urged are not of that character.

Had they appeared in a normal administrative hearing and timely claimed, they might give us pause. If we had before us the question whether a particular organization was, to use the statutory words a "Communist-front organization," (64 Stat. 987, 989, 50 U. S. C. § 782 (4)) or a "Communist-infiltrated organization," (68 Stat. 775, 777, 50 U. S. C. § 782 (4A)) the errors urged might loom

large. For then the decision might turn on intangibles to be closely appraised. The present problem, however, is in a somewhat different posture. We are in a field where Congress has found and declared that the Communist Party is "in fact an instrumentality of a conspiracy to overthrow the government of the United States," that its "policies and programs" are "secretly prescribed for it by the foreign leaders of the world communist movement," that it is "the agency of a hostile foreign power." 68 Stat. 775. These congressional findings amount to no more than facts of which some Justices have already taken judicial notice. See, *e. g.*, *Communications Assn.* v. *Douds*, 339 U. S. 382, 427 *et seq.* (opinion of Mr. Justice Jackson). This does not mean that anything goes and that the hearings are *pro forma*. It does suggest, however, that where, as here, the case does not turn on nice nuances which in closer contests might have to be carefully weighed, we should not prolong the administrative hearings which already have extended a decade. With this as a starting point, I agree with MR. JUSTICE FRANKFURTER that the Court of Appeals did not err in overruling the objections based on procedural errors.

May then the Communist Party, under control of a foreign power, be required to register?

The vices of registration may be not unlike those of licensing. Despite *Times Film Corp.* v. *Chicago*, 365 U. S. 43, I think licensing is an impermissible form of regulation when it vests discretion in the authorities to grant or withhold the exercise of First Amendment rights or to permit them to be exercised only on condition. *Lovell* v. *Griffin*, 303 U. S. 444, 451–452. Licensing, like a tax payable on the exercise of a First Amendment right (*Murdock* v. *Pennsylvania*, 319 U. S. 105) is therefore unconstitutional. See *Thomas* v. *Collins*, 323 U. S. 516. Yet registration, like licensing, may have aspects of

harassment and burden. That is why we said in *Thomas v. Collins, supra*, 540:

> "If the exercise of the rights of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition for exercising them and making such a condition the foundation for restraining in advance their exercise and for imposing a penalty for violating such a restraining order. So long as no more is involved than exercise of the rights of free speech and free assembly, it is immune to such a restriction. If one who solicits support for the cause of labor may be required to register as a condition to the exercise of his right to make a public speech, so may he who seeks to rally support for any social, business, religious or political cause. We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment."

Freedom of association is included in the bundle of First Amendment rights. *N. A. A. C. P. v. Alabama*, 357 U. S. 449, 460. So if we had only the question whether those who band together to espouse a political, educational, literary, civic, or ideological cause could be made to register, I would protest. The late Zachariah Chafee spoke of the danger in limiting our freedoms under political pressures. "Universities," he wrote, "should not be transformed, as in Nazi Germany, into loud-speakers for the men who wield political power." The Blessings of Liberty (1936) 241. There have been attempts here to interfere by law in a myriad of ways with the shaping of public opinion through many groups, attacked because they were non-conformists of one kind or another. As

we said recently, the identification of members of groups and fear of reprisal "might deter peaceful discussions of public matters of importance." *Talley* v. *California*, 362 U. S. 60, 65. There is, in my view, a disability on the part of government to probe the intimacies of relationships in the myriad of lawful societies and groups in this country. See, for example, *United States* v. *Rumely*, 345 U. S. 41, 48, 56–58 (concurring opinion); *Bates* v. *Little Rock*, 361 U. S. 516, 527 (concurring opinion); *Uphaus* v. *Wyman*, 364 U. S. 388, 401, 405–408 (dissenting opinion). From those precedents I would hopefully deduce two principles. First, no individual may be required to register before he makes a speech, for the First Amendment rights are not subject to any prior restraint. Second, a group engaged in lawful conduct may not be required to file with the Government a list of its members, no matter how unpopular it may be. For the disclosure of membership lists may cause harassment of members and seriously hamper their exercise of First Amendment rights. The more unpopular the group, the greater the likelihood of harassment. In logic then it might seem that the Communist Party, being at the lowtide of popularity, might better make out a case of harassment than almost any other group on the contemporary scene.

We have, however, as I have said, findings that the Communist Party of the United States is "a disciplined organization" operating in this Nation "under Soviet Union control" with the aim of installing "a Soviet style dictatorship" here. These findings establish that more than debate, discourse, argumentation, propaganda, and other aspects of free speech and association are involved. An additional element enters, *viz.*, espionage, business activities, and the formation of cells for subversion, as well as the use of speech, press, and association by a

foreign power to produce on this continent a Soviet satellite.[1]

Picketing is free speech *plus* (*Bakery Drivers Local* v. *Wohl*, 315 U. S. 769, 776–777 (concurring opinion); *Gibonéy* v. *Empire Storage Co.*, 336 U. S. 490, 497–503) and hence can be restricted in all instances and banned in some. Registration of those who disseminate propaganda of foreign origin (see *Viereck* v. *United States*, 318 U. S. 236, 251) has been thought to fall in the same category as barring speech in places that will create traffic conditions (*Schneider* v. *State*, 308 U. S. 147, 160; *Cox* v. *New Hampshire*, 312 U. S. 569) or provoke breaches of the peace. *Chaplinsky* v. *New Hampshire*, 315 U. S. 568. Though the activities themselves are under the First Amendment, the manner of their exercise or their collateral aspects fall without it.

Like reasons underlie our decisions which sustain laws that require various groups to register before engaging in specified activities. Thus lobbyists who receive fees for attempting to influence the passage or defeat of legislation in Congress may be required to register. *United*

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[1] For accounts of the attempts of Communists to infiltrate American trade unions see S. Doc. No. 89, 82d Cong., 1st Sess.; Taft, The Structure and Government of Labor Unions (1954), pp. 19 *et seq.*; Murray, American Labor and the Threat of Communism (1951), 274 Annals. Amer. Acad. Pol. & Soc. Sc. 125; Paschell and Theodore, Anti-Communist Provisions in Union Constitutions (1954), 77 Monthly Lab. Rev. 1097.

Eric Sevareid writing in the Washington Post for January 15, 1961, said:

"Americans get too hysterical about the Marxists in their midst. Americans do, considering that there are so few. But I notice that it is the hard core of Marxists who now threaten to split Belgium in two; that it was the hard core of Marxists who drove the British Labor Party down the official policy line of neutralism."

*States* v. *Harris*, 347 U. S. 612.[2] Criminal sanctions for failure to report and to disclose all contributions made to political parties are permitted. *Burroughs* v. *United States*, 290 U. S. 534. Publishers of newspapers, desiring reduced postal rates, have long been required to file with the Postmaster General and with the local postoffice certain data concerning ownership and circulation; and those disclosure requirements have been sustained. *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288. In short, the exercise of First Amendment rights often involves business or commercial implications which Congress in its wisdom may desire to be disclosed, just as it did in strictly financial matters under the Public Utility Holding Company Act of 1935. See *Electric Bond & Share Co.* v. *Securities & Exchange Comm'n*, 303 U. S. 419.

If lobbyists can be required to register, if political parties can be required to make disclosure of the sources of their funds, if the owners of newspapers and periodicals must disclose their affiliates, so may a group operating under the control of a foreign power.

The Bill of Rights was designed to give fullest play to the exchange and dissemination of ideas that touch the politics, culture, and other aspects of our life. When an organization is used by a foreign power to make advances here, questions of security are raised beyond the ken of disputation and debate between the people resident here. Espionage, business activities, formation of cells for subversion, as well as the exercise of First

[2] The dissents in that case were on grounds not material to the bare issue of registration now before us. The concealment of the main interests behind legislative proposals has been conspicuous. The example of the American Fair Trade League—controlled by manufacturers but purporting to represent retailers only—is told in Federal Trade Commission, Report on Resale Price Maintenance (1945), pp. 43–48.

Amendment rights, are then used to pry open our society and make intrusion of a foreign power easy. These machinations of a foreign power add additional elements to free speech just as marching up and down adds something to picketing that goes beyond free speech.

These are the reasons why, in my view, the bare requirement that the Communist Party register and disclose the names of its officers and directors is in line with the most exacting adjudications touching First Amendment activities.

II.

While the Act is pregnant with constitutional questions, I deal now with only one, *viz.*, whether § 7 of the Act is unconstitutional and void as conflicting with the provision against self-incrimination accorded by the Fifth Amendment.

The registration statement prepared by the Attorney General pursuant to § 7 (a) and (b) of the Act asks in Item 2 the name, address, position, and functions of any individual "who at any time during the twelve months preceding the execution of the statement was an officer, director, or person performing the functions of an officer or director" of the Communist Party. Item 3 requires a statement of any alias of any person listed in Item 2. Item 11 asks for the name, alias, and address of each individual "who was a member of the organization at any time during the period" of twelve months prior to the filing of the registration statement. The statement must be signed by the partners, officers, directors, and members of the governing body. 28 CFR § 11.200; Form ISA–1.

Those provisions are not conditional. The Government with all the authority it possesses has ordered the Party to register.

The duty to disclose the names of the officers, directors, and members is explicit. The duty is to make the dis-

closure here and now. The individuals who must make the disclosure are definitely described. There is no uncertainty as to what must be done. The question is whether the command made is constitutional under the Fifth Amendment.

If the requirement of Form ISA–1 that the statement be signed "by the partners, officers, and directors" were deleted and the statement was allowed to be filed by "any agent," the act of signing that implicates the partner, officer, or director would be eliminated. If the Court, sensitive to the high role performed by the Fifth Amendment, also deleted the compulsory disclosure of the others whose association with the Party is required to be disclosed without immunity, the problems presented by those disclosures would disappear. But the Court does none of these things. It requires officers and directors to sign; it requires that the names of officers, directors, and members within the 12-month period be disclosed. Thus the question of self-incrimination of each of those individuals is squarely presented.

III.

First as to the *officers, directors, and others who must sign the registration statement.* These individuals, who could be prosecuted as "active" Communist agents under *Yates* v. *United States,* 354 U. S. 298, and *Scales* v. *United States, ante,* p. —, cannot, in my view, be compelled to sign a registration statement. A compulsory admission of that ingredient of a crime would plainly violate the Fifth Amendment.

If a person who was on the witness stand in a courtroom or appearing before a Congressional Committee were asked whether he was an officer or director of the Communist Party, our decisions in *Blau* v. *United States,* 340 U. S. 159, 161, and *Quinn* v. *United States,* 349 U. S.

155, would protect him from self-incrimination. Under our system federal officials who desire to establish guilt must use the grand jury to get an indictment and a petit jury to obtain conviction. They cannot require the accused to "do their job for them." Chafee, The Blessings of Liberty (1956), p. 207.

The clause of the Fifth Amendment with which we are here concerned provides that "No person . . . shall be compelled in any criminal case to be a witness against himself." The clause has been hospitably construed. The Court said in *Counselman* v. *Hitchcock*, 142 U. S. 547, 562:

> "It is impossible that the meaning of the constitutional provision can only be, that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases; but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard."

As recently stated by Judge Samuel H. Hofstadter:

> "The privilege is applicable to civil cases, grand jury proceedings, legislative inquiries, and virtually every other form of official proceeding. It applies whether the witness is a party to the civil or criminal case or merely a witness. And it applies whether the testimony is directly in issue or is collateral. The witness himself is the judge in each case; he may not be compelled to give testimony which he himself in good faith believes might, in any manner whatever, pave the way to possible prosecution. To claim the privilege requires no special combination of words; the

clause is liberally construed to protect the right it was intended to secure." The Fifth Amendment and the Immunity Act of 1954 (Fund for the Republic, 1955), p. 10.

How then can the Government ask a person to sign a registration statement which makes admissions that would not survive challenge under the Fifth Amendment if asked orally of the individuals that the disclosure implicates?

*United States* v. *White*, 322 U. S. 694 held that the privilege does not excuse an officer of an organization from producing its records on the grounds that the contents of the records will or may incriminate him. As to the officer or director, it is plain that he incriminates himself not merely by producing records but by signing and filing the registration statement. The preparation of the registration statement and its execution are in the same category as the giving of testimony in the *Blau* and *Quinn* cases, if the Fifth Amendment is to have continuing vitality. Part of what is today required is the furnishing of statements and admissions from the pens of men and women whose very signature may start them on the way to prison. We made clear in *Curcio* v. *United States*, 354 U. S. 118 that the ruling in the *White* case was restricted to the production of books and record. We there upheld the custodian's privilege against testifying as to the "whereabouts of books and records" where that testimony might incriminate him. We said ". . . he cannot lawfully be compelled, in the absence of a grant of adequate immunity from prosecution, to condemn himself by his own oral testimony." *Id.*, 124.

It would seem to follow *a fortiori* that a custodian who need not testify concerning the whereabouts of records if that testimony would tend to incriminate him, need not put into writing the admission that he is an officer or

director of the Communist Party. What more incriminating admission could be compelled? This was the position of Judge Bazelon in the Court of Appeals, 223 F. 2d 531, 579, and it seems to me unassailable. See also *Shapiro* v. *United States*, 335 U. S. 1, 27; *Wilson* v. *United States*, 221 U. S. 361, 385.

*Electric Bond & Share Co.* v. *Securities & Exchange Comm'n*, *supra*, is irrelevant to our present problem under the Fifth Amendment. No claim was made in that case that the preparation and filing of a registration statement might implicate an officer or director and that the Fifth Amendment therefore protected him against signing unless immunity was granted. The problem in the present case is quite different. It raises the following kind of question: Can Congress, which has made embezzlement of national bank funds a criminal offense, require embezzlers to register without granting them the full immunity (cf. *Ullmann* v. *United States*, 350 U. S. 422) to which they are entitled? That is the closest analogy to the present case.

The compiling, the signing, and the filing of the registration statement required of officers, directors, and others by the registration form is a form of elicited testimony; not the surrender of pre-existing records. Where, as here, such disclosure will reveal knowledge of and relations with the Communist Party, I do not see how it can be demanded, unless immunity is granted.

The Bill of Rights does not go so far as to forbid all interrogation under threat of punishment. It does not prevent the breaking of myriad bonds of secrecy at the command of the Government. It protects only the individual who has himself become the object of the Government's punitive powers. From him it removes the humiliating presence of the questioner. The power of the Government is limited, so that it cannot punish either the silence or the passive hostility of one who claims the

privilege, whether he be a criminal or a prophet or merely a bewildered citizen suddenly caught in the sinister web of suspicion.

The privilege is often criticized as a shield for wrongdoing. But not every hostile silence which greets official interrogation has its beginning in wrongdoing. In a nation such as ours the Government must often meet with hostility; we are not constrained to admire its activities; we are free to detest them. That freedom could not long remain if the Government were free to require us to recount all our doings. The Government may still threaten silence with prison, but its power to do so stops short when information sought is incriminating. Even so ardent an advocate of the totalitarian state as Thomas Hobbes respected this core of privacy:

> "A covenant not to defend myself from force, by force, is always void. For (as I have shown before) no man can transfer or lay down his right to save himself from death, wounds, and imprisonment, the avoiding whereof is the only end of laying down any right . . . . A covenant to accuse oneself, without assurance of pardon, is likewise invalid. For in the condition of nature, where every man is judge, there is no place for accusation: and in the civil state the accusation is followed with punishment, which, being force, a man is not obliged not to resist." Leviathan, 23 Great Books 90.

The cases dealing with the duty to keep records (see *Shapiro* v. *United States, supra*) can be put to one side. Under the Smith Act, 18 U. S. C. § 2385, the very subject matter under regulation is interwoven with criminal activity. Where individuals compile and sign

[3] See Meltzer, Required Records, The McCarran Act and the Privilege Against Self-Incrimination. 18 U. of Chi. L. Rev. 687, 719–728.

the registration statement, as they must, it is the very making of the registration statement that will incriminate them, not the underlying documents.

Signing as an officer or director of the Communist Party—an ingredient of an offense that results in punishment—must be done under the mandate of law. That is compulsory incrimination of those individuals and, in my view, a plain violation of the Fifth Amendment.

IV.

The compulsory disclosure of those who have been *officers, directors, or members* of the Party during the last 12 months is equally objectionable under the Fifth Amendment. Membership in the Party is, by virtue of federal statutes, the start[4] of every prosecution whether it be for active "membership" as in *Scales* v. *United States, supra*, or for conspiracy to teach the doctrine, as in *Dennis* v. *United States*, 341 U. S. 494. Membership is a "link in the chain of evidence" needed for such prosecution, as we held in *Blau* v. *United States, supra*, 161; *Quinn* v. *United States, supra*. It is therefore in the class of disclosure which we have held since the time of Chief Justice Marshall[5] (see *United States* v. *Burr*, 25 Fed.

[4] It is also the starting point for certain other quasi-penal disabilities, including the roundup of those who may be put in detention camps by virtue of 50 U. S. C. §§ 812–814.

[5] In answering a claim of the prosecution that a witness cannot refuse to answer unless the answer, unconnected with other testimony, would be sufficient to convict him of a crime, Chief Justice Marshall said:

"This would be rendering the rule almost perfectly worthless. Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible but a probable case that a witness, by disclosing a single

Cas. No. 14,692e) could not be demanded by reason of the Fifth Amendment. The compulsory disclosure of membership in the Communist Party, which the *Blau* and *Quinn* cases have put within the protection of the Fifth Amendment, is the necessary and immediate effect of filing as a public record the registration statement required by § 7. As in case of officers and directors who must sign the registration statement, this is, in my view, compulsory incrimination of the members and a plain violation of the Fifth Amendment.

If Congress can through use of the registration device compel disclosure of people's activities that violate federal laws, the Fifth Amendment would be cast into a limbo.

As I have said, each person required to be listed in the registration statement, were he to be brought before his interrogators, could not be compelled to admit what the statute here requires petitioner to set forth at length. The only difference that exists between compelling each member and officer, and between compelling petitioner is the thin "veil" of petitioner's fictitious juridical personality.

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fact, may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing, but all other facts without it would be insufficient. While that remains concealed within his own bosom he is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description.

"What testimony may be possessed, or is attainable, against any individual the court can never know. It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws." 25 Fed. Cas., at 40.

*Hale v. Henkel*, 201 U. S. 43, held that a corporation could not claim a privilege against self-incrimination. That case—and others, such as *Wilson* v. *United States*, *supra*, and *United States* v. *White*, *supra*, which I have mentioned—have implemented a constitutional policy of publicity for associational activities which would be abhorrent if required of individuals and in matters that were less clearly within the realm of day-to-day administrative regulation.

The present requirement for the disclosure of membership lists is not a regulatory provision, but a device for trapping those who are involved in an activity which, under federal statutes, is interwoven with criminality. The primary effect of the required registration is not disclosure to the public but criminal prosecution. I do not see how the Government that has branded an organization as criminal through its judiciary,[6] its legislature,[7] and its executive,[8] can demand that it submit the names of all its members—unless it grants immunity for the disclosure.

Prior to today,[9] the nearest the Court ever came to allowing the registration device to be used as a mecha-

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[6] See *Barenblatt* v. *United States*, 360 U. S. 109, 128.

[7] See Communist Control Act of 1954, § 2, 68 Stat. 775, 50 U. S. C. § 841.

[8] See List of Organizations, App. A, 5 CFR, part 210 (1949 ed.); *Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 124–129.

[9] Section 6 of the Mann Act (36 Stat. 825, 827, 18 U. S. C. § 2424) provides that anyone harboring an alien woman in a house of prostitution must register. There is no required form—merely a statement in writing giving the following information: the name of the woman, the place where she is kept, all of the facts as to the date of her entry into the United States, the port of entry, her age, nationality, parentage, and all facts concerning her procuration to come to this country within the knowledge of the person required to furnish the statement. One who files is immune from prosecution by

nism for compulsory disclosure of criminal activities was *United States* v. *Kahriger*, 345 U. S. 22. See also *Lewis* v. *United States*, 348 U. S. 419. Gamblers were required to register with the Collector of Internal Revenue and to pay an occupational tax. The defense of the Fifth Amendment was rejected on grounds that seemed to some of us at the time to be specious. Registration could be required, the Court held, because it pertained only to "the business of wagering in the future." *United States* v. *Kahriger*, *supra*, 33. The Fifth Amendment, the Court said, "has relation only to past acts, not to future acts that may or may not be committed." *Id.*, 32. The sluice gates, opened a hair's width by that case, are now flung wide. I remain in agreement with what MR. JUSTICE BLACK said in *United States* v. *Kahriger*, *supra*, 37: "[W]e have a Bill of Rights that condemns coerced confessions, however refined or legalistic may be the technique of extortion."

V.

It is said that the Party has no standing to assert the rights of its officers, directors or members.

The privilege against self-incrimination is a personal one. It must be claimed; it may be waived. In ordinary circumstances, there is no Fifth Amendment privilege against incriminating another. *Rogers* v. *United States*, 340 U. S. 367. And see *Hale* v. *Henkel*, *supra*, 69–70; *United States* v. *White*, *supra*, 704. On the other hand, the intimate connection between associations and their members has long been recognized. In *Beauharnais* v.

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the United States for anything reported in the registration statement. See *United States* v. *Mack*, 112 F. 2d 290, 292. But this provision was held in violation of the Fifth Amendment in *United States* v. *Lombardo*, 228 F. 980, aff'd on other grounds, 241 U. S. 73, because the immunity extended only to federal, not state prosecutions.

*Illinois*, 343 U. S. 250, 262. MR. JUSTICE FRANKFURTER writing for the Court said:

> "Long ago this Court recognized that the economic rights of an individual may depend for the effectiveness of their enforcement on rights in the group, even though not formally corporate, to which he belongs."

The case cited was *American Foundries* v. *Tri-City Council*, 257 U. S. 184, where the right of a union to speak for its members was recognized. In *N. A. A. C. P.* v. *Alabama*, *supra*, the Association was allowed to assert its members' constitutional rights:

> "If petitioner's rank-and-file members are constitutionally entitled to withhold their connection with the Association despite the production order, it is manifest that this right is properly assertable by the Association. To require that it be claimed by the members themselves would result in nullification of the right at the very moment of its assertion. Petitioner is the appropriate party to assert these rights, because it and its members are in every practical sense identical." *Id.*, 459.

We dealt there with a Negro group asserting the First Amendment rights of its members. The members, it was argued, would be harassed if their names were disclosed and that harassment would abridge their First Amendment rights. We agreed with that view, *id.*, 460–462, and held that N. A. A. C. P. could not be forced to disclose to Alabama its membership lists. We did not, I assume, write a rule good for that day only. Nor did I think we wrote only for Negro groups.

Nor did I think we restricted the assertion by a group of the rights of its members to those asserting First Amendment rights. In *Anti-Fascist Refugee Committee* v. *McGrath*, *supra*, three groups, under circumstances

somewhat similar to the present case, claimed the right to invoke their members' rights under both the First and the Fifth Amendments. They had been designated as "communist" by the Attorney General; and the impact of that classification on the status of the members as federal employees was striking and immediate. Could that classification be constitutionally made without a hearing? The consensus of opinion among those who reached the issue seemed clear—that the groups could raise objections that involved the constitutional rights of their members. The view was forcefully asserted by Mr. Justice Jackson. *Id.*, 186. As MR. JUSTICE FRANKFURTER stated:

> "Designation works an immediate substantial harm to the reputations of petitioners. The threat which it carries for those members who are, or propose to become, federal employees makes it not a finicky or tenuous claim to object to the interference with their opportunities to retain or secure such employees as members." *Id.*, 159.

That was my own view then, *id.*, 174–175, and now.

This analysis has support in a long line of cases where the Court has allowed *A* to assert *B's* constitutional right in seeking redress or prevention of harm to himself. The root of this doctrine is found in equity. In *Truax* v. *Raich*, 239 U. S. 33, an injunction had been sought by an employee who was an alien, seeking to restrain enforcement of an Arizona statute. The right invoked was the employee's own right under the Fourteenth Amendment. But the statute imposed no penalty on the alien for working. It penalized his employer for hiring him. Nevertheless, the injunction issued. In *Pierce* v. *Society of Sisters*, 268 U. S. 510, the proprietors of a private school to protect their monetary interest in preserving the school were allowed to assert rights of parents in the education

of their children. Similarly, a white vendor was allowed to assert his Negro vendee's rights in enforcing a contract to sell real property, subject to a restrictive city ordinance, in *Buchanan* v. *Warley*, 245 U. S. 60. See also *International Harvester* v. *Department of Taxation*, 322 U. S. 435; *Barrows* v. *Jackson*, 346 U. S. 249; *Bates* v. *City of Little Rock*, 361 U. S. 516.

*Bryant* v. *Zimmerman*, 278 U. S. 63, which sustained a *state* law requiring the Ku Klux Klan to file its membership lists with state officials was explained in *N. A. A. C. P.* v. *Alabama*, *supra*, 465, as a case involving an organization whose acts were "unlawful intimidation and violence," not First Amendment activities. That explanation was adequate for that case as only First Amendment rights were being considered in *N. A. A. C. P.* v. *Alabama*, *supra*. No Fifth Amendment question,[10] was, however, raised in *Bryant* v. *Zimmerman*, *supra*.

Petitioner, the Communist Party, seeks in this case to assert that the statute under which it is ordered to register is unconstitutional, because it will have the necessary effect of depriving members of their privilege against being compelled to reveal their connection with the Party. This is not a case, as the majority opinion admits, like *United States* v. *Sullivan*, 274 U. S. 259, where a taxpayer, because he claimed the privilege against self-incrimination with respect to the source of some of his income, argued that he was wholly excused from filing a tax return. Nor is this a case where "one who is required to assert the privilege against self-incrimination may thereby arouse the suspicions of prosecuting authorities." For here, if an individual were to

[10] The Court had held years earlier in *Twining* v. *New Jersey*, 211 U. S. 78, that the Fifth Amendment was not applicable to the States. And see *Jack* v. *Kansas*, 199 U. S. 372, holding that if immunity from state prosecution were granted, the defense that it offered no immunity from federal prosecution would have been of no avail.

attempt to claim the privilege against filing for the Party he would admit an ingredient of a crime, namely, his connection with the Party.

Clearly, this is a situation in which only the Party can effectively assert the privilege of its officers, directors, and members. This is the teaching of *N. A. A. C. P.* v. *Alabama, supra*, and of the opinions of Mr. Justice Jackson, Mr. Justice Frankfurter and myself in *Joint Anti-Fascist Refugee Committee* v. *McGrath, supra*, and of the other cases discussed above. When we reject those precedents, we create a special rule for this day only.

The Party is the proper party to raise the objection because no one else can raise it effectively. The community of interest between the Party and its members is indeed closely analogous to the community of interest between a corporation and its stockholders. See Stevens, Corporations (1949), pp. 788–789. Since the command to register cannot be separated from the means of registration, an attack is properly made on the incriminating features of the statute by petitioner who is commanded to register. See *The Employers' Liability Cases*, 207 U. S. 463, 500–502; *United States* v. *Reese*, 92 U. S. 214, 221. Cf. *Electric Bond & Share Co.* v. *Securities & Exchange Comm'n, supra*.

In *Boyd* v. *United States*, 116 U. S. 616, 638, a court order to produce an invoice, claimed to be privileged under the Fifth Amendment, was held to be unconstitutional and void. One need not, I have assumed, obey an unconstitutional command and raise his constitutional objection only on compliance. Of course, defiance of a governmental command because it is unconstitutional is deep in our traditions. *Thomas* v. *Collins, supra; Staub* v. *City of Baxley*, 355 U. S. 313. Yet heretofore a person claiming that a disclosure would violate his Fifth Amendment rights need not first tender the information claimed to be privileged. A person asked whether he is

a member of the Communist Party can invoke the Fifth Amendment and refuse to reply since under existing federal laws the answer would tend to incriminate him. *Quinn* v. *United States*, *supra*, 162; *Blau* v. *United States*, *supra*, 161. The answers now demanded by the registration form and the regulations require precisely the kind of answers we held protected against self-incrimination in the *Quinn* and *Blau* cases.

VI.

The fact that there may be other times when the issue may be raised—as for example if a registration statement is not filed and officers or members are prosecuted for that default under § 15 of the Act—seems immaterial. This case is not in the category of those challenges of a law made before it is known how and in what manner it will be enforced and applied. Cf. *Rescue Army* v. *Municipal Court*, 331 U. S. 549; *Federation of Labor* v. *McAdory*, 325 U. S. 450. A final order to register under the Act has been issued. The disclosure requirements are clear and specific. Now is the time to raise Fifth Amendment questions. To relegate the parties to another time and place in order to raise those constitutional objections is to fashion an extremely harsh rule to fit the Communist Party but no one else. Default means the risk of criminal prosecution. No person, I think, should be forced to wait until his default to raise his constitutional objection. The great injustice in what we do today lies in compelling the officials of the Party to violate this law before their constitutional claims can be heard and determined. Never before, I believe, have we forced that choice on a litigant. See *Terrace* v. *Thompson*, 263 U. S. 197, 216. The modern trend has indeed been to protect a person against prosecutions that may involve infringements of his constitutional rights. At times even equity has stepped in. See *Philadelphia Co.* v. *Stimson*,

223 U. S. 605. The prevention of peril and insecurity involved in the sanctions of some laws, has led to a generous use of the declaratory judgment procedure so that a person need not run the gantlet of a criminal prosecution to get an adjudication of his rights. See *Railway Mail Assn.* v. *Corsi*, 326 U. S. 88; *United Public Workers* v. *Mitchell*, 330 U. S. 75, 91–94. Cf. *McGrath* v. *Kristensen*, 340 U. S. 162. The order requiring registration requires disclosure; the constitutionality of that disclosure requirement is before us here and now. This case presents the only effective opportunity to secure the benefits of the Fifth Amendment guarantee. Indeed, if the question were not raised now, the strict rule of *Rogers* v. *United States*, *supra*, might mean that the question had been waived.

## VII.

My conclusion is that while the Communist Party can be compelled to register, no one acting for it can be compelled to sign a statement that he is an officer or director nor to disclose the names of its officers, directors, or members—unless the required immunity is granted. Why then, one may ask, do we have a registration law? Congress (past or present) is attempting to have its cake and eat it too. In my view Congress can require full disclosure of all the paraphernalia through which a foreign dominated and controlled organization spreads propaganda, engages in agitation, or promotes politics in this country. But the Fifth Amendment bars Congress from requiring full disclosure by one Act and by another Act making the facts admitted or disclosed *under compulsion* the ingredients of a crime.

There is a giving of evidence by the filing of a registration. Its filing is the equivalent of officials testifying in investigations conducted by the Executive or Legislative Branch. It is compulsory disclosure of evidence which

links officers, directors, and members of the group with a crime. Force and compulsion are outlawed techniques for federal law enforcement. Coerced confessions are taboo because of the long bitter experience of minorities in trying to maintain their freedom under hostile regimes. Our Constitution protects all minorities, no matter how despised they are.

Accordingly, I dissent.

# SUPREME COURT OF THE UNITED STATES

No. 12.—October Term, 1960.

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| Communist Party of the United States of America, Petitioner, v. Subversive Activities Control Board. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit. |

[June 5, 1961.]

Mr. Justice Brennan with whom The Chief Justice joins, dissenting in part.

I agree with the Court and with Mr. Justice Douglas that the order requiring that the Party register and disclose its officers and members is not constitutionally invalid as an invasion of the rights of freedom of advocacy and association guaranteed by the First Amendment to Communists as well as to all others.

I also share the Court's view that we are not called upon in this case to decide the constitutionality of the various duties and sanctions attaching to the Party, and to individual members, once orders to register become final. We are required by this case to decide only the validity of the order requiring the petitioner to register in accordance with § 7 of the Act as implemented by the regulations and Form ISA–1 of the Attorney General. We should properly reach at this time only such constitutional questions as necessarily relate to the requirements governing registration.

The questions in addition to those under the First Amendment which seem to me most nearly within the sphere of permissible constitutional adjudication in this proceeding arise from the interaction of the registration requirements with the criminal statutes under which Communist Party membership is implicated. This interplay poses the question whether the registration require-

ments violate the Fifth Amendment privilege against self-incrimination.

I do not believe that all of the self-incrimination questions raised by the registration provisions are properly adjudicable now. Some may be better left for subsequent adjudication as the necessity arises. For example, we need not decide now, I think, the constitutionality of the provision of § 8 for the self-registration of individual members. That provision becomes operative only upon the failure of the petitioner, or its officials, to list members in effecting its registration, pursuant to a final order; the Government's brief observes that the criminal sanction against a member arising from nonregistration must be preceded by a final order of the Subversive Activities Control Board directing him to register. § 15 (a)(2). We cannot know at this time the posture in which the case will appear when a member comes under an enforceable duty to register, if he ever does. I also lay aside the requirements of § 7 (h), and its implementing regulation, 28 CFR § 11.205, that Party officials effect the registration of the organization if the organization fails to register itself within 30 days of a final order. That duty, enforceable by criminal sanctions against the officials, arises only in the contingency of nonregistration by petitioner in accordance with the present order. Here again the situation may not arise. I assume that the opportunity of the officials to raise the same objections is not irrevocably lost if we do not consider them now. Nor, finally, do I now concern myself with whether the Party may interpose the constitutional privilege of its members because of the nature of the information about them required to be supplied to complete the registration statement as described in the Attorney General's Form ISA–1. Section 7 (d) requires that the registration statement accompanying the registration shall provide such information as the names

and addresses of members, and their past and present aliases, as well as information about the officers and activities of the organization. The Attorney General's regulations and Form ISA–1 implement this requirement.

But I do think we must reach one issue of self-incrimination, namely, whether the requirements of § 7 (d) as spelled out in the Attorney General's regulations and Form ISA–1 are void as necessarily conflicting with the Fifth Amendment privilege of the Party officials who are charged with the duties necessary to complete the Party's registration. The statute, the regulations and the Form together clearly require that the registration statement shall be completed, signed and filed by designated officials. These officials are the "partners, officers and directors, including the members of the governing body of the organization"; they are explicitly required by the Form to sign the completed statement and vouchsafe their familiarity with, and the accuracy of, its contents. Whether these officials, consistently with the Fifth Amendment privilege, can be required to complete, sign and file the statement is a serious constitutional question. These requirements are in effect an inquiry into the status of officership and knowledge of Party activities of the signatories. Under today's decision in *Scales* v. *United States*, — U. S. —, the answers to such an inquiry might well implicate the officials in criminality in violation of several federal statutes.

I believe that the constitutional validity of the inquiry that I find implicit in these requirements is ripe for adjudication now. I read the Court's opinion as saying that there is no fatal bar to adjudicability of the question merely in the fact that the organization, and not an individual official of the organization, is asserting the privilege in this proceeding. The requirement of "standing"—that a litigant must show that he himself is affected by the operation of the action he challenges as it affects an-

other—is involved here. But as the cases cited by my Brother DOUGLAS show, and the Court seems to concede, a party has been allowed to raise the constitutional rights of another person not before the Court as a named party in a variety of situations where the effect of the challenged state action on himself is derivative from the impact on the other person. Of course, this Court has indicated on a number of occasions that the privilege is a personal right which must normally be claimed by the individual seeking its protection. See, *e. g.*; *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 113; *United States* v. *Murdock*, 284 U. S. 141, 148; *Rogers* v. *United States*, 340 U. S. 367, 371; *Smith* v. *United States*, 337 U. S. 137, 147–148. These statements were made in the context of an issue of waiver—whether a later claim of privilege should be honored where it was contended that the party had an earlier opportunity to make the claim and had failed to do so. The present case presents quite the opposite situation—not whether the privilege is being claimed too late but too early, not waiver but premature assertion.

The issue of justiciability which confronts us is therefore not whether the petitioner may raise the Fifth Amendment question at all but whether it may do so now. I agree with the Court that the cases which have upheld standing in the first sense are not decisive of our problem. The following considerations, in my view, justify our adjudication now: (a) the order imposes a presently enforceable duty on the organization to complete and file Form ISA–1 and creates an incentive for both organization and officials to make the disclosures implicit in the completion, signing and filing of that Form; (b) the inquiry eliciting these disclosures of officership and knowledge is specific and not open to possibly varying answers; (c) the incriminating character of the information thus disclosed is plain; and (d) finally, if the question is not decided

now the officials must run the risk of not being able to make an acceptable claim of privilege at a later time. There thus inheres in putting off decision the substantial possibility of erosion of the privilege. We may and should avoid that undesirable result by deciding the question now.

I think the reasons advanced by the Court in support of the contrary conclusion are overborne by the considerations I have suggested. The Court says that the officials may sign the statement and comply with the requirements, or may claim the privilege in such a form that it will be honored and thus avoid incrimination, and that in any event, a claim of privilege cannot be evaluated at this time because of the varying and presently unknowable circumstances which may determine whether it would have to be honored. The possibility of "voluntary" compliance by the officials should not be a bar to a decision now. Given the structure of the statute, compliance cannot indisputably be assumed to be a voluntary waiver of the privilege. The organization is under a duty by virtue of the order now before us to file a statement in accordance with the Attorney General's requirements, on penalty of prosecution for not filing a registration statement; the failure of the officials to complete, sign or file Form ISA–1 might subject it to such prosecution. And if the organization should not register within the 30-day period specified in § 7 (c), the officials are duty-bound under § 7 (h) to effect its registration, also on penalty of criminal sanctions. Plainly enough, then, the order generates pressure on the officials to complete, sign and file to avoid the possibility of prosecution either of the organization or themselves. This pressure may be increased by the uncertainties which attend efforts to make an acceptable claim of the privilege. If we pass the opportunity for decision now officials may well comply out

of fear that a later effort to make an acceptable claim of privilege will fail.

A claim of privilege on the registration form which names the official would be self-defeating. For if the admission of officership in the Communist Party is incriminating, then a claim of privilege by name would amount to the very same admission—the claimant would be asserting that he could not complete, sign or file the form because the admission of his officership would incriminate him. The Court suggests that a claim of the privilege is potentially always incriminating in that it may arouse the suspicions of the interrogators. However, this registration requirement seems to present a different case in important respects. Claiming the privilege here does more than attract suspicion to the claimant; it admits an element of his possible criminality. Moreover, registration is unique because of the initial burden it puts on the potential defendant to come forward and claim the privilege. He may thereby arouse suspicions that had not even previously existed and indeed, virtually establish a prima facie case against himself. The usual situation in which the privilege is invoked is a judicial, legislative, or administrative proceeding in which the person claiming it appears because there is already some reason to think that he has information on the subject matter of the inquiry. His invocation of the privilege in such circumstances may confirm the suspicions of his interrogators, but is less likely to arouse them initially than in the case of a registration regulation which calls on all persons everywhere, known or unknown, who fall within a prescribed category, to come forward and identify themselves. At least in governmentally initiated inquiries, there are likely to be certain checks on self-accusation, either the explicit requirement of probable cause governing the maintenance of a criminal prosecution or institutional limitations on the exercise of the power of inquiry. Here there is no

such initial burden on government, no requirement, for example, that it identify officials in a proceeding for that purpose and then seek to elicit the desired information as to other officials and members from them. I think, therefore, that if the privilege does protect an official from disclosure of his officership and knowledge when an inquiry explicitly in those terms is made, it would also protect him from disclosure in the kind of "indirect" inquiry and response that seems to me implicit in the suggestion that a claim of the privilege by name may be an adequate alternative.

There remains consideration of the possibility that an anonymous claim of the privilege may be made and honored by the Attorney General. The organization might simply file a statement in which it asserted the privilege on behalf of its officials, listing their titles but not their names. However, on the Court's own reasoning the right to have a claim of privilege honored may depend on a variety of circumstances, including such factors as already-existing public knowledge of the information which the claimant seeks to conceal, and it is difficult to see how following this course would advance the attempt of the claimant to have his privilege honored. In a subsequent enforcement proceeding against the organization for failure to register in accordance with the regulations, or against officials for failing to register the organization, the defense of privilege could be met with the same objection that the Court raises here—that the privilege claim could not be evaluated unless the identity of the claimant were known. The possibility that the Attorney General might honor even an anonymous claim of the privilege would simply mean abandonment of one of the requirements in the Form. But I do not see how we can view this case as if that requirement did not exist, since the order under review is to register in accordance with the Attorney General's requirements as they now are. Cer-

tainly an official might be sufficiently dubious as to the efficacy of an anonymous claim of the privilege by the organization on his behalf that he would choose one of the alternatives of complying, claiming the privilege by name, or not making any claim, all dangerous courses for him. Therefore, I cannot believe that the Court's suggestion that a claim may be made in a form in which it could be honored presents an official of petitioner with a sufficiently realistic choice to require us to defer consideration of this question until it arises at some time after a choice among these alternatives is made.

I do not read *United States* v. *Sullivan*, 274 U. S. 259, and other cases which the Court cites, *e. g.*, *In re Groban*, 99 Ohio App. 512, 135 N. E. 2d 477, aff'd, 164 Ohio St. 26, 128 N. E. 2d 106, aff'd, 352 U. S. 330, *O'Connell* v. *United States*, 40 F. 2d 201, as indicating a different result here. Those cases seem to me to hold that an individual cannot thwart a legitimate inquiry by refusing to answer any questions at all on the ground that some incriminating questions might be asked; they require that he must at least respond to the inquiry and make his claims of privilege as the incriminating questions are asked. In *Sullivan* the questions were neutral on their face and were asked pursuant to an inquiry in furtherance of the collection of the revenue; a claim of self-incrimination as to all such questions was meaningless in terms of the traditional requirement that the tribunal before which the claim is made have the opportunity to decide whether the claim shall be allowed. See *United States* v. *Burr*, 25 Fed. Cas. 38; *United States ex rel. Vajtauer* v. *Commissioner*, *supra*, at p. 113.

Moreover, in *Sullivan* a claim of privilege as to individual questions might have aroused suspicions but would not have pinpointed the taxpayer's criminal activities. No such wholesale immunity for the petitioner's officials would be involved in a conclusion that their claim of priv-

ilege should be adjudicated without a requirement that they first make it on the registration form specifically, with the attendant risks I have previously considered. The inquiry implicit in the requirements of completing, signing and filing here is precise; it demands disclosure on matters of officership in, and knowledge of, the Communist Party. The incriminating nature of that inquiry seems plain on its face, since an admission of officership and knowledge would be not merely a possible link in the chain needed to convict under the Smith Act but would establish a main ingredient of the crime proscribed in the membership clause of the Act as this Court construes it today in *Scales* v. *United States*. Cf. *In re Dewar*, 102 Vt. 340, 148 A. 489. Mr. Justice Holmes wrote in *Sullivan* that the taxpayer "could not draw a conjurer's circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law." 274 U. S., at p. 264. Petitioner seeks to draw no such "conjurer's circle" for its officials in an essentially noncriminal area of inquiry, but to assert their privilege against replying to an inquiry in a regulatory area permeated with criminal statutes in circumstances where any word upon the paper responsive to the inquiry would involve them in the admission of one of the major elements of a crime, and where the effect of even claiming the privilege is not merely to arouse suspicions of illegality but to admit the same element of the crime.

Nor am I persuaded that this Fifth Amendment claim should not be adjudicated now because some of the officials may not be entitled to the privilege if the fact of their officership is already known. Even on the assumption that public notoriety or prior admission in these or other proceedings would make the privilege inapplicable to such officials, there is nothing in the record to indicate how many officials fall into this category. The Govern-

ment contends that since the record does not establish that any officials are not publicly known as such, we should refrain from adjudicating the privilege claim now because no one may actually be entitled to invoke it. But since the record also leaves open the possibility that there may be officials entitled to assert the privilege, and since I see such difficulty in the way of effective assertion of the privilege now or later without disclosure of the information sought to be protected, I do not believe that these persons should be subjected to the risks and uncertainties of deciding on a course of conduct with a view to litigating this question in a subsequent proceeding. Where the danger of compulsory incrimination in violation of the Fifth Amendment thus appears on the face of the requirements it seems to me improper to force any who are affected to hazard the loss of their protection because some, or even all, have no protection at all. Cf. *People* v. *McCormick*, 228 P. 2d 349, 354–355.

I do not regard this position on adjudicability as calling for the impermissible decision of a hypothetical case. Nor does it open the way to the invalidation of the requirements on their face despite valid applications simply because they might be invalidly applied in other circumstances. See *United States* v. *Raines*, 362 U. S. 17. If the requirements violate the Fifth Amendment, they do so for all subject to them because they require incrimination without an effective protection of the privilege. And it is because I discern no adequate procedural protection for the privilege that I believe the Court should adjudicate this particular question now.

As to the merits of the Fifth Amendment claim, I believe that officials cannot be compelled to complete, sign and file the registration statement without abridging their privilege against self-incrimination. I do not think that the doctrine of *United States* v. *White*, 322 U. S. 694, applies to an inquiry directed to the fact of

officership, *qua* officership, and knowledge, *qua* knowledge, as opposed to the production of organizational records by an officer who is their custodian. It is the individual official's own status and knowledge that is the subject of the inquiry I find implicit in the requirement that an official complete, sign and file the statement. The principle that a custodian of organizational records may be required to produce them, even if their contents would incriminate him personally, is a recognition that an organization acts only through people, and that to recognize the privilege in the custodian of its records might be to immunize the organization's past acts. But these officials are not directed to produce records of their organization as its custodians, but to complete, sign and file as its officials, and thus to identify themselves as possible participants in a criminal conspiracy and as persons presumptively exhibiting the degree of knowledge and activity necessary for a conviction under the membership clause of the Smith Act. Nor are they called on, in fact, to produce records at all, but rather to complete, sign and file a statement which may or may not incorporate the records of the organization. And more than the incorporation of existing records is required in any event. All the information on Form ISA–1 must be supplied whether or not in existing records. In addition, the requirement of signatures does not involve mere authentication or identification of records, cf. *Curcio* v. *United States*, 354 U. S. 118, 125, because the officials are required to vouchsafe completeness and accuracy of the information supplied in the Form. Thus the requirements go far beyond the compulsory production approved in *White*. If the admission both of officership status and knowledge of Party activities cannot be compelled in oral testimony in a criminal proceeding, I do not see how compulsion in writing in a registration statement makes a difference for constitutional purposes. Cf. *People ex rel. Ferguson* v. *Reardon*,

197 N. Y. 236, 243–244. Since the immunity granted under § 4 (f) of the statute is not complete, I do not think that the official's compliance with the requirements can be exacted consistently with the Fifth Amendment. And if the officials cannot be required to complete, sign and file Form ISA–1, I do not see how the present order can be upheld. The requirements patently do not contemplate the effectuation of registration by any except Party officials in the precise manner specified by the requirements. I would therefore hold the order invalid insofar as it directs the petitioner to register in accordance with the requirements.